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**A. M. BOARDMAN and ELLEN D. WILLIAMS**



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# INDEX-DIGEST

OF THE

NEW YORK

## COURT OF APPEALS REPORTS,

INCLUDING

Volumes 1-95 of the Regular Series, Keyes, Abbott's Court of  
Appeals Decisions and Transcript Appeals.

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BY IRVING BROWNE,

EDITOR OF THE ALBANY LAW JOURNAL AND THE AMERICAN REPORTS.

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## PREFACE.

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My object has been to furnish a guide, in the smallest possible compass, to the New York Court of Appeals Reports. In every instance the exact point alone is denoted — all “it seems” and “queries” are omitted. Where it is possible in a few words to indicate the substance of the decision it has been done; in other instances, words indicating the subject are used. I have endeavored to avoid unnecessary repetition, for the practitioner ought to have as few pages to handle as possible. The table of cases, under the names of both parties, is the only one of the kind in the State. The work has been carefully verified, and it is hoped that the mistakes are not numerous nor misleading.

IRVING BROWNE.



# TABLE OF STATUTES, SESSION LAWS AND CODES CONSTRUED.

	Vol. Page.		Vol. Page.
1 R. L. p. 319, sec. 3.....	3, 53	1 R. S. p. 387, secs. 1, 2.....	82, 459
444, sec. 23.....	2, 459	388, sec. 4.....	13, 221
2 R. L. p. 153, sec. 2.....	4, 293		5, 376
191, sec. 152.....	88, 434	391, sec. 9, sub. 4... ..	88, 142
409, sec. 118.....	27, 188	391, sec. 12.....	62, 348
sec. 178.....	12, 406	395, sec. 31.....	51, 610
416, sec. 179.....	3, 511	396, secs. 36, 37.....	58, 401
432, secs. 220-222.....	10, 567	398, sec. 7.....	65, 263
433, sec. 224.....	11, 461	400, sec. 13.....	26, 514
1 R. S. p. 62, sec. 1, p. 65, sec. 1	77, 546	412, sec. 83.....	4, 577
109, sec. 24.....	86, 564	414, sec. 1.....	16, 424
117, sec. 9.....	77, 378	tit. 4, sec. 1.....	4, 442
118, sec. 19.....	68, 514	415, sec. 6.....	48, 70
123, sec. 42.....	40, 113		76, 64
136, sec. 1.....	72, 70	463, sec. 38.....	17, 93
(5th ed.) p. 148, sec. 45... ..	37, 155	501, sec. 1.....	93, 397
p. 164, secs. 8-11... ..	50, 321	513, sec. 55.....	20, 252
173, sec. 17.....	92, 446	514, sec. 58.....	24, 559
179, sec. 11.....	79, 627		57, 549
221, sec. 19.....	31, 151	517, sec. 81.....	67, 59
secs. 18, 23.....	71, 276	518, sec. 86.....	78, 21
226, sec. 49.....	11, 308	519, sec. 89.....	54, 132
229, sec. 60.....	27, 387	521, sec. 102.....	34, 452
232, sec. 73.....	86, 522	532, secs. 23, 24.....	93, 562
266, secs. 90-95.....	6, 74	534, sec. 1; p. 735,	
267, secs. 93, 94.....	12, 603	sec. 14.....	24, 74
289, sec. 6.....	82, 351	586, sec. 44.....	52, 383
312, sec. 1.....	59, 134	588, sec. 9.....	15, 9
346, secs. 19, 26... ..	52, 374	588, sec. 54.....	32, 659
357, sec. 8.....	93, 397	589.....	3, 479
367, sec. 5.....	68, 259	591, sec. 8.....	13, 114
379, sec. 72.....	61, 205		47, 307
387, sec. 1.....	67, 528	sec. 9.....	9, 589
	88, 576	593, sec. 9.....	94, 168



# vi STATUTES, SESSION LAWS AND CODES CONSTRUED.

	Vol. Page.		Vol. Page.
1 R. S. p. 595, sec. 28.....	1, 83	1 R. S. p. 728, sec. 140.....	43, 462
600, sec. 1, sub. 6...	59, 96	735, sec. 110.....	15, 307
sec. 4.....	7, 364	sec. 112.....	11, 397
601, sec. 1.....	5, 562	737, sec. 126.....	92, 295
sec. 2.....	93, 162	738, sec. 137.....	13, 509
603, sec. 4.....	59, 5		86, 603
	94, 334	sec. 140.....	13, 151
	21, 406	739, sec. 147.....	68, 41
sec. 5.....	91, 1		22, 170
604, sec. 4.....	80, 599		79, 390
sec. 8.....	72, 433		71, 189
605, sec. 11.....	21, 406	741, sec. 5.....	20, 412
614, sec. 1.....	56, 435	742, sec. 19.....	67, 400
sec. 4.....	47, 521	745, sec. 7.....	60, 102
616, sec. 14.....	88, 513	749, sec. 3.....	79, 527
617, sec. 15.....	56, 76	sec. 4.....	32, 587
662, sec. 8.....	70, 202	sec. 7.....	14, 430
664, secs. 22, 30, 31....	7, 228		14, 64
	240	752, sec. 10, sub. 1....	14, 235
665, sec. 26.....	56, 424	753, sec. 15.....	14, 235
sec. 28.....	1, 80		52, 67
666, sec. 29.....	94, 137	754, sec. 19.....	41, 313
676, sec. 70.....	89, 219	sec. 22.....	5, 263
677, secs. 51, 52.....	46, 12		80, 171
685, sec. 12.....	70, 104		13, 535
690, sec. 1.....	7, 555	755, sec. 1.....	87, 257
695, sec. 6.....	51, 295	756, sec. 1.....	89, 641
709.....	56, 310		64, 220
710, sec. 6.....	9, 520		69, 1
	24, 57		66, 157
720, secs. 15-20.....	20, 320		52, 138
723, secs. 14, 15.....	70, 581		59, 541
sec. 18.....	24, 9	sec. 3.....	71, 173
724, sec. 24.....	70, 581	secs. 37, 38.....	83, 215
726, sec. 40.....	23, 69	762, secs. 37, 38.....	87, 446
727, sec. 45.....	52, 332		66, 77
728, sec. 51.....	52, 251		79, 23
	89, 251	sec. 39.....	63, 132
	47, 544	sec. 55.....	81, 532
	48, 218	763, sec. 8.....	69, 148
secs. 51, 52.....	59, 342	764, secs. 2, 7.....	62, 513
	77, 58	768, sec. 5.....	79, 536
sec. 52.....	67, 264	772.....	4, 463
	22, 564	sec. 3.....	64, 242
secs. 51, 53.....	80, 538	sec. 8.....	49, 373
sec. 53.....	18, 515		91, 525
sec. 55.....	24, 9	773, sec. 3.....	15, 322
	53, 351	2 R. S. p. 3, sec. 1, etc.....	3, 41
sec. 55, sub. 3 ...	2, 297	sec. 1, sub. 2.....	13, 259
	23, 367	3, sec. 4.....	11, 331
secs. 63, 65.....	12, 394	12, sec. 57.....	2, 388

	Vol. Page.		Vol. Page.
2 R. S. p. 16 . . . . .	61, 515	2 R. S. p. 116, sec. 18 . . . . .	71, 217
23, sec. 35, sub. 7 . . . . .	84, 410	secs. 19-21 . . . . .	88, 503
31 . . . . .	69, 215	134, sec. 6 . . . . .	23, 363
sec. 3 . . . . .	88, 629		66, 649
32, secs. 1, 3-6 . . . . .	46, 236	135, sec. 1 ; 137, sec. 1 . . . . .	66, 374
35, sec. 2 . . . . .	84, 410	136, sec. 5 . . . . .	71, 341
49, sec. 47 . . . . .	6, 309		79, 19
54, sec. 12 . . . . .	72, 184	137, sec. 1 . . . . .	76, 630
57, sec. 3 . . . . .	52, 530	139, sec. 5 . . . . .	11, 220
sec. 4 . . . . .	12, 376	sec. 5 ; p. 146,	
	81, 130	sec. 49 . . . . .	86, 18
sec. 5 . . . . .	45, 256	146, sec. 48 . . . . .	64, 47
	86, 210	154, sec. 5 . . . . .	56, 76
61, secs. 30-39 . . . . .	50, 298	173, secs. 38, 39 . . . . .	70, 270
63, sec. 40 . . . . .	94, 535	174, secs. 38, 39 . . . . .	6, 236
	91, 516	191, secs. 152-154 . . . . .	72, 491
	67, 409	secs. 153, 154 . . . . .	84, 105
sub. 4 . . . . .	91, 261	sec. 155 . . . . .	71, 9
64 . . . . .	25, 9	192, 193 . . . . .	2, 360
sec. 42 . . . . .	88, 377	194, sec. 170 . . . . .	79, 527
64, 65, secs. 42-48 . . . . .	16, 9	195, sec. 177 . . . . .	65, 294
sec. 44 . . . . .	77, 369	sec. 180 . . . . .	11, 544
65, sec. 49 . . . . .	89, 555	199 . . . . .	11, 575
sec. 50 . . . . .	70, 387	sec. 153 . . . . .	63, 341
68, sec. 67 . . . . .	26, 433	209, secs. 5, 6 . . . . .	88, 117
69, sec. 3 . . . . .	14, 449	220, sec. 1 . . . . .	89, 480
71, secs. 18-21 . . . . .	14, 449	223, sec. 10 . . . . .	70, 481
72, sec. 22 . . . . .	27, 357	226, sec. 8 . . . . .	31, 289
74, sec. 27 . . . . .	24, 417	241, 245 . . . . .	25, 588
secs. 23, 26 . . . . .	63, 462	269, sec. 40 . . . . .	45, 360
77, sec. 42 . . . . .	72, 565	275, sec. 2 . . . . .	77, 101
83, secs. 6, 8 . . . . .	66, 489		57, 399
sec. 7 . . . . .	18, 28	286, sec. 59 . . . . .	80, 202
84, sec. 13 . . . . .	89, 1	288, sec. 71 . . . . .	88, 62
	59, 140		69
88, sec. 33 . . . . .	89, 352	289, sec. 83 . . . . .	66, 592
sec. 34 . . . . .	79, 129	297, sec. 27 . . . . .	10, 96
sec. 36 . . . . .	88, 453		20, 210
89, sec. 38 . . . . .	50, 538	301, secs. 46, 48 . . . . .	10, 170
sec. 39 . . . . .	43, 521	sec. 48 . . . . .	14, 477
90, sec. 43 . . . . .	36, 15	307, sec. 30 . . . . .	10, 280
97, sec. 76 . . . . .	79, 246	309, sec. 37 . . . . .	23, 347
100 . . . . .	2, 245		42, 143
sec. 1 . . . . .	62, 494	312 . . . . .	56, 407
	88, 309	317, sec. 1 . . . . .	70, 136
103, sec. 19 . . . . .	88, 309	318, sec. 5 . . . . .	85, 427
106, sec. 37 . . . . .	14, 281	321, sec. 1 . . . . .	61, 521
109, sec. 55 . . . . .	1, 341	346, sec. 21 . . . . .	93, 585
113, secs. 1, 2 . . . . .	58, 282	360, secs. 1, 2 . . . . .	46, 46
114, sec. 9 . . . . .	88, 487	362, sec. 26 . . . . .	68, 528
116, sec. 18 . . . . .	56, 615	366, sec. 14 . . . . .	2, 451

# viii STATUTES, SESSION LAWS AND CODES CONSTRUED.

	Vol. Page.		Vol. Page.
2 R. S. p. 366, secs. 18, 19, 20, 21,		2 R. S. p. 656, chap. 5, sub. 3 . . .	78, 492
23 . . . . .	1, 20	657, sec. 5, sub. 2 . . .	10, 120
369, sec. 38 . . . . .	17, 276	sec. 9 . . . . .	19, 537
370, sec. 46 . . . . .	56, 507	664, sec. 25 . . . . .	88, 192
377, secs. 1-4 . . . . .	4, 513		86, 369
385, sec. 49 . . . . .	24, 143	sec. 27 . . . . .	63, 207
387, secs. 1, 2 . . . . .	68, 552	sec. 28 . . . . .	25, 374
394, secs. 11, 12, 23 . . .	50, 332	665, sec. 27 . . . . .	67, 15
406, sec. 73 . . . . .	69, 256	sec. 34 . . . . .	50, 598
secs. 75, 76 . . . . .	54, 437	668, sec. 10 . . . . .	64, 583
447, secs. 1, 2 . . . . .	58, 282	sub. 1 . . . . .	71, 561
458, sec. 3 . . . . .	13, 309	673, sec. 33 . . . . .	25, 380
462 . . . . .	59, 143	sec. 34 . . . . .	72, 365
463, sec. 30 . . . . .	61, 524	677 . . . . .	22, 413
sec. 36 . . . . .	3, 415	sec. 53 . . . . .	87, 561
	18, 592	sec. 55 . . . . .	49, 436
sec. 38 . . . . .	80, 599	678, sec. 59 . . . . .	22, 245
464, secs. 41, 42 ; p. 469,			78, 377
secs. 67, 68, 72 ; p.		679, sec. 66 . . . . .	72, 330
43, sec. 12 . . . . .	1, 330	681, sec. 1 . . . . .	69, 107
470, sec. 75 . . . . .	78, 114	682, sec. 8 . . . . .	81, 629
sec. 100 . . . . .	10, 164	687, sec. 8 . . . . .	92, 146
492 . . . . .	7, 508	691, sec. 5 . . . . .	92, 348
493, sec. 1 . . . . .	20, 182	694, sec. 23 . . . . .	92, 490
sec. 2 . . . . .	3, 438	699, sec. 8 . . . . .	53, 511
505, sec. 30 . . . . .	18, 529	701, sec. 30 . . . . .	41, 21
512, sec. 28 . . . . .	66, 385	702, sec. 27 . . . . .	22, 178
	16, 569	sec. 30 . . . . .	23, 252
sub. 4 . . . . .	84, 287	703, sec. 33 . . . . .	86, 365
513, sec. 22 . . . . .	76, 574	727, sec. 45 . . . . .	56, 95
533, sec. 47 . . . . .	40, 105	sec. 50 . . . . .	82, 235
534, sec. 1, sub. 3 . . .	76, 294		16, 344
541, sec. 2 . . . . .	14, 32	728, sec. 55 . . . . .	78, 244
542, sec. 4 . . . . .	57, 479	sec. 56 . . . . .	77, 39
545, secs. 3, 10, 12 . . .	65, 481	731, sec. 1 . . . . .	80, 500
547, sec. 14 . . . . .	86, 428	734, sec. 13 . . . . .	88, 585
	68, 153	738, sec. 4 . . . . .	31, 463
552, sec. 13 . . . . .	84, 272	759, sec. 13 . . . . .	43, 1
563, sec. 22, sub. 2, sec.		768, sec. 8 . . . . .	39, 216
42 . . . . .	60, 559	853, (5th ed.) sec. 81 . .	35, 139
587, sec. 57 . . . . .	53, 128	3 R. S. (5d ed.) p. 146, sec. 4 . . . .	30, 393
sec. 61 . . . . .	60, 31	(2d ed.) p. 222, sec. 7 . . . .	11, 148
591, sec. 8 . . . . .	10, 60	p. 294, sec. 3 . . . . .	19, 482
	48, 305	547, sec. 8 . . . . .	31, 157
599, sec. 45 . . . . .	18, 128	932, sec. 1 . . . . .	83, 462
602, sec. 66 . . . . .	83, 178	1786, chap. 12, sec. 4 . . . . .	80, 171
617, sec. 24 . . . . .	18, 260	1789, chap. 14 . . . . .	56, 383
619, sec. 44 . . . . .	12, 32	1798, chap. 80 . . . . .	77, 448
	78, 541	1805, chap. 89, sec. 38 . . . . .	27, 87
639, sec. 30 . . . . .	68, 198	chap. 98, sec. 3 . . . . .	19, 68
648 . . . . .	9, 435	sec. 25 . . . . .	19, 100



	Vol. Page.		Vol. Page.
1806, chap. 126.....	11, 115	1830, chap. 320, secs. 63, 69 .....	23, 394
1807, chap. 115.....	70, 303	chap. 330, sec. 1.....	8, 383
sec. 3.....	21, 267		45, 770
1813, chap. 60.....	65, 134	1831, chap. 31.....	12, 190
	654	chap. 300.....	77, 144
sec. 3.....	66, 164	sec. 10, sub. 4....	62, 275
sec. 4.....	68, 570	sec. 12.....	23, 148
sec. 11.....	46, 131	secs. 16, 17.....	1, 44
chap. 86, sec. 83.....	67, 73	sec. 31.....	26, 418
sec. 181.....	45, 102	1832, chap. 26.....	25, 289
	36, 182	chap. 158, sec. 1.....	69, 250
	85, 459	chap. 179, sec. 38.....	65, 566
sec. 175.....	50, 513	chap. 276, sec. 1.....	7, 281
sec. 178.....	49, 150		8, 346
	53, 202	1833 .....	3, 294
	57, 344	chap. 78... ..	56, 599
sec. 184... ..	92, 262	chap. 165, sec. 4.....	2, 330
sec. 212.....	37, 275	chap. 227.....	37, 59
1815, chap. 199.....	68, 71	chap. 271, sec. 8.....	51, 84
1816, chap. 115, sec. 2 ... ..	1, 79	sec. 9.....	57, 616
	47, 460	chap. 279 .....	27, 569
chap. 131, sec. 15.....	76, 108		52, 185
1817, chap. 205.....	3, 238		71, 341
chap. 75.....	8, 110	sec. 1.....	77, 628
1818, chap. 210.....	46, 318	sec. 3.....	19, 496
	56, 533		13, 556
1821, chap. 172.....	28, 396		14, 71
chap. 193.....	1, 392		93, 20
chap. 204.....	16, 203	chap. 281 .....	72, 196
1822, chap. 257, sec. 4.....	47, 501		83, 74
1823, chap. 242, sec. 43.....	47, 457	chap. 319.....	50, 13
chap. 276. ....	70, 385	1834 .....	3, 294
1826, chap. 185, sec. 48.....	20, 370	chap. 73.....	1, 392
1827, chap. 172.....	26, 287	sec. 40.....	4, 419
1828, chap. 137, sec. 27.....	51, 78	chap. 256.....	5, 434
chap. 164, secs. 4, 5.....	69, 75	1836, chap. 239.....	1, 290
1829, chap. 94.....	17, 502	chap. 41.....	2, 53
sec. 33.....	19, 245	sec. 6.....	21, 136
	21, 490	sec. 7.....	1, 290
sec. 35... ..	15, 9	chap. 242.....	47, 157
chap. 78, sec. 43.....	3, 197	1837, chap. 20.....	4, 463
1830, chap. 56.....	21, 595	chap. 93.....	7, 281
sec. 82.....	29, 447	chap. 150.....	3, 396
chap. 75, sec. 21.....	7, 364		79, 54
chap. 108....	12, 541	chap. 388, sec. 9.....	52, 23
chap. 179. ....	24, 521	chap. 430, secs. 4, 5.....	1, 274
	24, 638		3, 498
sec. 3.....	61, 283		29, 327
chap. 295. ....	25, 163		64, 242
chap. 320, sec. 20.....	71, 238		65, 432
sec. 62.....	77, 39		91, 525

	Vol. Page.		Vol. Page.
1837, chap. 436, sec. 4 .....	94, 373	1844, chap. 300.....	14, 281
chap. 451, sec. 5 .....	81, 21	chap. 315, sec. 11 .....	1, 386
chap. 460 .....	50, 298	chap. 86.....	69, 75
sec. 4 .....	87, 19	chap. 305.....	80, 523
sec. 18 .....	6, 190	chap. 315, art. 4, sec. 8....	59, 83
sec. 22 .....	24, 166	1845, chap. 300.....	10, 164
sec. 65 .....	69, 419	chap. 69, sec. 17 .....	89, 460
sec. 67 .....	69, 536	chap. 115, sec. 1 .....	81, 130
sec. 71 .....	24, 46	sec. 4 .....	80, 171
1838, chap. 206 .....	58, 627	chap. 180, sec. 3 .....	57, 399
secs. 5, 9, 11....	7, 538	chap. 234.....	26, 134
sec. 18 .....	82, 291	chap. 260, sec. 2 .....	1, 379
sec. 21 .....	19, 152	1846, chap. 216.....	9, 575
1839, chap. 218.....	86, 107	chap. 274. ....	2, 182
	89, 75		13, 299
chap. 355, sec. 3 .....	19, 37		14, 22
1840, chap. 342. ....	8, 448	chap. 22, sec. 1 .....	1, 379
chap. 326, sec. 10 .....	1, 79	chap. 156.....	23, 420
chap. 363, sec. 4 .....	3, 19	chap. 291, sec. 20 .....	26, 529
chap. 80.....	59, 387	chap. 274, sec. 3 .....	26, 580
	86, 11	chap. 327.....	15, 451
	90, 492	1847, chap. 432.....	5, 285
chap. 254.....	23, 420	chap. 280, secs. 10, 11, 20..	1, 228
chap. 326, sec. 7 .....	66, 395	chap. 80.....	21, 179
	69, 353	chap. 133.....	46, 503
	70, 477		506
	76, 432		66, 569
	84, 108	chap. 210.....	24, 150
chap. 342, sec. 13 .....	68, 198		31, 51
chap. 363, sec. 4 .....	17, 521	sec. 1.....	11, 376
	21, 490	sec. 33.....	52, 383
chap. 386.....	17, 445	secs. 34, 35 .....	14, 546
1841, chap. 218.....	4, 66	sec. 44.....	48, 527
chap. 230, sec. 3 .....	1, 79	chap. 270.....	24, 269
chap. 247.....	20, 562	sec. 9.....	45, 524
1842, sec. 33 .....	4, 300	chap. 470, sec. 34.....	23, 293
chap. 157.....	1, 130	chap. 280.....	47, 330
	11, 281	sec. 37.....	63, 36
chap. 318.....	54, 62	chap. 338.....	92, 415
chap. 130, tit. 4 .....	61, 420	chap. 390.....	62, 198
chap. 342, sec. 12 .....	50, 8	sec. 2 .....	80, 156
1843, chap. 87, sec. 1 .....	39, 333	chap. 410.....	34, 235
chap. 90.....	4, 51		56, 507
chap. 94, sec. 12 .....	3, 290		68, 473
chap. 47.....	61, 444	chap. 426, sec. 92 .....	26, 467
chap. 95.....	1, 371	chap. 430.....	15, 617
chap. 132, tit. 5, sec. 4 ....	15, 451	chap. 450.....	14, 310
	15, 512		15, 432
chap. 169.....	47, 157		89, 24
1844, chap. 148, sec. 5 .....	3, 47	chap. 455.....	34, 268
chap. 220.....	3, 305		54, 528

	Vol. Page.		Vol. Page.
1847, chap. 455.....	57, 549	1848, chap. 319.....	59, 434
secs. 8, 9.....	63, 306	sec. 6.....	92, 433
sec. 13.....	67, 330	1849, chap. 28.....	17, 64
chap. 460, sec. 150.....	56, 208		17, 370
chap. 480, sec. 146.....	38, 58		40, 113
chap. 495.....	66, 162	chap. 121.....	17, 316
chap. 498, sec. 4.....	78, 356	chap. 140.....	8, 483
1848, chap. 140, sec. 42.....	38, 103	chap. 187, sec. 19.....	23, 318
chap. 346.....	14, 289	chap. 194.....	8, 472
chap. 37.....	62, 386		24, 86
sec. 8.....	89, 409	chap. 195, sec. 5.....	89, 266
sec. 10.....	83, 582	chap. 200.....	12, 268
sec. 18.....	93, 361	chap. 226.....	18, 199
chap. 40, sec. 8.....	59, 96		21, 9
sec. 10.....	89, 334		27, 393
	338		36, 302
	91, 308	sec. 27.....	23, 508
sec. 12.....	21, 261	chap. 250, sec. 5.....	32, 659
	27, 297	chap. 256.....	14, 310
	49, 183		22, 191
	50, 137		92, 219
sec. 10.....	50, 568		52, 389
sec. 13.....	56, 559		67, 417
sec. 12.....	58, 179	chap. 308.....	21, 52
	60, 53		77, 1
	62, 202	chap. 373.....	71, 118
	63, 62	chap. 752, sec. 4.....	24, 583
sec. 10.....	63, 93	1850, chap. 71, sec. 2.....	32, 659
sec. 12.....	65, 252	chap. 82.....	26, 53
	68, 34	chap. 84.....	8, 241
	69, 396	chap. 92.....	51, 12
	72, 100	chap. 94.....	54, 128
sec. 4.....	72, 433	chap. 102.....	45, 323
sec. 12.....	80, 379	sec. 16.....	78, 64
	80, 610	chap. 122.....	64, 274
	81, 46		68, 570
	49	chap. 140.....	48, 498
sec. 15.....	83, 156		89, 75
sec. 12.....	86, 95	sec. 1.....	20, 157
sec. 13.....	63, 422	sec. 4.....	57, 473
sec. 15.....	89, 122		87, 294
sec. 18.....	61, 274	sec. 10.....	51, 155
sec. 25.....	52, 203	sec. 12.....	46, 521
chap. 84, sec. 20.....	35, 177		12, 628
chap. 111.....	26, 203	sec. 13.....	53, 574
	70, 38	sec. 18.....	69, 209
chap. 156.....	42, 384	sec. 21.....	67, 371
chap. 224, sec. 2.....	85, 258		77, 248
chap. 265.....	48, 132	sec. 22.....	49, 356
sec. 5.....	60, 510	sec. 28.....	84, 308
chap. 319.....	46, 477	sec. 28, sub. 5... 58, 152	

# xii STATUTES, SESSION LAWS AND CODES CONSTRUED.

	Vol. Page.		Vol. Page.
1850, chap. 140, sec. 28, sub. 5...	84, 247	1852, chap. 282.....	93, 196
sec. 28, sub. 6...	77, 557	chap. 361.....	25, 214
79, 69		88, 129	
sec. 28, sub. 10..	84, 190	chap. 368, sec. 2 .....	88, 527
sec. 36 .....	12, 245	chap. 375. ....	23, 439
sec. 39 . ....	25, 442	24, 114	
13, 78		sec. 2 .....	36, 224
sec. 44 .....	13, 42	chap. 384.....	19, 234
51, 568		31, 285	
63, 58		1853, chap. 62.....	24, 345
sec. 47 .....	86, 107	sec. 1 .....	52, 510
sec. 49 .....	49, 455	71, 552	
chap. 170.....	49, 635	chap. 80.....	50, 451
chap. 172.....	17, 51	chap. 138.....	22, 413
23, 275		chap. 153.....	61, 542
33, 665		chap. 179.....	88, 129
35, 65		sec. 12 . ....	17, 584
chap. 179.....	60, 40	chap. 220.....	60, 242
73		chap. 223.....	18, 240
chap. 260.....	15, 489	chap. 230, sec. 9 .....	76, 558
chap. 275.....	67, 379	chap. 230, page 472.....	15, 512
chap. 278. ....	11, 593	chap. 238.....	62, 75
chap. 295.....	64, 188	chap. 283.....	19, 20
49, 106		chap. 301.....	85, 117
chap. 298.....	17, 486	chap. 333.....	47, 225
chap. 313.....	42, 384	57, 133	
1851, chap. 485.....	7, 9	63, 93	
chap. 180.....	8, 317	sec. 2 .....	46, 589
chap. 176, sec. 8 .....	62, 348	80, 128	
chap. 513.....	13, 70	chap. 335.....	35, 94
chap. 134, sec. 33.....	77, 36	chap. 407, sec. 29 .....	52, 609
chap. 176.....	48, 71	chap. 442.....	19, 445
sec. 2 .....	85, 359	chap. 463.....	26, 303
chap. 371.....	48, 390	67, 506	
chap. 386....	85, 117	sec. 17 .....	78, 114
chap. 389, secs. 285-291....	28, 605	chap. 466.....	46, 541
chap. 444.....	21, 373	sec. 12 . ....	76, 64
chap. 455.....	16, 112	sec. 13 .....	58, 94
chap. 497.....	24, 485	chap. 467, sec. 29 . ....	45, 446
chap. 504.....	39, 454	60, 449	
chap. 513....	20, 247	chap. 469.....	16, 424
57, 409		sec. 29 .....	60, 249
chap. 371, sec. 2.....	37, 344	chap. 579, sec. 6 .....	66, 623
1852, page 48 .....	15, 297	chap. 603, sec. 5 .....	14, 356
chap. 52, sec. 3.....	64, 606	chap. 617, sec. 5 .....	31, 446
chap. 71.....	18, 592	chap. 654.....	20, 387
chap. 82.....	7, 385	1854, chap. 28.....	17, 110
49, 137		chap. 54.....	50, 302
chap. 228.....	62, 645	chap. 74.....	69, 101
secs. 6, 7 .....	57, 331	chap. 75, sec. 1 .....	52, 596
chap. 277....	17, 218	chap. 96.....	19, 245

	Vol. Page.		Vol. Page.
1854, chap. 101.....	85, 117	1855, chap. 356.....	76, 329
chap. 130.....	24, 20	chap. 404.....	57, 409
chap. 188.....	78, 356	chap. 407.....	52, 83
chap. 197.....	19, 422	chap. 421.....	21, 111
chap. 232.....	19, 408		44, 172
chap. 270.....	69, 215		46, 266
	60, 457		54, 262
	78, 601	chap. 427, tit. 1, sec. 3 ....	72, 334
	85, 478	secs. 63, 65 ....	53, 431
chap. 282.....	61, 351	sec. 76 ....	66, 5
	76, 254	chap. 428.....	31, 164
	84, 582		36, 297
	66, 407	chap. 475.....	60, 242
sec. 5 .....	60, 116	chap. 536.....	23, 53
	67, 243	chap. 545.....	21, 517
sec. 7 .....	64, 535	chap. 559.....	48, 132
	94, 12	chap. 64.....	57, 177
sec. 8 .....	38, 433	chap. 338, sec. 1 .....	62, 224
	67, 153	1857, chap. 63, tit. 8, secs. 1-6..	78, 56
	81, 190	secs. 4, 6 .....	82, 324
sec. 13 .....	86, 108	tit. 8, sec. 4 ....	63, 291
sec. 17 .....	91, 552	chap. 82, sec. 3 .....	81, 109
chap. 384.....	48, 486	chap. 185.....	26, 523
	62, 339		46, 644
sec. 33 .....	59, 280	sec. 1 .....	30, 505
	58, 463	chap. 228.....	26, 523
sec. 13, sub. 2... ..	87, 204		30, 505
tit. 2, secs. 1, 13,		chap. 243.....	59, 131
subs. 4, 16....	57, 591	chap. 344.....	23, 572
tit. 4, sec. 16 ...	89, 189	chap. 401.....	71, 298
tit. 5, sec. 28....	87, 481		57, 171
tit. 5, sec. 33....	52, 445	chap. 405.....	17, 141
chap. 386.....	20, 447	chap. 416.....	39, 187
chap. 398.....	23, 53		49, 269
chap. 402.....	54, 226	sec. 3 .....	51, 144
	77, 388	chap. 446.....	50, 363
chap. 654.....	24, 93		67, 486
1855, chap. 6.....	72, 307	sec. 7 .....	46, 42
chap. 37.....	59, 40		50, 509
	78, 561		60, 16
	80, 254		60, 343
sec. 1 .....	23, 242	sec. 38 .....	83, 254
chap. 42.....	43, 539	chap. 456, sec. 3 .....	21, 459
chap. 101, sec. 6 .....	71, 616	chap. 531, sec. 8 .....	53, 60
chap. 231.....	13, 378	chap. 569.....	19, 188
chap. 327.....	16, 246	chap. 590, sec. 6 .....	56, 466
chap. 337.....	16, 58	chap. 628.....	17, 516
	36, 276		20, 363
	88, 117		21, 173
sec. 3 .....	78, 492	sec. 18 .....	77, 331
chap. 339, sec. 3 ....	53, 525	sec. 29 .....	56, 321

# xiv STATUTES, SESSION LAWS AND CODES CONSTRUED.

	Vol. Page.		Vol. Page.
1857, chap. 639.....	59, 316	1860, chap. 345.....	94, 401
	65, 322	chap. 348.....	39, 196
	68, 376		369
chap. 754.....	50, 416		45, 51
(vol. 2) chap. 763.....	68, 71		54, 29
	26, 287		56, 629
(vol. 2) chap. 569.....	36, 449		71, 502
(vol. 2) chap. 628, secs. 22,30	35, 154		59, 649
1858, chap. 357.....	42, 107		60, 154
chap. 129.....	23, 53	chap. 360.....	59, 434
	40, 133		79, 327
chap. 196.....	37, 267	chap. 396.....	26, 558
chap. 204.....	80, 523	chap. 410.....	22, 95
chap. 258.....	16, 112		25, 406
chap. 306, sec. 19.....	19, 529		26, 167
chap. 314.....	72, 424		27, 336
chap. 314, sec. 3.....	72, 32	chap. 501.....	69, 557
chap. 322.....	31, 330	chap. 508, sec. 33.....	24, 405
chap. 332, sec. 1.....	32, 147	chap. 509.....	63, 8
chap. 326, sec. 6.....	58, 484	chap. 510.....	60, 385
chap. 330.....	36, 113		62, 160
chap. 338.....	27, 627	chap. 513.....	72, 330
	46, 100	chap. 522, sec. 2.....	31, 265
	52, 80	chap. 522.....	68, 71
	77, 170	1861, chap. 143.....	67, 528
	90, 668	sec. 40.....	76, 506
sec. 1.....	60, 16	sec. 41.....	54, 507
	26	secs. 192, 193, 208	65, 516
chap. 357, sec. 1.....	60, 381	chap. 169.....	60, 165
1859, chap. 79.....	44, 415		62, 457
chap. 174.....	20, 529	sec. 5.....	62, 339
chap. 208.....	27, 336	chap. 303.....	26, 167
	35, 125		28, 400
chap. 213, sec. 1.....	60, 165	chap. 308.....	81, 62
chap. 262, sec. 2.....	78, 601	sec. 1.....	70, 157
chap. 302.....	32, 355	chap. 311.....	65, 322
chap. 312.....	92, 604		70, 430
chap. 384.....	57, 171	sec. 1.....	48, 57
chap. 388.....	82, 351	chap. 333, sec. 3.....	59, 83
chap. 385, sec. 4.....	53, 400	chap. 340.....	45, 234
chap. 495.....	29, 534	1862, chap. 63, sec. 21.....	89, 128
1860, chap. 117.....	24, 399	sec. 39.....	89, 189
chap. 139, sec. 5.....	51, 506	chap. 183, sec. 41.....	68, 1
chap. 202.....	22, 67	chap. 197.....	50, 598
chap. 235.....	43, 476	chap. 300.....	59, 163
chap. 254.....	77, 448	chap. 385, sec. 8.....	50, 451
chap. 259, sec. 69.....	26, 316	chap. 412.....	27, 147
chap. 322.....	44, 156	chap. 459.....	35, 302
chap. 340.....	82, 494		46, 439
chap. 345.....	54, 450	chap. 468.....	93, 539
	87, 98	chap. 478.....	45, 766

	Vol. Page.		Vol. Page.
1862, chap. 478.....	50, 360	1864, chap. 555, tit. 7, sec. 75....	76, 422
	63, 476	tit. 10, sec. 1....	93, 438
	69, 618	chap. 565, sec. 7.....	77, 350
	76, 50	chap. 578.....	47, 566
	78, 30	chap. 582, sec. 2.....	80, 27
sec. 1.....	52, 346	1865, chap. 36, sec. 1.....	50, 314
	79, 273	chap. 41.....	48, 540
	83, 279	chap. 97.....	67, 516
sec. 8.....	77, 489	sec. 10.....	48, 524
chap. 482.....	36, 358	chap. 181.....	35, 449
	39, 19	chap. 249.....	32, 377
	43, 52	chap. 300.....	59, 228
	48, 313	chap. 381.....	46, 178
	57, 112		47, 556
	59, 554		68, 88
	61, 530	chap. 453.....	92, 430
	65, 128	sec. 1.....	52, 434
	71, 413	chap. 544.....	36, 285
1863, chap. 18, sec. 18.....	35, 551	chap. 564.....	62, 567
chap. 62, sec. 1.....	90, 21	chap. 565, sec. 8.....	84, 596
chap. 63, sec. 2.....	90, 213		85, 1
chap. 209, sec. 2.....	47, 108	chap. 694.....	92, 311
chap. 212.....	87, 637	chap. 733.....	81, 573
chap. 226.....	29, 124	chap. 778.....	65, 232
	59, 599	1866, chap. 74.....	37, 661
chap. 227, sec. 2.....	60, 16		60, 165
chap. 362, sec. 8.....	78, 306	chap. 217, sec. 1.....	46, 57
chap. 422.....	71, 413	chap. 347.....	82, 196
chap. 500.....	54, 269	chap. 367, sec. 7.....	85, 1
	57, 433	chap. 398, sec. 2.....	84, 532
	59, 367	chap. 466.....	89, 11
	63, 624	chap. 483.....	36, 285
	65, 333	chap. 534, sec. 1.....	58, 116
sec. 5.....	56, 610	chap. 576.....	82, 172
sec. 14.....	67, 253	chap. 578.....	34, 657
chap. 863, tit. 12, sec. 36..	70, 126	chap. 633, sec. 7.....	93, 313
tit. 13, sec. 37...	78, 310	chap. 656.....	86, 11
1864, chap. 8.....	46, 70	chap. 658.....	64, 377
sec. 22.....	42, 130	chap. 697.....	84, 308
chap. 140, sec. 3.....	38, 201	chap. 723, sec. 6.....	84, 614
chap. 402.....	45, 551	chap. 752.....	60, 127
	66, 129	chap. 761.....	67, 516
chap. 403, sec. 29.....	91, 137		69, 91
chap. 517.....	65, 43	chap. 861, sec. 1.....	77, 347
	69, 328	1867, chap. 19, sec. 2.....	39, 418
sec. 2.....	85, 453	chap. 88.....	77, 130
chap. 422, sec. 3.....	38, 240	chap. 96.....	47, 608
chap. 544, secs. 1, 2.....	91, 83	chap. 360, sec. 25.....	82, 621
chap. 547.....	79, 293	chap. 577, secs. 3, 4.....	57, 496
chap. 555.....	67, 36	sec. 12.....	38, 386
tit. 7, art. 7, sec. 68, 58,	85	chap. 697.....	91, 430

# xvi STATUTES, SESSION LAWS AND CODES CONSTRUED.

	Vol. Page.		Vol. Page.
1867, chap. 697, sec. 1 .....	83, 538	1869, chap. 678 .....	94, 490
chap. 708. ....	82, 172	sec. 1 .....	56, 315
chap. 747 .....	66, 55	chap. 700 .....	45, 729
sec. 3. ....	56, 504	chap. 714 .....	65, 588
chap. 774 .....	49, 587	chap. 744, sec. 2. ....	62, 339
	62, 294	chap. 793 .....	71, 580
chap. 782, sec. 2 .....	89, 401	chap. 826 .....	68, 17
sec. 8. ....	88, 445	chap. 855 .....	68, 259
sec. 79. ....	47, 351	sec. 1 .....	64, 53
chap. 814 .....	45, 356	sec. 5 .....	71, 481
	46, 439		77, 342
	52, 62	chap. 861 .....	84, 308
sec. 2 .....	50, 477	chap. 875 .....	47, 501
chap. 860 .....	56, 629		64, 18
chap. 887 .....	49, 510	sec. 7 .....	67, 87
chap. 938, sec. 1 .....	51, 401		58, 491
1868, chap. 254 .....	42, 404	sec. 11 .....	63, 48
chap. 314 .....	60, 398	chap. 880 .....	42, 378
chap. 317 .....	70, 28	chap. 888 .....	71, 315
chap. 442 .....	87, 171	chap. 890 .....	87, 559
chap. 520 .....	64, 167	chap. 902 .....	77, 297
chap. 553 .....	71, 513	sec. 7 .....	80, 152
chap. 577 .....	64, 92	sec. 13 .....	89, 94
chap. 631 .....	89, 189	chap. 907 .....	45, 772
chap. 635, sec. 1 .....	60, 165		59, 192
chap. 717 .....	43, 10	secs. 1, 2 .....	68, 321
chap. 721, sec. 1 .....	85, 105	chap. 907 .....	76, 182
chap. 762, sec. 5 .....	63, 604		93, 405
chap. 776 .....	54, 276	chap. 912 .....	72, 124
chap. 816 .....	79, 437	chap. 917 .....	70, 220
	449	chap. 967 .....	46, 110
chap. 818 .....	71, 309	1870, chap. 77 .....	82, 318
chap. 844, sec. 3 .....	52, 395	tit. 3, sec. 10 ..	68, 479
1869, chap. 84, sec. 2 .....	57, 473	tit. 7, sec. 1. ....	56, 374
chap. 90 .....	82, 172	chap. 78 .....	88, 445
chap. 97 .....	60, 165		91, 664
	65, 349	chap. 81, sec. 214 .....	50, 274
chap. 241 .....	68, 403	chap. 92 .....	56, 629
chap. 272 .....	46, 401	chap. 129 .....	79, 327
chap. 292 .....	86, 512	chap. 137 .....	62, 160
chap. 314, sec. 2 .....	52, 538		62, 504
chap. 411, secs. 3, 4 .....	60, 385		67, 486
chap. 520 .....	69, 242		80, 565
chap. 558 .....	67, 215	sec. 20 .....	52, 526
	66, 1		76, 174
chap. 569 .....	42, 186		82, 243
sec. 4 .....	76, 186	sec. 47 .....	77, 347
chap. 588, sec. 1 .....	49, 332	sec. 60 .....	82, 358
chap. 590 .....	64, 112	sec. 77 .....	68, 88
chap. 631 .....	49, 86	sec. 104 .....	60, 303
chap. 678 .....	50, 240		83, 431



	Vol. Page.		Vol. Page.
1870, chap. 137, sec. 120 .....	47, 330	1870, chap. 741, sec. 5 .....	81, 143
chap. 163.....	64, 212		83, 107
	68, 396	chap. 750.....	46, 375
sec. 2 .....	59, 53	chap. 925.....	52, 296
chap. 175.....	45, 249	1871, chap. 126.....	94, 179
	69, 175	chap. 161.....	64, 404
sec. 2 .....	70, 521	cnap. 213.....	60, 303
	56, 387	chap. 219.....	69, 122
chap. 190, sec. 6 .....	56, 466	chap. 226, sec. 4.....	89, 530
	476	chap. 282.....	53, 450
chap. 194.....	66, 1	chap. 303.....	72, 1
chap. 225.....	56, 249	chap. 381, sec. 1.....	66, 623
chap. 242, sec. 2.....	59, 620	chap. 383, sec. 49.....	49, 132
chap. 257.....	65, 278	chap. 419.....	47, 216
chap. 321.....	58, 416	chap. 432.....	79, 454
	63, 348	chap. 460.....	59, 599
chap. 340.....	46, 401	chap. 461.....	93, 551
chap. 356, sec. 6.....	70, 1	chap. 486.....	67, 120
chap. 359, sec. 1.....	77, 455	chap. 491, sec. 3.....	63, 88
	80, 139	chap. 583, sec. 7.....	76, 151
	87, 572	chap. 579.....	63, 136
sec. 9 .....	70, 481	chap. 566.....	78, 232
sec. 11 .....	72, 317		79, 384
chap. 382, sec. 3.....	93, 372	chap. 574.....	85, 526
sec. 8 .....	93, 196	sec. 7.....	70, 459
chap. 374.....	52, 374	sec. 9 .....	63, 353
chap. 383.....	67, 486	chap. 603.....	60, 174
	85, 268	chap. 609.....	84, 308
sec. 1 .....	56, 60	chap. 625.....	53, 413
	76, 174	chap. 628, sec. 2.....	60, 319
sec. 7.....	58, 491	chap. 641, tit. 6, sec. 1, tit	
sec. 27.....	46, 100	10, sec. 9.....	76, 20
	85, 526	chap. 670, sec. 12.....	81, 153
	84, 596	chap. 674.....	69, 358
chap. 427.....	89, 36	chap. 695.....	71, 481
chap. 436.....	46, 9	chap. 715.....	52, 478
chap. 470.....	53, 450	chap. 721, secs. 7, 8, 33....	60, 10
sec. 2, sub. 5....	90, 526	chap. 730, sec. 5.....	84, 190
chap. 492.....	56, 448	chap. 809.....	71, 513
chap. 519.....	64, 547	chap. 839.....	71, 580
	68, 167	chap. 925.....	86, 317
chap. 519, sec. 1.....	76, 393	sec. 1.....	69, 491
sec. 22.....	80, 339	sec. 4.....	47, 415
tit. 15, sec. 9....	90, 679	1872, chap. 45.....	56, 144
chap. 570.....	76, 182	sec. 2.....	52, 131
chap. 593.....	89, 392	chap. 102.....	82, 324
chap. 598, title 6, sec. 6....	91, 616	chap. 129, sec. 10.....	83, 514
chap. 623.....	69, 358	chap. 161.....	59, 192
chap. 626, sec. 2.....	89, 61		79, 171
chap. 685.....	77, 64	chap. 219, secs. 3, 4.....	50, 525
chap. 741.....	58, 323	chap. 285.....	68, 259

# xviii STATUTES, SESSION LAWS AND CODES CONSTRUED.

	Vol. Page.		Vol. Page.
1872, chap. 299.....	62, 567	1873, chap. 335, sec. 25.....	78, 84
chap. 367.....	67, 87	secs. 25, 106 ...	82, 491
chap. 375.....	52, 224	sec. 28.....	72, 445
chap. 387 .....	80, 302		86, 149
chap. 438, sec. 1.....	62, 375		88, 245
	67, 522		92, 428
chap. 475.....	53, 164		94, 451
	67, 218	sec. 33.....	85, 541
	80, 484	sec. 41.....	93, 97
chap. 500.....	69, 358		67, 475
chap. 570, sec. 1....	62, 186	sec. 43.....	77, 347
chap. 575.....	79, 279		91, 265
chap. 580.....	50, 504	sec. 71.....	84, 348
	52, 80	sec. 73.....	91, 117
	63, 239	secs. 73, 91 ....	83, 543
	70, 157	sec. 76.....	64, 148
	85, 268	sec. 77.....	77, 153
	85, 302		82, 358
	85, 307	sec. 91.....	82, 131
sec. 5.....	69, 452		83, 528
sec. 7.....	60, 16		84, 596
	72, 225	secs. 91, 73.....	91, 117
	67, 441	sec. 97.....	67, 21
	70, 490	sec. 105. ....	92, 584
	76, 174	sec. 112.....	83, 207
chap. 629, sec. 2, sub. 15...	66, 657	sec. 114.....	67, 456
sec. 3, sub. 12...	66, 189		68, 413
chap. 639.....	60, 507	chap. 338, sec. 28.....	82, 247
chap. 669.....	67, 149	chap. 363.....	56, 629
chap. 675, sec. 13.....	62, 299	chap. 370, sec. 40.....	76, 47
chap. 687.....	63, 623	chap. 427.....	67, 218
chap. 700 .....	52, 556		72, 334
chap. 715.....	60, 398		80, 484
chap. 771.....	50, 553	chap. 428, sec. 2 .....	59, 166
sec. 7.....	64, 404	chap. 452.....	66, 569
chap. 812.....	56, 261	chap. 501.....	84, 634
chap. 838, sec. 4.....	56, 629	chap. 528, sec. 4 .....	92, 116
chap. 872.....	89, 67	chap. 531.....	67, 371
sec. 8.....	63, 535	sec. 13 .....	68, 591
1873, chap. 112.....	85, 117	chap. 538.....	58, 516
chap. 186.....	93, 438	chap. 549, sec. 5 .....	63, 277
chap. 239 .....	53, 450	sec. 8 .....	59, 92
sec. 1.....	58, 295	chap. 613.....	66, 237
chap. 335.....	64, 499	chap. 617.....	67, 506
	66, 162	chap. 644, sec. 5 .....	88, 117
	66, 585		91, 211
	70, 454	chap. 646.....	87, 493
sec. 6.....	80, 117	chap. 757.....	70, 530
	80, 185	sec. 22 .....	77, 523
sec. 18.....	69, 444	chap. 758, sec. 2 .....	63, 640
sec. 25.....	79, 582	chap. 813, tit. 2, sec. 3. .	78, 33

# STATUTES, SESSION LAWS AND CODES CONSTRUED. xix

	Vol. Page.		Vol. Page.
1873, chap. 820.....	70, 287	1875, chap. 371.....	86, 38
chap. 863, sec. 13, sub. 4...	87, 204	sec. 21 .....	79, 15
sec. 14 .....	69, 408	sec. 48 .....	69, 358
tit. 2, sec. 5.....	77, 503	sec. 49 .....	80, 225
sec. 10, tit. 2....	76, 160	chap. 379.....	81, 211
tit. 19, sec. 27...	90, 435		94, 183
1874, chap. 180.....	67, 109	chap. 476.....	81, 139
chap. 193.....	80, 317	chap. 479.....	79, 221
chap. 261.....	80, 171	chap. 482, sec. 1 .....	68, 259
chap. 296.....	92, 570	sec. 1, sub. 9...	92, 1
chap. 304. ....	68, 413	chap. 517.....	71, 371
chap. 312.....	60, 457	chap. 563.....	80, 302
	84, 596	chap. 564. ....	93, 475
	84, 619	chap. 595....	70, 327
	85, 536	chap. 606.....	70, 327
chap. 313.....	83, 431		361
	68, 214	chap. 634.....	93, 291
	85, 268	1876, chap. 49. ....	76, 337
chap. 314.....	68, 214	sec. 3 .....	85, 323
chap. 322....	63, 57	chap. 77.....	77, 248
	67, 199		88, 279
	72, 120	chap. 122, sec. 4 .....	83, 464
	77, 598	chap. 182.....	84, 478
chap. 323.....	64, 107	chap. 187....	89, 75
chap. 332.....	60, 126	chap. 198, sec. 2 .....	77, 248
	67, 447	chap. 295.....	78, 492
chap. 430.....	84, 582	chap. 299..	80, 614
chap. 444.....	70, 287	chap. 425, sec. 1 .....	79, 189
chap 448....	67, 371	chap. 439. ....	68, 381
chap. 547, sec. 5 .....	89, 308	chap. 445.....	67, 568
chap. 545, sec. 4 .....	60, 204	1877, chap. 165. .	72, 527
chap. 575.....	72, 245	chap. 167. ....	84, 478
chap. 583.....	84, 308	chap. 178.....	81, 532
chap. 589, sec. 31 .....	89, 358	chap. 305, sec. 16 .....	92, 363
sec. 36 .....	71, 495	chap. 318, sec. 5 .....	81, 500
chap. 600.....	67, 199	chap. 383.....	94, 544
chap. 604.....	86, 437	chap. 466, sec. 3, sub. 3..	94, 387
chap. 638.....	86, 623	1878, chap. 318, sec. 1 .....	94, 387
chap. 648.....	70, 569	sec. 2 .....	78, 248
1875, chap. 2.....	82, 204	sec. 7 .....	89, 259
chap. 19.....	91, 5	chap. 389.....	91, 265
chap. 49.....	63, 194	1879, chap. 85.....	82, 196
	202	chap. 89.....	93, 313
	84, 565	chap. 176. .	78, 347
chap. 181. ....	72, 368	chap. 253.....	86, 1
chap. 223.....	90, 336	chap. 379, secs. 1, 3.....	94, 394
	91, 672	chap. 390.....	79, 593
sec. 59 .....	84, 610		83, 240
chap. 258.....	78, 200	chap. 449.....	78, 330
chap. 300.....	76, 475		78, 346
chap. 337....	64, 557	chap. 538, sec. 1 .....	86, 401

# xx STATUTES, SESSION LAWS AND CODES CONSTRUED.

	Vol. Page.		Vol. Page.
1880, chap. 59, sec. 4 .....	90, 48	Code, sec. 14.....	3, 375
chap. 110.....	91, 574	sec. 24.....	59, 124
chap. 245.....	91, 502	sec. 30.....	18, 57
chap. 324.....	82, 621		18, 395
chap. 486.....	71, 201	sub. 8.....	24, 386
chap. 542.....	91, 593	sub. 6.....	57, 286
	92, 328	sec. 34.....	76, 555
	92, 383	sec. 47.....	4, 600
	92, 458	sec. 53.....	56, 585
	93, 313	sec. 53, sub. 10.....	42, 542
sec. 3 .....	89, 409	sec. 54, sub. 4.....	47, 89
	92, 487	sec. 64, sub. 15.....	91, 346
secs. 3, 8... ..	91, 574	sec. 83.....	54, 377
chap. 554.....	94, 263	sec. 91.....	49, 362
1881, chap. 76.....	91, 616	sec. 95.....	14, 225
chap. 211.. ..	89, 36	sec. 97.....	49, 362
chap. 361.....	91, 574	sec. 99, sub. 2.....	78, 194
chap. 551, sec. 2 .....	86, 1	sec. 103.....	71, 471
chap. 415.....	90, 68	sec. 111.. ..	44, 228
chap. 532.....	92, 128		349
chap. 559.....	92, 191		57, 409
chap. 681, sec. 2 .. ..	89, 634		62, 475
1882, chap. 90.....	90, 411	sec. 112.....	9, 211
chap. 360. ....	92, 554	sec. 113.....	9, 176
chap. 363.....	92, 591		22, 389
chap. 399.....	92, 537		47, 430
1883, chap. 93.....	94, 497	sec. 116, sub. 2.....	83, 110
chap 378, sec. 2 .....	94, 587	sec. 120.....	23, 286
Code, sec. 11 .....	4, 415	sec. 121.....	49, 125
	14, 597		53, 1
	46, 358		58, 562
	47, 624	sec. 122.....	48, 321
	50, 493	sec. 129.....	50, 176
	499	sec. 132.....	35, 104
	53, 504		65, 30
	508		76, 190
	58, 103	sec. 135.....	49, 84
	60, 326		53, 280
	67, 358		56, 359
	67, 278		58, 609
	311		69, 600
	67, 484		85, 313
	67, 555		88, 216
	68, 221		82, 256
	68, 343	sec. 136.....	42, 373
	376	sub. 2.....	21, 300
sub. 1.....	2, 566	sec. 140.....	60, 427
sub. 2.....	2, 186	sec. 149.....	16, 297
	17, 158		33, 83
sub. 3.....	40, 561	sec. 150.....	59, 533
	45, 637		61, 226

# STATUTES, SESSION LAWS AND CODES CONSTRUED. xxi

	Vol. Page.		Vol. Page.
Code, sec. 150.....	67, 237	Code, sec. 243.....	65, 314
sec. 155.....	13, 83		68, 585
sec. 157.....	52, 596	sec. 244, sub. 4.....	85, 506
sec. 160.....	18, 119	sec. 245.....	38, 18
	59, 176	sec. 247.....	18, 315
sec. 162.....	76, 564		53, 497
	76, 397		61, 251
sec. 165.....	11, 547		45, 468
	12, 67	sec. 254.....	47, 119
	46, 427	sec. 261.....	38, 423
sec. 167.....	56, 12	sec. 264.....	53, 371
	58, 237		56, 247
	64, 173	sec. 265.....	47, 244
	68, 294		54, 147
sec. 171.....	65, 89	sec. 267.....	29, 673
sec. 172.....	38, 21		56, 192
	49, 78	sec. 268.....	46, 565
sec. 173.....	37, 300		47, 221
	58, 636	sec. 271.....	1, 426
	78, 74		1, 608
sec. 175.....	56, 359	sub. 1.....	63, 315
	70, 486	sub. 3.....	20, 251
sec. 177.....	46, 200	sec. 272 .....	46, 565
	59, 233		47, 221
sec. 179.....	70, 492		78, 74
sec. 186.....	57, 582	sec. 274 .....	1, 611
	88, 403		54, 207
sec. 187.....	72, 587	sec. 275.....	40, 504
sec. 191.....	81, 91	sec. 277.....	9, 470
sec. 197.....	45, 393		9, 559
sec. 201.....	59, 310		38, 423
	98, 143	sec. 279.....	1, 423
sec. 203.....	44, 104	sec. 282.....	1, 428
secs. 206-217.....	49, 259		1, 536
sec. 207.....	80, 339		17, 9
sec. 210.....	59, 269	sec. 283.....	1, 607
sec. 220.....	9, 263		17, 9
sec. 222.....	64, 326	sec. 284.....	26, 383
	76, 600	sec. 288.....	59, 156
sec. 223.....	18, 463		71, 377
secs. 227-245.....	50, 80	sec. 292.....	48, 27
sec. 227.....	54, 164	sec. 294.....	37, 355
	68, 370		48, 27
sec. 228.....	6, 560	sec. 297.....	47, 368
secs. 232-236.....	89, 343		54, 516
sec. 235.....	56, 52	sec. 303.....	51, 387
	61, 583		69, 462
	84, 1		71, 443
	92, 256	sec. 304.....	7, 486
sec. 238.....	50, 128		21, 466
	54, 207	sec. 305.....	8, 29

# xxii STATUTES, SESSION LAWS AND CODES CONSTRUED.

	Vol. Page.		Vol. Page.
Code, sec. 305..	9, 549	Code, sec. 399.....	13, 293
sec. 306.....	56, 50		18, 52
	7, 486		22, 353
sec. 307, sub. 5.....	50, 427		26, 264
sec. 308.....	2, 570		33, 688
sec. 309.....	37, 380		34, 447
	51, 365		44, 58
	29, 410		45, 696
	62, 333		47, 278
sec. 313.....	77, 476		51, 43
sec. 317.....	52, 587		59, 336
sec. 321.....	607		59, 587
sec. 329.....	62, 333		62, 80
sec. 334.....	38, 469		65, 107
	60, 371		70, 385
	62, 111		387
	63, 245		78, 90
sec. 335.....	14, 60		155
	63, 245		282
	87, 409		81, 625
sec. 338 .....	83, 261	sec. 401, sub. 7.....	58, 383
sec. 339.....	2, 561	sec. 427.....	62, 114
sec. 344.....	22, 517		84, 63
sec. 348.....	87, 409	sec. 432.....	57, 161
sec. 352.....	47, 67		67, 334
sec. 356 .....	65, 380	sec. 440.....	57, 161
sec. 366.....	24, 635	sec. 448.....	62, 75
sec. 369.....	56, 671	sec. 449 .....	41, 425
sec. 371 .....	47, 1		49, 266
	62, 27		56, 407
sec. 372... ..	27, 130		69, 567
	46, 612	sec. 457.....	3, 341
	60, 191	sec. 460.....	10, 374
	63, 617	Code Civ. Pro., chap. 16.....	92, 306
sec. 375.....	42, 373	sec. 14.....	81, 235
	44, 63		87, 521
	89, 146	sec. 17.....	84, 284
sec. 379.....	89, 146	sec. 23.....	88, 611
sec. 381.....	51, 1	sec. 160.....	81, 35
sec. 383.....	22, 418	sec. 184, sub. 4..	83, 174
	24, 518	sec. 190, sub. 2..	77, 514
	33, 409	sec. 190.....	82, 506
sec. 385.....	57, 652		609
	63, 261		85, 628
sec. 388.....	11, 575	sec. 191.....	81, 13
sec. 391.....	64, 120		128
sec. 397....	11, 128	sec. 382, sub. 5..	87, 160
	14, 482	sec. 406.....	72, 499
sec. 399.....	3, 489	sec. 426....	84, 622
	9, 170	sub. 3.....	84, 445
	12, 373	sec. 432.....	87, 137

# STATUTES, SESSION LAWS AND CODES CONSTRUED. xxiii

	Vol. Page.		Vol. Page.
Code Civ. Pro., secs. 440, 441, 787	89, 397	Code Civ. Pro., sec. 993	82, 459
sec. 451.....	93, 82	sec. 997.....	93, 392
sec. 452.....	77, 232	sec. 999.....	79, 506
sec. 501.....	90, 293	sec. 1005.....	80, 275
	93, 552	sec. 1013.....	86, 433
sec. 521.....	81, 40	sec. 1023.....	84, 284
sec. 525.....	87, 231	sec. 1207.....	85, 246
sec. 531.....	84, 493	sec. 1210.....	77, 515
sec. 535.....	81, 246	sec. 1236.....	81, 182
sec. 544.....	72, 442		82, 366
	79, 579	sec. 1240.....	77, 423
sec. 550.....	94, 473	sec. 1279.....	76, 602
sec. 551.....	87, 272		92, 622
sec. 552.....	85, 502	sec. 1300.....	76, 106
sec. 599.....	88, 611	sec. 1303.....	85, 652
secs. 595, 598...	88, 611	sec. 1308.....	72, 613
sec. 636.....	84, 141	sec. 1317.....	76, 585
sec. 638.....	93, 93	sec. 1326.....	85, 241
sec. 682.....	82, 88	sec. 1337.....	87, 514
	85, 500	sec. 1338.....	85, 21
	89, 440	sec. 1342.....	79, 573
	93, 87	sec. 1347.....	79, 175
sec. 683.....	81, 141	sec. 1351.....	78, 228
sec. 708, sub. 3..	94, 508	sec. 1353.....	85, 353
sec. 713.....	31, 349	sec. 1354.....	82, 366
sec. 723.....	88, 500	sec. 1356.....	88, 611
	89, 22	sec. 1368.....	86, 517
sec. 724.....	78, 362	sec. 1421.....	91, 577
sec. 757.....	90, 461	sec. 1464.....	88, 600
sec. 758.....	77, 480	sec. 1766.....	91, 281
sec. 763.....	77, 515	sec. 1778.....	88, 424
sec. 786.....	86, 270	sec. 1780.....	87, 137
sec. 791, sub. 5..	84, 642	sec. 1937.....	92, 581
sub. 6..	92, 646	secs. 2281, 2283..	87, 521
sec. 822.....	87, 272	sec. 2534.....	94, 574
sec. 829.....	79, 415	sec. 2545.....	88, 656
	80, 198	secs. 2554, 2555..	91, 235
	88, 251	sec. 2586.....	87, 514
	88, 447		81, 623
	90, 298	sec. 2662.....	89, 401
sec. 830.....	81, 151	secs. 2717, 2718..	92, 251
	92, 293	sec. 2957.....	93, 54
sec. 832.....	86, 353	sec. 3165, sub. 2.	93, 93
	91, 241	sec. 3248.....	85, 523
sec. 834.....	80, 281	sec. 3253.....	92, 401
	92, 274	sec. 3271.....	92, 353
sec. 870.....	77, 33	sec. 3296.....	87, 184
	78, 220	sec. 3331.....	90, 521
	78, 599	Code Crim. Pro., sec. 176	92, 85
sec. 873.....	86, 519	secs. 188-200...	91, 241
sec. 982.....	88, 258	sec. 519....	92, 560
	92, 398	sec. 527....	92, 554, 560

## ABBREVIATIONS.

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In the regular series, the first figures denote the volume, the second the page.

“Abb.” stands for Abbott’s Court of Appeals Decisions.

“Trans. App.” for Transcript Appeals.

“Am. Rep.” for American Reports.



# INDEX-DIGEST

OF THE

## NEW YORK COURT OF APPEALS REPORTS.

### A.

#### Abandonment.

See ADVERSE POSSESSION; DOMICILE; EASEMENT; HIGHWAY; INSURANCE; SHIP AND SHIPPING.

#### ABATEMENT AND REVIVOR.

Action for claim and delivery of personal property does not abate by plaintiff's death. *Potter v. Van Vranken*, 36, 619.

On death of plaintiff in replevin, action abates. *Burke v. Luce*, 1, 163.

No abatement where issue has been joined on a counter-claim. *Livermore v. Bainbridge*, 49, 125.

Abatement of action against corporation by dissolution. *McCulloch v. Norwood*, 58, 562.

Lien of creditor's bill not extinguished by defendant's death. *Brown v. Nichols*, 42, 26.

Cause of action for fraudulently inducing plaintiff to marry defendant by false representations that he was unmarried does not survive death of defendant. *Price v. Price*, 75, 244; 31 Am. Rep. 463.

Action against vendor of land for fraudulent representations survives. *Haight v. Hayt*, 19, 464.

On death of lunatic, power of committee ceases. *Matter of Beckwith*, 87, 503.

Alternative mandamus not abated by death of one petitioner after return. *People v. Board of Supervisors of Essex Co.*, 70, 228.

Cause of action by husband for loss of wife's services and for expenses caused by negligence survives plaintiff's death. *Oregon v. Brooklyn Crosstown R. Co.*, 75, 192; 31 Am. Rep. 459.

Death of plaintiff husband in action for injury to wife abates action for loss of society, but action for expenses and loss of services survives. *Oregon v. Brooklyn Crosstown R. Co.*, 83, 595; 38 Am. Rep. 447.

Action for breach of promise of marriage abates with death of defendant. *Wade v. Kalbfleisch*, 58, 282; 17 Am. Rep. 250.

Action does not abate by marriage of female plaintiff — order of substitution. *Mapes v. Snyder*, 59, 450.

Proceeding to foreclose mechanic's lien under act of 1863, chapter 500, abates on defendant's death. *Leavy v. Gardner*, 63, 624.

Death of mortgagor after decree in foreclosure does not prevent execution. *Hays v. Thomae*, 56, 521.

Foreclosure does not abate by death of mortgagee and his appointment of mort-

gagor as one of his executors. *McGregor v. McGregor*, 35, 218.

Death of prior mortgagee, party to foreclosure, or devolution of his interest, does not necessitate revivor. *Hancock v. Hancock*, 22, 568.

Action by officer does not abate by the expiration of his term and the election of his successor after commencement of the term at which the cause was tried. *Manchester v. Herrington*, 10, 164.

Of partition, by death of one tenant in common. *Requa v. Holmes*, 16, 193; 26, 338.

Action by assignee for benefit of creditors against sheriff for wrongful taking of assets does not abate by plaintiff's death—personal representative should be substituted—consent to substitution of successor in trust binding. *Emerson v. Bleakley*, 2 Abb. 22; 2 Trans. App. 171; 3 id. 100.

Cause of action against stockholder under general insurance act, survives. *Chase v. Lord*, 77, 1.

Liability of joint surety on appeal ceases with his death. *Randall v. Sackett*, 77, 480.

Right of revivor rests in discretion—laches—limitation. *Beach v. Reynolds*, 53, 1.

Action may be revived at any time under Code of Civil Procedure, § 757, as amended in 1874, where both parties are dead. *Holsman v. St. John*, 90, 461.

Revivor is by motion—discretion—delay—sole defendant. *Coit v. Campbell*, 82, 509.

Case proceeds as if substituted party had been in from beginning. *Moore v. Hamilton*, 44, 666.

Bill of revivor when by devisee. *Brady v. McCosker*, 1, 214.

Mere lapse of time does not defeat right of revivor. *Evans v. Cleveland*, 72, 486.

Stipulation that action shall survive, as condition of postponement—effect of—attorney may make. *Cox v. New York Cent., etc., R. Co.*, 63, 414.

### Abduction.

See CRIMINAL LAW—*Kidnapping*.

### Abortion.

See CRIMINAL LAW.

### Acceptance.

See NEGOTIABLE INSTRUMENT.

### ACCESSION.

A willful trespasser gets no title to corn taken by him and converted by him into whisky. *Silsbury v. McCoon*, 3, 379.

### Accessory and Accomplice.

See CRIMINAL LAW; WITNESS.

### Accident.

See INSURANCE; NEGLIGENCE.

### ACCORD AND SATISFACTION.

Partly executed accord and tender of performance of residue is not satisfaction. *Kromer v. Heim*, 75, 574; 31 Am. Rep. 491.

Assignment and delivery of property on agreement to release constitutes, without proof of acceptance. *Therasson v. Peterson*, 2 Keyes, 636; 4 Abb. 396.

Agreement to accept smaller sum for debt binding when secured by surety—wife's joining husband in mortgage. *Keeler v. Salisbury*, 33, 648.

Agreement to accept notes in settlement of claim is not. *Day v. Roth*, 18, 448.

Compromise of claim without consideration is not binding. *Bunge v. Koop*, 48, 225; 8 Am. Rep. 546.

When liability not discharged by unsealed instrument for nominal consideration. *Dambmann v. Schulting*, 75, 55.

Compromise by creditors must be unanimous and equal. *Durgin v. Ireland*, 14, 322.

Note of third person, to be in full of debt if paid at maturity, discharges debtor if creditor accepts payment after maturity. *Conkling v. King*, 10, 446.

A written receipt of money in full of a claim of damages for personal injuries cannot be contradicted by parol. *Coon v. Knap*, 8, 402.

Receipting a portion of an undisputed account in full does not preclude recovery of balance. *Ryan v. Ward*, 48, 204; 8 Am. Rep. 539.

Stipulation to accept less than amount in suit not satisfaction. *Noe v. Christie*, 51, 270.

See PAYMENT; PLEADING; RELEASE.

## ACCOUNT.

Action of, lies only between two merchants. *Appleby v. Brown*, 24, 143.

An account stated conclusive unless impeached for fraud or mistake—what constitutes. *Lockwood v. Thorne*, 11, 170.

Can only be opened for fraud, mistake or manifest error. *Harley v. Eleventh Ward Bank*, 76, 618; *McIntyre v. Warren*, 3 Keyes, 185.

Account rendered, not conclusive on either party. *Champion v. Joslyn*, 44, 653.

Rendering account does not make it an account stated. *Guernsey v. Rexford*, 63, 631.

Bill presented and not objected to, is account stated and draws interest. *Case v. Hotchkiss*, 3 Keyes, 334.

Account stated, what assent renders conclusive. *Lockwood v. Thorne*, 18, 285.

Creditor not estopped from recovering quantum meruit by previous presentment of account stating a smaller sum. *Williams v. Glenny*, 16, 389.

Plaintiff must show assent of defendant, express or implied. *Volkening v. DeGraaf*, 81, 268.

Goods sold and delivered at different times is "mutual, open and current account," within statute of limitations. *Green v. Disbrow*, 79, 1; S. C., 35 Am. Rep. 496.

Where reciprocal demands, action for balance due, *Id.*

Agreement to account for proceeds of sales—embezzlement by agents does not excuse from liability. *Walker v. Spencer*, 86, 162.

May be required from agent intrusted with moneys to invest and deal with—burden on agent to show performance of duties. *Marvin v. Brooks*, 94, 71.

Facts entitling legatee under will to. *Matter of McCarter*, 94, 558.

Action for—form of judgment—counter-claim of judgment. *Taylor v. Root*, 4 Keyes, 335.

When action lies for accounting of joint adventure in purchase and sale of stocks—evidence. *Marston v. Gould*, 69, 220.

See AGENCY; EXECUTOR AND ADMINISTRATOR; PLEADING; SURROGATE; TRUSTS.

## Accretion.

See WATER AND WATER-COURSES.

## ACKNOWLEDGMENT.

One authorized to take acknowledgment of deeds may do so of mortgages. *Trustees Can. Acad. v. McKechnie*, 90, 618.

Taking of, not a judicial act—officer related to parties. *Lynch v. Livingston*, 6, 422.

See DEED; MORTGAGE; STATUTE OF LIMITATIONS.

## ACTION.

- I. *When action will lie.*
- II *When action will not lie.*
- III. *By and against whom maintainable.*
- IV. *By and against whom not maintainable.*
- V. *Form of.*

I. *When action will lie.*

When action lies against one whose debt has been paid with money belonging to a third. *Ely v. Norton*, 2 Abb. 19.

On subscriptions on same paper, one as individual, and the other with addition of "exr.," separate actions lie. *Erie, etc., R. Co. v. Patrick*, 2 Abb. 72.

Bill to recover drawback duties. *Moore v. Des Arts*, 1, 359.

For wrongful taking of chattel — trespass or replevin — constructive possession. *Ely v. Ehle*, 3, 506.

Maintainable upon promise made by defendant to third person for benefit of plaintiff, though without his privity. *Secor v. Lord*, 3 Keyes, 525.

Lies to set aside erroneous or illegal assessment, only when constituting on its face a valid lien on land, and to prevent multiplicity of suits. *Heywood v. City of Buffalo*, 14, 534.

For death by wrongful act, etc., given to personal representative when the sufferer, if living, might have sued. *Quin v. Moore*, 15, 432.

When separate accounts do not constitute an entire claim. *Secor v. Sturgis*, 16, 548.

When trustee of fund, entitled to succeed in case of intestacy, prevents a will in favor of third by promising to hold for him, action lies for money had and received. *Williams v. Fitch*, 18, 546.

For mesne profits — how regulated. *Holmes v. Davis*, 19, 488.

Acceptance of benefits under a will charged with payment of annuity justifies action without express promise. *Gridley v. Gridley*, 24, 130.

For conversion of a billiard-table — when maintainable upon general proof of detention of four of equal value. *Clark v. Griffith*, 24, 595.

For balance of unpaid purchase-money of chattels, not transferred by transfer of acceptances given for part of price but not received in payment. *Battle v. Coit*, 26, 404.

Lies for services agreed to be compensated by will, and not so provided for. *Robinson v. Raynor*, 28, 494.

If one reclaims property carried by flood without his fault upon another's land he must pay for the damage done by it. *Sheldon v. Sherman*, 42, 484; 1 Am. Rep. 569.

When lies against agent to recover subscriptions paid. *Rector, etc., v. Crawford*, 43, 476.

For money had and received — no demand necessary — what equivalent to refusal — agency or partnership. *Howard v. France*, 43, 593.

To recover money paid in ignorance of facts. *Goss v. Mather*, 46, 689.

For money had and received in stock transactions. *Jaycox v. Cameron*, 49, 645.

When lies to recover tax illegally collected. *National Bank of Chemung v. City of Elmira*, 53, 49.

To recover money paid on judgment, lies after reversal — joint debtors — demand of one — revivor. *Scholey v. Halsey*, 72, 578.

For rents and profits — plaintiff must have possession. *Bockes v. Lansing*, 74, 437.

When maintainable for recovery of specific bank bills. *Graves v. Dudley*, 20, 76.

Where mortgagee retains surplus moneys to apply on a subsequent and usurious mortgage, mortgagor may recover as for money had and received. *Cope v. Wheeler*, 41, 303.

Lies against one who has assumed a liability of the State to another. *Coster v. Mayor, etc.*, 43, 399.

When legislature transfers turnpike to a railroad company without compensation to owners of fee, they may maintain successive actions for damages. *Mahon v. New York Cent. R. Co.*, 24, 658.

Second action against joint debtor unserved, allowed, though judgment in first appealed from. *Morey v. Tracey*, 92, 581.

## II. When it will not lie.

Debt on chattel mortgage — when does not lie. *Culver v. Sisson*, 3, 264.

Will not lie by rightful claimants against wrongful claimant for money paid latter by a third. *Butterworth v. Gould*, 41, 450; *Patrick v. Metcalf*, 37, 332.

Action in equity cannot be turned into one of damages by evidence. *Bradley v. Aldrich*, 40, 504.

When, for money paid for stock. *Kelsey v. Northern Light Oil Co.*, 45, 505.

For non-delivery of goods sold conditionally but destroyed by accident without seller's fault. *Dexter v. Norton*, 47, 62; 7 Am. Rep. 415.

Against C. for inducing A. to break his contract to sell to B., and to sell to C. instead, although C. had contracted to buy the property of B. *Ashley v. Dixon*, 48, 430; 8 Am. Rep. 559.

Does not lie for explosion of a steam boiler on premises unless there is negligence or a nuisance. *Loose v. Buchanan*, 51, 476; 10 Am. Rep. 623.

When does not lie to recover scrip bought by defendant in his own name with money intrusted to him by plaintiff to buy for him. *Wheeler v. Allen*, 51, 37.

To cancel written instrument — when not maintainable — irreparable injury — that evidence may be lost, or a defense to instrument, not sufficient. *Globe Mutual Life Ins. Co. v. Reals*, 79, 202.

Not maintainable against town under act of 1875, chapter 49, authorizing people to recover money, etc., from public corporations. *People v. New York, etc., Ry. Co.*, 84, 565.

(c.) *By and against whom maintainable.*

By assignor of collateral against assignee for surplus and surrender of principal security, is equitable and single. *Cahoon v. Bank of Utica*, 7, 486.

Owner of wheat delivered by warehouseman by mistake may maintain action for proceeds. *Cobb v. Dows*, 10, 335.

Individual may maintain, to prevent perversion of dedicated land from public uses, where there is no municipal corporation to do it. *Cady v. Conger*, 19, 256.

May be brought against convict in prison. *Davis v. Duffie*, 3 Keyes, 606.

For failure of title of chattel — several successive sellers — action by last as assignee of former. *Bordwell v. Collie*, 45, 494.

(d.) *By and against whom not maintainable.*

Postmaster wrongfully detaining newspaper does not act judicially. *Teall v. Felton*, 1, 537.

Not maintainable by husband for instantaneous death of wife by negligence. *Green v. Hudson River R. Co.*, 2 Abb. 277.

Laborers on public work under sub-lessee of contractor, cannot maintain action on contractor's bond. *McCluskey v. Cromwell*, 11, 593.

To avoid act of supervisors in erecting a new town cannot be maintained by citizen having only common interest. *Doolittle v. Supervisors*, 18, 155.

None lies by rightful claimant against wrongful claimant whose claim has been recognized. *Patrick v. Metcalf*, 37, 332.

Cannot be maintained by one in rebellion against government. *Sanderson v. Morgan*, 39, 231.

Chamberlain of New York having named P. Bank as depository, his successor naming B. Bank as depository, latter cannot recover deposit from former. *Lewis v. Park Bank*, 42, 463.

Seller of goods delivering to carrier by buyer's order cannot maintain action for loss. *Krulder v. Ellison*, 47, 36; 4 Am. Rep. 721.

(e.) *Form of.*

Where parties contract under penalty, on breach action may be had for penalty or for damages. *Haggart v. Morgan*, 5, 422.

On a destroyed note. *Des Arts v. Leggett*, 16, 582.

By city, to determine rights to land claimed for public square. *Mayor, etc., v. Stuyvesant*, 17, 34.

When "originally commenced in a court of a justice of the peace." *Cook v. Nellis*, 18, 126.

Claim to remove cloud and claim for possession may be joined. *Lattin v. McCarty*, 41, 107.

To set aside election of dower need not be brought within a year. *Chamberlain v. Chamberlain*, 43, 424.

Damages may be awarded in action for reformation of contract. *Bidwell v. Astor Mut. Ins. Co.*, 16, 263.

See various specific titles; PARTIES; PLEADINGS.

**Ademption.**

See WILL.

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**Adjournment.**

See TRIAL.

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**Adjudication.**

See APPEAL; BANKRUPTCY; FORMER  
ADJUDICATION; JUDGMENT.

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**Administrator.**

See CONFLICT OF LAWS; EXECUTOR  
AND ADMINISTRATOR; SURROGATE; WILL.

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**ADMIRALTY.**

Supreme court has no jurisdiction in,  
even by stipulation. *Bartlett v. Spicer*,  
75, 528.

See SHIP AND SHIPPING.

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**Admission.**

See ATTORNEY AND CLIENT; CRIMINAL  
LAW — *Evidence*; EVIDENCE.

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**Adultery.**

See MARRIAGE — *Divorce*.

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**ADVANCEMENT.**

Discharges estate of claim as heir. *Parker v. McCluer*, 1 Trans. App. 240; 3 Abb. 454.

Exchange of lands, with oral understanding, when deemed advancement. *Id.*, 3 Keyes, 318.

Descendants of a child of intestate, entitled to benefit of, on final distribution — statutes in regard to, and distribution to be construed together. *Beebe v. Estabrook*, 79, 246.

See WILL.

**ADVERSE POSSESSION.**

Twenty-five years requisite before Revised Statutes. *Clark v. Baird*, 9, 183.

Must be under claim and assertion of right. *Flora v. Carbean*, 38, 111.

Title as against all the world may be established by. *Cahill v. Palmer*, 45, 478.

Does not bar title unless continuous for twenty years — acts on highway not adverse claim. *Bliss v. Johnson*, 94, 235.

As to statute of champerty, must be under claim of specific title. *Crary v. Goodman*, 22, 170.

Deed of lands held in, valid against grantor, his heirs, and strangers. *Hamilton v. Wright*, 37, 502.

Must be actual, not constructive, to avoid deed for champerty. *Dawley v. Brown*, 79, 390.

May be based on deed executed under power not proved — character of occupation. *Munro v. Merchant*, 28, 9.

Under assessment lease. *Sands v. Hughes*, 53, 287.

Cannot be based on claim under unexpired term of assessment lease. *Bedell v. Shaw*, 59, 46.

When good defense in ejectment — plaintiff having equitable interest merely. *Bennett v. Garlock*, 79, 302; 35 Am. Rep. 517.

Deed of land held adversely by bankrupt to assignee valid. *Coleman v. Manhattan etc., Co.*, 94, 229.

Deed of highway by owner not void for possession by railroad company. *Broistedt v. South Side R. Co. of Long Island*, 55, 220.

Fences along low-water mark taken up in winter — gathering sea weed — abandonment. *Trustees, etc., v. Kirk*, 84, 215; 38 Am. Rep. 505.

Right to flow presumed from twenty years' continuous injurious use. *Hammond v. Zekner*, 21, 118.

Of water-course — when grant presumed — burden of proof. *Haight v. Price*, 21, 241.

By tenant in common — what constitutes. *Culver v. Rhodes*, 87, 348.

Of wharf in New York city. *Thompson v. Mayor, etc.*, 11, 115.

Acquired by New York city. *Sherman v. Kane*, 86, 57.

What is not — when no defense to action for waste. *Robinson v. Kime*, 70, 147.

May not be based on instrument purporting to convey absolute title where grantee knows the grantor has but an easement. *Pitts v. Wilder*, 1, 525.

Judgment debtor's occupancy of land after sale on execution presumed to be for purchaser. Renunciation of claim. *Cook v. Travis*, 20, 400.

Husband's marital possession cannot be adverse to wife's grantee. *Vandevoort v. Gould*, 36, 639.

When not established by cattle fence across stream. *Yates v. Van De Bogert*, 56, 526.

When gathering of sea weed not sufficient to show adverse possession. *Trustees of East Hampton v. Kirk*, 68, 459.

When agreement for occupation defeats claim of. License. *Devyr v. Schaefer*, 55, 447.

Public easement in highway not extinguished by twenty years' adverse possession. *St. Vincent Orphan Asylum v. City of Troy*, 76, 108; 32 Am. Rep. 286.

Claim of woodland unfenced on two sides and outside of definite boundary of deed, not valid — evidence of surveyor as to line necessary to give quantity called for. *Pope v. Hammer*, 74, 240.

One obtaining possession under lease cannot set statute running by disclaiming landlord's title. *Whiting v. Edmunds*, 94, 309.

Cannot be set up by purchaser of life estate at sheriff's sale as against reversioner. *Burhans v. Van Zandt*, 7, 523.

Not interrupted except by action on hostile possession. *Robinson v. Phillips*, 56, 634.

See BOUNDARY; DEED; ESTOPPEL; PLEADING; STATUTE OF LIMITATION.

### AFFIDAVIT.

Omission of deponent's name in body, not fatal. *People v. Sutherland*, 81, 1.

A party cannot be compelled to make, for a motion. *King v. Leighton*, 58, 383.

See various specific titles.

### AGENCY.

#### I. Proof of agency.

#### II. Authority of agent.

(a.) How conferred.

(b.) By parol.

(c.) Regarding commercial paper.

(d.) General and special.

#### III. Revocation of agency.

#### IV. Ratification of agency.

(a.) Accepting fruits of agent's acts.

(b.) Knowledge of facts.

(c.) Generally.

#### V. Compensation of agent.

#### VI. Liability of agent to third parties.

#### VII. Liability of principal to third parties.

#### VIII. Liability of principal to agent.

#### IX. Liability of third parties to principal.

#### X. Questions between principal and agent.

#### XI. Double agency.

#### XII. Generally.

#### I. Proof of agency.

That insurance company authorized party to buy policy register, not proof of general agency. *Stringham v. St. Nicholas Ins. Co.*, 1 Trans. App. 334; 3 Keyes, 280.

Whether one is acting as agent or principal is question of fact. *McClune v. Cain*, 2 Keyes, 203; *Dunn v. Hornbeck*, 72, 80.

Questions of fact — act in excess of authority — ratification. *Watson v. Gray*, 4 Keyes, 385.

When title does not pass through acts of one falsely pretending to be agent. *McGoldrick v. Willits*, 52, 612.

Evidence to establish. *Richards v. Millard*, 56, 574.

#### II. Authority of agent.

(a.) How conferred.

Unauthorized declarations, to bind principal, must be within scope of agency. *New York Life Ins. and Trust Co. v. Beebe*, 7, 364.

What amounts to — partnership accounts. *Howard v. France*, 43, 593.

Cannot be created by agent's misrepresentations. *Marvin v. Wilber*, 52, 270.

When not constituted by agreement of consignment. *German Bank v. Edwards*, 53, 541.

Power of attorney to sue and release gives no authority to release without satisfaction. *DeMetz v. Dugrow*, 53, 635.

When carman receiving goods sold by and returned to his employer is deemed his agent in respect thereto. *Purcell v. Jaycox*, 59, 288.

Where one of two joint agents becomes incapacitated, the other cannot perform without principal's consent. *Salisbury v. Brisbane*, 61, 617.

When authority to sign notes presumed from course of dealing. *Turner v. Keller*, 66, 66.

When public not bound by private instructions — principal bound by contract by agent in his own name as agent for the named principal. *Hill v. Miller*, 76, 32.

How and when established among conspirators to obtain money by forgery. *New York Guard and Indemnity Co. v. Gleason*, 78, 503.

Agent to collect rents has no implied authority to indorse check therefor. *Robinson v. Chemical Nat. Bank*, 86, 404.

Agent cannot bind principal to arbitration unless specially authorized. *McPherson v. Cox*, 86, 472.

#### (b.) By parol.

Agent authorized by parol to contract, but contracting under seal, the agreement binds principal as a simple contract. *Worrall v. Munn*, 5, 229.

Agent under parol authority may bind his principal by contract for sale of land — agreement to take pay in work — failure of vendor to perform — recovery quantum meruit. *Moody v. Smith*, 70, 598.

Authority of corporate agent not provable by parol. Failure to object to agent's act after notice is ratification. *Benninghoff v. Agricultural Ins. Co.*, 93, 495.

#### (c.) Regarding commercial paper.

Custom of clerk to sign papers for employees, as forwarders, not competent to warrant submission of question of authority to sign bill of lading and of sale. *Dous v. Perrin*, 16, 325.

Authority to accept a bill for a certain amount for a particular purpose will not authorize acceptance for part of the amount for another purpose. *Nixon v. Palmer*, 8, 398.

Agent to transmit bill for acceptance must take nothing short of explicit and unequivocal acceptance. *Walker v. Bank of State of N. Y.*, 9, 582.

Agent gets no property in business paper sent him for collection, although he has remitted in anticipation. *Dickerson v. Wason*, 47, 439; 7 Am. Rep. 455.

Authority to make drafts — construction — declarations of agent. *Merchants' Bank v. Griswold*, 72, 472; 27 Am. Rep. 159.

Possession of unindorsed note payable to principal's order gives no implied authority to take payment. *Doubleday v. Kress*, 50, 410; 10 Am. Rep. 502.

#### (d.) General and special.

An agent to take care of property and give notice of liens has no authority to contract with others to purchase on account of his principal at a judicial sale. *Brisbane v. Adams*, 3, 129.

Agent to buy property at judicial sale, and restricted to a certain sum, may not bid for himself beyond that sum. *Moore v. Moore*, 5, 256.

Mortgagor executing power of attorney to mortgagee to sell and convey the premises and pay over the surplus, the mortgagee cannot acquire the title without consent. *Dobson v. Racey*, 8, 216.

A general authority to buy and load a vessel does not authorize the agent to borrow money to make the purchase. *Bank of the State of Indiana v. Bugbee*, 1 Abb. 86; 3 Keyes, 461.

Master of vessel authorized to sell cargo and buy return cargo is general agent therefor. *Bidenlac v. Smith*, 31, 259.



Case of special — false statement of agent. *Booth v. Bierce*, 38, 463.

Agent to hire tow-boat, not authorized to assume perils or risks of voyage, or insure against negligence of employees. *Martin v. Earnsworth*, 49, 555.

Agent to collect trust funds cannot pay over to cestui que trust. *Hancock v. Gomez*, 50, 668.

Power of agent for shipping goods to contract with carrier — custom. *Shelton v. Merchants' Dispatch Trans. Co.*, 59, 258.

Factor bound to follow instructions though he makes advances, unless principal fails to repay within reasonable time. *Hilton v. Vanderbilt*, 82, 591.

Can agent make loan on second mortgage without assent of principal? *Whitney v. Martine*, 88, 535.

Authority to deposit does not imply authority to draw checks on deposit. *Bates v. First Nat. Bk.*, 89, 286.

Payment to agent with actual though not apparent authority valid. *Johnson v. Donnell*, 90, 1.

### III. Revocation of agent's authority.

Of firm ceases on death of member. *Martine v. International Life Ins. Soc.*, 53, 339; 13 Am. Rep. 529.

When death of one partner does not revoke agency for firm. *Bank of New York v. Vanderhorst*, 32, 553.

Authority of agent in Virginia of foreign insurance company not revoked or suspended by the civil war — receipt of Confederate money binding. *Robinson v. International Life Ass. Soc.*, 42, 54; 1 Am. Rep. 490.

When circumstances do not give constructive notice of revocation. *Clafin v. Lenheim*, 66, 301.

Principal bound for goods accepted by agent after termination of agency, under agreement void within statute of frauds. *Barkley v. Rensselaer & Saratoga R. Co.*, 71, 205.

Principal may repudiate, as against agent, contracts misrepresented by agent. *Levy v. Loeb*, 89, 386.

### IV. Ratification.

#### (a.) Accepting fruits of agent's acts.

Principal cannot adopt agent's bargain without adopting the instrumentalities. *Elwell v. Chamberlain*, 31, 611; *Murray v. Bining*, 8 Keyes, 107.

By receipt of benefit — joinder of parties. *Leslie v. Wiley*, 47, 648.

Construction of power of attorney — ratification. *Craighead v. Peterson*, 72, 279; 27 Am. Rep. 150.

#### (b.) Knowledge of facts.

By knowledge and omission to object. *Hazard v. Spears*, 2 Abb. 353.

Agent to sell bank stock has no implied power to warrant — ratification not effected without knowledge. *Smith v. Tracy*, 36, 79.

Knowledge of facts, essential to. *Rowan v. Hyatt*, 45, 138; *Nixon v. Palmer*, 8, 398.

To collect, no authority to extend time of payment, ratification must be with knowledge of facts. *Ritch v. Smith*, 82, 627.

#### (c.) Generally.

In part, of unauthorized act of agent is a confirmation of the whole. *Farmers' Loan and Trust Co. v. Walworth*, 1, 433.

For purchase of land — excess of authority. *Sage v. Sherman*, 2, 418.

Of act outside of limited authority — question of fact. *Hazard v. Spears*, 4 Keyes, 469.

What is. *Keeler v. Salisbury*, 33, 648.

Resolution of directors of corporation ratifying act is evidence of authority. *Dent v. North American Steamship Co.*, 49, 390.

Gold contract — estoppel of agent — ratification by principal — evidence. *Fowler v. New York Gold Ex. Bank*, 87, 138.

Authority to make contract does not authorize the surrender of it — question of ratification of surrender. *Stillwell v. Mutual Life Ins. Co.*, 72, 385.

Sealed lease signed by lessor as "agent" — he alone can sue on — ratification. *Schaefer v. Henkel*, 75, 378.

Corporation ratifying acts of agents may not deny them. *Sheldon, etc., Co. v. Eickemeyer, etc., Co.*, 90, 607.

When principal ratifies unauthorized act of agent, other party bound. *Andrews v. Aetna Ins. Co.*, 92, 596.

#### V. Compensation of agent.

Agent may not retain profits of contract made for principal. *Wilson v. Wilson*, 4 Abb. 621.

Proceeds of property consigned for sale are primary fund for reimbursement of consignee's advances. *Gihon v. Stanton*, 9, 476.

Consignor and consignee — lien for advances. *Dodge v. Wilbur*, 10, 579.

When question of fact whether services intended to be gratuitous. *Pendleton v. Empire Stone Dressing Co.*, 19, 13.

Broker entitled to commissions on an accepted exchange of property put in his hands for sale. *Redfield v. Tegg*, 38, 212; *Moses v. Bierling*, 31, 462.

Real estate broker procuring vendor who contracts is entitled to commissions although vendor could not fulfill. *Knapp v. Wallace*, 41, 477; *Mooney v. Elder*, 56, 238.

When broker for sale of real estate not entitled to commissions. *McClare v. Paine*, 49, 561; 10 Am. Rep. 431.

When broker entitled to commissions. *Martin v. Silliman*, 53, 615; *Lloyd v. Matthews*, 51, 124; *Sussdorff v. Schmidt*, 55, 319.

Broker may recover commissions from both parties by consent with knowledge. *Rowe v. Stevens*, 53, 621.

Cannot appropriate benefits in dealing with principal's property. *Bain v. Brown*, 56, 285.

Broker to sell land, opening but abandoning negotiations, cannot recover commissions where principal subsequently sells to same customer. *Wylie v. Marine Nat. Bk.*, 61, 415.

Broker to sell not entitled to commissions after termination of agency although sale

is subsequently made to party of his introduction. *Sibbald v. Bethlehem Iron Co.*, 83, 378; 38 Am. Rep. 441.

Agent of life insurance company dissolved by State has no claim for breach of contract of service. *People v. Globe, etc., Ins. Co.*, 91, 174.

#### VI. Liability of agent to third parties.

When action does not lie against agent individually on instrument executed by him as cashier. *Barbour v. Litchfield*, 4 Abb. 655.

Bounty agent of county not personally liable. *Hall v. Lauderdale*, 46, 70.

Dealing with agent as principal. *Meeker v. Claghorn*, 44, 349.

Contracting in his own name estopped although other party knew his agency. *Babbett v. Young*, 51, 238.

Not liable in damages to third person for making an unauthorized contract void by statute of frauds. *Baltzen v. Nicolay*, 53, 467.

May not justify refusal to pay over principal's moneys by attachment or supplementary proceedings against another without notice to principal. *Barnard v. Kobbe*, 54, 516.

Action against agent and purchaser, charging fraud — when not maintainable. *Price v. Keyes*, 62, 378.

Acceptance by, when valid under statute of frauds — when agent personally liable — evidence. *Wilcox Silver Plate Co. v. Green*, 72, 17.

Liability for negligence in presenting draft for collection. *First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 77, 320; 33 Am. Rep. 618.

Disclosing principal, not personally liable on contract. *Whitford v. Laidler*, 94, 145.

#### VII. Liability of principal to third parties.

Promise by employer to pay for merchandise ordered by contractor in his name without authority — when binding. *Watson v. Gray*, 4 Abb. 540.

Delivery of deed to agent as such is delivery to principal. *Worrall v. Munn*, 5, 229.

Promise, by agent of mortgagee to credit payment to him — when invalid. *Lewis v. Ingersoll*, 1 Keyes, 347.

When not bound by agent's agreement to apply payments on mortgage. *Fellows v. Northrup*, 39, 117.

Liable for agent's fraudulent representations on sale. *Craig v. Ward*, 3 Keyes, 387; *Indianapolis, etc., Ry. Co. v. Tyng*, 63, 653.

A corporation is not liable for a willful trespass of its servant, although authorized and sanctioned by the president and general agent. *Vanderbilt v. Richmond Turnpike Co.*, 2, 479.

When liable for trespass of agent. *Lee v. Village of Sandy Hill*, 40, 443.

When judgment creditor charged with knowledge of agent. *Ingalls v. Morgan*, 10, 178.

One covenanting "to take proper means" for collection of a bond and mortgage is responsible for the neglect of his competent attorney arising from error of judgment. *Hoard v. Garner*, 10, 261.

When corporation liable on fraudulent stock certificates of its agent. *Mechanics' Bank v. N. Y. & N. H. R. Co.*, 13, 599.

Agent's usury does not affect principal. *Condit v. Baldwin*, 21, 219.

Vendor of land liable for agent's material but innocent misrepresentations. *Bennett v. Judson*, 21, 238.

When agent's consent to delay in execution of contract binds principal. *Pratt v. Hudson R. R. Co.*, 21, 305.

When bound by agent's drafts fraudulently issued for accommodation of a third. *Exchange Bank v. Monteath*, 26, 505.

Action lies against principal and agent jointly for agent's negligence in absence of principal. *Phelps v. Wait*, 30, 78.

Liability of corporation for spurious stock issued by agent. *New York & N. H. R. Co. v. Schuyler*, 34, 30.

When forwarder bound by clerk's special contract. *Goodrich v. Thompson*, 44, 324.

When liable to public for frauds of agent in manufacture. *Durst v. Burton*, 47, 167; 7 Am. Rep. 423.

Sale to one doing business in name of another — when latter liable. *Ferris v. Kilmer*, 48, 300.

When express company receiving note for collection becomes responsible for another connecting company which it employs. *Palmer v. Holland*, 51, 416.

Express company collecting forged draft, liable as principal when agency not disclosed. *Holt v. Ross*, 54, 472; 16 Am. Rep. 472.

Contract obtained by fraud of agent and the other party not binding on principal. *Nat. Life Ins. Co. v. Minch*, 53, 144.

When goods are purchased by known agent for use of principal, latter must respond unless he shows credit to agent. *Butler v. Evening Mail Association*, 61, 634.

When contract for purchase of land made by agent in his own name cannot be enforced as contract of undisclosed principal. *Briggs v. Partridge*, 64, 357; 21 Am. Rep. 617.

When principal bound by agent's issue of bill of lading on forged warehouse receipt. *Armour v. Michigan Cent. R. Co.*, 65, 111; 22 Am. Rep. 603.

Sale to one known to be agent of undisclosed principal — subsequent disclosure and action against principal — evidence. *Cobb v. Knapp*, 71, 348; 27 Am. Rep. 51.

When principal bound by agent's representation of character of commercial paper offered for sale — ratification. *Ahern v. Goodspeed*, 72, 108.

Assignment of judgment, principal purchasing, bound by agent's knowledge that one of the debtors had been released. *Bennett v. Buchan*, 76, 386.

Principal not liable for deficiency on mortgage assumed by agent. *Tuthill v. Wilson*, 90, 423.

#### VIII. Liability of principal to agent.

For bills drawn on, by agent in a corporate name — evidence of ownership. *Rice v. Isham*, 4 Abb. 37.

#### IX. Liability of third parties to principal.

Where agent converts gold into currency, principal may recover for currency. *Greentree v. Rosenstock*, 61, 583.

Principal cannot maintain action against carrier for moneys delivered to him by agent at his direction, although consignee is fictitious and moneys were obtained by fraud. *Thompson v. Fargo*, 63, 479.

One dealing with agent not disclosing principal, liable to principal if with notice putting on inquiry. *Wright v. Cabot*, 89, 570.

#### X. Questions between principal and agent.

No action lies against a deputy sheriff for money rightfully received by him and belonging to the plaintiff. *Colvin v. Holbrook*, 2, 126.

A demand does not create an obligation in favor of a third person against an agent. *Id.*

Payment to a son of mortgagee's agent, who acted as clerk for his father, is not payment to the agent. *Lewis v. Ingersoll*, 3 Abb. 55.

Agent cannot retain benefits of contract without consent of principal. *Wilson v. Wilson*, 4 Keyes, 413.

Sub-agent not liable to principal. *Montgomery County Bank v. Albany City Bank*, 7, 459.

Agent cannot buy from himself. *Conkey v. Bond*, 36, 427.

When agent not bound to insure principal's property in his hands. *Lee v. Adsit*, 37, 78.

When principal bound to indemnify agent. *Howe v. Buffalo, etc., R. Co.*, 37, 297.

When agent responsible to principal for selling notes for less than face—accounting—assignment. *Allen v. Brown*, 44, 228.

Unauthorized parting with principal's property, though not with wrongful intent, is a conversion. *Laverty v. Snethen*, 68, 522; 23 Am. Rep. 184.

Where agent sues, principal may counter-claim for his breach of contract by conversion of the principal's property. *Coit v. Stewart*, 50, 17.

Agent liable to principal for negligence—need not show fraud—evidence. *Heinemann v. Heard*, 50, 27.

Principal can follow proceeds of sale of his property deposited by agent in bank in his own account. *Van Alen v. American Nat. Bank*, 52, 1.

If agent departs from instructions and secures better result, even by use of his own means or credit, the advantage inures to the principal. *Dutton v. Willner*, 52, 312.

Principal bound by agent's receipt of deed as mere security. *Meehan v. Forrester*, 52, 277.

When principal bound by agent's purchases on checks, although he furnished him cash for payment. *Morey v. Webb*, 58, 350.

One of several principals may recover from another moneys paid him by common agent. *Hathaway v. Town of Cincinnati*, 62, 434.

When power of attorney does not justify agent in applying principal's money to his own debt. *Voltz v. Blackmar*, 64, 440.

Lease executed by agent individually not binding on principal—entry and payment of rent by lessor. *Kiersted v. Orange, etc., R. Co.*, 69, 343; 25 Am. Rep. 199.

Agent cannot bind principal to receipt of money due from himself by his own written acknowledgment—insurance premium—former receipts. *Neuendorff v. World Mut. Life Ins. Co.*, 69, 389.

Principal may maintain action to compel agent to surrender his securities, or for their value—form of complaint—evidence of value. *Western R. Co. v. Bayne*, 75, 1.

Agent cannot set up title of third person to moneys of principal in his hands. *Ballou v. Ballou*, 78, 325.

Relation between savings bank and trustees or directors, principal and agent. *Hun v. Cary*, 82, 65; 37 Am. Rep. 546.

Ordinarily agent engages only for ordinary skill and care. *Loeb v. Hellman*, 83, 601.

Attorney loaning money on bond and mortgage to insolvent obligors on land already mortgaged—liable to principal for loss—ratification by principal must be with knowledge. *Whitney v. Martine*, 88, 535.

Agent to invest moneys may be compelled to account and has burden of proof. *Marvin v. Brooks*, 94, 71.

### XI. Double agency.

Not permitted. *N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co.*, 14, 85; *Carman v. Beach*, 63, 97. See V.

### XII. Generally.

Duty of former agent employed to solicit orders to communicate an order received after his agency ceased. *Edmonstone v. Hartshorn*, 19, 9.

Construction of contract in respect to accounting. *Boston Carpet Co. v. Journey*, 36, 384.

When not fraudulent as against creditors. *Smith v. Van Olinda*, 48, 169.

See CONTRACT; INSURANCE; OFFICE AND OFFICER; USURY.

## AGISTER.

Has no lien. *Bissell v. Pearce*, 28, 252.

## Agreement.

See CONTRACT.

## Alibi.

See CRIMINAL LAW.

## ALIENAGE.

Case arising in 1774—construction of R. S.—alien may hold except as against State. *Munro v. Merchant*, 28, 9.

Construction of act of April 2, 1798—effect of devise of lands held under. *Duke of Cumberland v. Graves*, 7, 305.

Naturalization is not retroactive. *Heney v. Brooklyn Benevolent Society*, 39, 333.

Devise of real estate to alien void, but of income, valid. *Mary v. McGlynn*, 88, 357.

Alien devisee, born after death of testator, may take under will. *Wadsworth v. Wadsworth*, 12, 376.

Child born to citizen of U. S. while residing, but not naturalized, in a foreign country, is not alien. *Ludlam v. Ludlam*, 26, 356.

Resident alien devisee takes title, defeasible by State if he does not file declaration of intention. *Hall v. Hall*, 81, 180.

Rights of children of resident alien in real estate—escheat. *Goodrich v. Russell*, 42, 177.

On death of wife, fee of lands conveyed to alien husband and wife descends to husband subject to right of people. *Wright v. Saddler*, 20, 320.

Alien female marrying citizen can take by descent—naturalized citizen not “resident alien”—acts of 1845, ch. 115; 1874, ch. 261. *Luhrs v. Eimer*, 80, 171.

Alien non-resident widow of naturalized citizen entitled to dower. *Burton v. Burton*, 1 Keyes, 359.

Of common grandfather does not affect descent between children of citizen brothers. *McGregor v. Comstock*, 3, 408.

A citizen daughter of an alien mother cannot inherit from her mother's brother. *McLean v. Swanton*, 13, 535.

Alien cannot be admitted to the bar. *Matter of O'Neill*, 90, 584.

“Alienage of any ancestor” includes lineal or collateral ancestors, or both. *McCarthy v. Marsh*, 5, 263.

## Alimony.

See MARRIAGE—Divorce.

## ALTERATION.

Of one of several instruments forming contract avoids contract. *Meyer v. Huneke*, 55, 412.

See DEED; NEGOTIABLE INSTRUMENT; SURETY.

**AMENDMENT.**

Of bill in chancery after taken as confessed. *Classon v. Cooley*, 8, 426.

Of pleading. *Thompson v. Kessel*, 30, 383.

Of pleading without costs. *Cayuga Co. Bank v. Warden*, 6, 19.

When new trial will be granted for refusal to allow amendment of pleading. *Russell v. Conn*, 20, 81.

Defendant may amend answer within twenty days and insert any new defense. *McQueen v. Babcock*, 3 Keyes, 428.

This court will not amend complaint when so doing will present different issue. *Fitch v. Mayor*, 88, 500.

Defendants in action cannot be changed by. *New York, etc., Assoc. v. Remington Ag. Works*, 89, 22.

Adding attorney-general as party, invalid. *Davis v. Mayor, etc.*, 14, 506.

Of clerical error in name of commissioner. *Ganson v. City of Buffalo*, 2 Abb. 236.

Inserting name of party in copy summons filed, and of verification of petition for appointment of guardian ad litem. *Van Wyck v. Hardy*, 4 Abb. 496.

Of notice of appeal, enlarging it, not allowed. *Lavalle v. Skelly*, 90, 546.

Complaint not amendable on appeal by striking out names of individual defendants and inserting that of corporation. *Bassett v. Fish*, 75, 303.

Of complaint on certificate of indebtedness, by village by alleging debt for services, may be made at trial. *Woolsey v. Village of Rondout*, 4 Abb. 639.

Of complaint as to amount of damages claimed. *Corning v. Corning*, 6, 97.

Of insufficient answer. *Youngs v. Kent*, 46, 672.

—"Knowledge of" before "information"—referee may order. *Bennett v. Lake*, 47, 93.

—Setting up matter arising subsequent to commencement of suit, in effect supplemental answer. *Howard v. Johnston*, 82, 271.

—At trial, when discretionary. *Smith v. Bodine*, 74, 30.

Judgment of foreclosure and report of sale are subject of. *Hogan v. Hoyt*, 37, 300.

Confession of judgment may be amended. *Union Bank v. Bush*, 36, 631.

On motion to set aside judgment by confession, amendment of statement of indebtedness allowable. *Mitchell v. Van Buren*, 27, 300.

A judge of a district court has no power to amend his judgment except in the exercise of discretion. *Carpentier v. Willet*, 1 Abb. 312.

By court, of undertaking on appeal, not allowable without consent of surety. *Langley v. Warner*, 1, 606.

When referee may allow. *Secor v. Law*, 4 Abb. 188.

Of complaint—power of referee to allow. *Grattan v. Metropolitan Life Ins. Co.*, 80, 281; 36 Am. Rep. 617.

Referee may allow, of bill of particulars. *Melvin v. Wood*, 3 Trans. App. 297; 3 Keyes, 533; 3 Abb. 272.

**ANIMALS.**

In action for injury by domestic animal while trespassing, proof of scienter not requisite. *Van Leuven v. Lyke*, 1, 515.

Declaration must be for the trespass, and particular injury alleged in aggravation. *Id.*

Duty of owner of ferocious dog, knowing its nature. *Muller v. McKesson*, 73, 195; 29 Am. Rep. 123.

One keeping vicious dog with knowledge of its propensities is liable for injury by it—contributory negligence. *Lynch v. McNally*, 73, 347.

When owner of premises liable to stranger invited by his licensee, for injury by dog. *Kelly v. Tilton*, 3 Keyes, 263; 2 Abb. 495.

One keeping a dog which he knows to be vicious is liable for his injuring a person innocently on his premises, although he had never injured any one before. *Rider v. White*, 65, 54; 22 Am. Rep. 600.

Stealing dog is larceny. *Mullaly v. People*, 86, 365.

Owner allowing horse to go loose in city streets liable for injury without proof of scienter. *Dickson v. McCoy*, 39, 400.

Act for prevention of cruelty to—who may arrest—injunction will not issue to restrain sheriff's appointee from arresting. *Davis v. American Soc. for Prevention of Cruelty to Animals*, 75, 362.

Seizure of estrays—jurisdiction. *Leavitt v. Thompson*, 52, 62.

See CARRIER; CONSTITUTIONAL LAW; CRIMINAL LAW; ESTRAYS; NEGLIGENCE; RAILROAD.

### ANNUITIES.

Value computed by American Experience Tables—value such sum as will purchase similar in solvent company. *Att'y-Gen. v. N. Amer. Life Ins. Co.*, 82, 172.

See WILL.

### Answer.

See PLEADING.

### APPEAL.

#### I. When an appeal lies here.

- (a.) Generally.
- (b.) Orders.
- (c.) Questions of fact.

#### II. When an appeal does not lie here.

- (a.) Generally.
- (b.) Orders.
- (c.) Discretionary orders.
- (d.) Defaults.
- (e.) Questions of fact.
- (f.) Question of waiver.
- (g.) Probate matters.
- (h.) New trial.
- (i.) Costs.
- (k.) Amount involved less than \$500.

#### III. Practice.

- (a.) Generally.
- (b.) Exceptions.
- (c.) Waiver.
- (d.) Reargument.

(e.) Remittitur.

(f.) Costs.

(g.) Case.

(h.) Probate questions.

#### IV. Powers of General Term.

##### V. Undertaking on appeal.

#### VI. New trial.

#### VII. Appeal in general.

(a.) Miscellaneous matters.

(b.) Presumptions.

(c.) Questions of fact.

(d.) Waiver.

(e.) Disposition of judgment.

#### I. When an appeal lies here.

(a.) Generally.

From decision of surrogate as to competency as administrator. *McMahon v. Harrison*, 6, 443.

When appeal lies from General Term. *Cook v. N. Y. Floating Dry Dock Co.*, 18, 229.

When lies from award of fund claimed by rival claimants under section 122, Code Pro. *Kirby v. Fitzpatrick*, 18, 484.

Judgment upon mandamus reviewable by appeal, not writ of error. *People v. Church*, 20, 529.

On appeal from justice's court all the appellate courts have power to modify the judgment without regard to technical errors. *Brownell v. Winnie*, 29, 400.

Special proceeding in equity. *Matter of Petition of Livingston*, 34, 554.

Orders denying re-taxation and correction of judgment-roll, dismissing appeal from order refusing mandamus, and denying motion to correct case, may be reviewed here on final judgment. *Hoe v. Sanborn*, 36, 93.

In action commenced in justice's court and discontinued on plea of title. *Flora v. Carbean*, 38, 111.

When lies here in contempt proceedings. *Brinkley v. Brinkley*, 47, 40.

As to damages, only the question whether more than nominal damages were recoverable is reviewable here. *Ihl v. Forty-second Street, etc., R. Co.*, 47, 317.

When in action commenced in New York city district court. *Heinrich v. Kom*, 47, 658.

Writ of error lies to review order reversing conviction in Oyer and Terminer. *People v. Bennett*, 49, 137.

In partition under disputed will, this court can review only questions of law. *Hewlett v. Wood*, 55, 634.

When question of alimony reviewable here. *Collins v. Collins*, 71, 269.

Policy-holders in a life company may appeal in proceedings for appointment of receiver. *Attorney-General v. North American Life Ins. Co.*, 77, 297.

When trustee may appeal — when cestui que trust may appeal in his name. *Bockes v. Hathorn*, 78, 222.

Reversal of judgment on questions of law where not stated to be on facts. *Weyer v. Beach*, 79, 409.

Judgment can only be reviewed here for errors of law and on exception. *Standard, etc., v. Amazon*, 79, 506.

Writ of error lies to review final judgment only. *Tabor v. People*, 90, 248.

To review preliminary injunction. *Selchow v. Baker*, 93, 59.

In favor of corporation in action against it and its directors severally from an order of General Term reversing judgment for defendants and giving new trial. *Williams v. Western Union Tel. Co.*, 93, 162.

(b.) *From orders.*

From order reversing surrogate's dismissal of proceedings for accounting of executor, and directing him to proceed. *Messerve v. Sutton*, 3, 546.

From order denying motion to set aside sale under judgment. *King v. Platt*, 2 Abb. 527.

From order dismissing appeal for neglect to give security. *Genter v. Fields*, 2 Abb. 253.

In summary proceedings to recover land. *People v. Boardman*, 4 Keyes, 59.

From order discharging attachment pending appeal from judgment. *Wright v. Rowland*, 4 Keyes, 165; 4 Abb. 649.

Order punishing contempt — when appealable here. *Sudlow v. Know*, 4 Abb. 326; *Erie Ry. Co. v. Ramsey*, 45, 637.

From order vacating judgment entered by confession for defect. *Belknap v. Waters*, 11, 477.

From order requiring party beneficially interested to pay costs. *Giles v. Halbert*, 12, 32.

From order adding attorney-general as party. *Davis v. Mayor, etc.*, 14, 506.

From order granting new trial, when lies. *Ely v. Holton*, 15, 595; *Harris v. Burdett*, 73, 136.

From order denying new trial, deliberately made, although motion not opposed. *Seneca Nation v. Knight*, 19, 587.

When from order striking out answer as sham. *Edson v. Dilkeye*, 17, 158.

From order dismissing appeal on ground that it was too late. *Bates v. Voorhees*, 20, 525; *Matter of N. Y. Cent., etc., R. Co.*, 60, 112.

This court may review question of fact of authority of attorney to appear. *Id.*

And question of loss of right of appeal by unauthorized appearance is appealable to this court. *Id.*

From order vacating satisfaction of judgment, although only for costs. *McGregor v. Comstock*, 19, 581.

From order reversing decree of probate. *Talbot v. Talbot*, 23, 17.

From order apportioning debts among stockholders of insolvent bank. *Matter of Hollister Bank*, 23, 508.

From judgment of Supreme Court directing new trial in Oyer and Terminer. *Hartung v. People*, 26, 154.

From order striking new matter constituting defense from answer. *Rapalee v. Stewart*, 27, 310.

From order refusing to reinstate party wrongfully dispossessed under writ of assistance. *Chamberlain v. Choles*, 35, 477.

From order vacating attachment as matter of strict right. *Tracy v. First Nat. Bank of Selma*, 37, 523.

From order denying motion to change place of trial to proper county in local action. *Leland v. Hathorn*, 42, 547.



When lies from discretionary order concerning costs. *Morris v. Wheeler*, 45, 708.

When question of costs appealable here. *Sturgis v. Spofford*, 58, 103.

From order denying new trial for new evidence on account of supposed want of power. *Tracey v. Altmeyer*, 46, 598.

From order denying new trial before entry of judgment on verdict. *Caughey v. Smith*, 47, 244.

From order setting aside judgment. *Fisher v. Hepburn*, 48, 41.

From order for new trial on facts. *Smith v. Aetna Life Ins. Co.*, 49, 211.

From order denying motion for reargument based on ground that trial justice sat on appeal. *Graham v. Linden*, 50, 547.

From order denying new trial on account of communications between judge and jury, after retirement, not in presence of party. *Watertown Bank and Loan Co. v. Mix*, 51, 558.

From order denying motion to strike out unverified answer. *Fredericks v. Taylor*, 52, 596.

From order refusing to set aside ex parte order striking out pleading. *Rice v. Ehele*, 55, 518.

By judgment debtor declared bankrupt pending appeal below. *Sanford v. Sanford*, 58, 67; 17 Am. Rep. 206.

From order dismissing appeal from order granting leave to bring action on judgment. *Hanover Fire Ins. Co. v. Tomlinson*, 58, 215.

From order for bill of particulars in crim. con. *Tilton v. Beecher*, 59, 176; 17 Am. Rep. 337.

From order denying motion to require finding of fact not conclusively proved. *Smith v. Glens Falls Ins. Co.*, 62, 85.

When from order granting leave to sue for deficiency after foreclosure. *Equitable Life Ins. Soc. v. Stevens*, 63, 341.

From order setting aside report and granting new trial in action for partnership accounting. *Johnson v. Youngs*, 65, 599.

Where from order of arrest—when conclusions of fact below will be followed. *Wright v. Brown*, 67, 1.

From judgment setting aside assignment and ordering accounting and receiver. *Produce Bank v. Morton*, 67, 199.

From order denying motion in matter of discretion on ground of want of power—opinion cannot be looked at. *Hewlett v. Wood*, 67, 394.

From order that commissioners of town build bridge. *Matter of Freeholders of Irondequoit*, 68, 376.

From order auditing accounts of drainage commissioners. *Matter of Application of Ryers*, 72, 1.

On appeal here from order granting alimony pendente lite, the question of power is the only one reviewable. *Kennedy v. Kennedy*, 73, 369.

On question of legal liability of property to attachment. *Dunlop v. Patterson Fire Ins. Co.*, 74, 145; 30 Am. Rep. 283.

From order appointing receiver of life insurance company. *People v. American Mut. Life Ins. Co.*, 74, 177.

From order for new trial on facts in action of divorce for adultery tried before referee. *Conger v. Conger*, 77, 432.

From order refusing to vacate attachment issued on affidavit of mere information and belief. *Steuben County Bank v. Alberger*, 78, 252.

From order of surrogate refusing to vacate allowance of counsel fees against executor. *Seaman v. Whitehead*, 78, 306.

From order imposing costs absolutely—final decision heard here. *Bergen v. Curman*, 79, 146.

Order settling interrogatories disallowing pertinent question—substantial right. *Uline v. N. Y. Cent. & Hud. R. R. Co.*, 79, 175.

From order depriving Marine Court of jurisdiction. *People v. Justices of Marine Court*, 81, 500.

Order punishing attorney for misconduct based on evidence reviewable on facts in this court—distinction between such case and one committed in presence of court. *Matter of Eldridge*, 82, 161; 37 Am. Rep. 558.

Order as to assessment, rehearing not ordered—such order final. *Matter of N. Y. Protestant Public School*, 82, 606.

From order reversing Special Term, reversing referee's report on disputed claim against an estate. *Fredenburgh v. Biddlecom*, 85, 196.

From order refusing to entertain appeal from order granting open commission to examine unnamed witnesses. *Jemison v. Citizens' Savings Bank*, 85, 546.

From order for examination of party before referee before trial. *Berdell v. Berdell*, 86, 519.

From order depriving referee in part of his legal fees. *Hobart v. Hobart*, 86, 636.

From discretionary order denied on ground of lack of power—discretion must be exercised. *Matter of Att'y-Gen. v. Continental Life Ins. Co.*, 88, 77.

From unauthorized order for temporary injunction. *McHenry v. Jewett*, 90, 58.

From order punishing for criminal contempt in civil action. *People v. Dwyer*, 90, 402.

From discretionary order when decision based on ground of want of power—opinion if part of record can be referred to. *Tolman v. Syracuse, etc., R. Co.*, 92, 353.

To review grant of extra allowance not within power of court below. *Conaughty v. Saratoga Co. Bank*, 92, 401.

From order refusing to vacate wrongful levy under attachment. *Plimpton v. Bigelow*, 93, 592.

From order permitting receiver to defend action. *Honegger v. Wettstein*, 94, 252.

From order in proceedings to condemn, awarding costs against owners. *Matter of New York, etc., R. Co.*, 94, 287.

#### (c.) Questions of fact.

Finding that indorsement was for accommodation, when reviewable here. *Fielden v. Lahens*, 2 Abb. 111.

When this court may review facts in case commenced in Chancery. *Dunham v. Watkins*, 12, 556.

Facts in divorce reviewed on equitable principles. *Forrest v. Forrest*, 25, 501.

When General Term orders new trial on law and facts, this court may review the facts. *Beebe v. Mead*, 83, 587.

This court will review facts on reversal on facts. *Petersen v. Rawson*, 34, 370.

Mere allegation of refusal to find facts raises no question. *Casler v. Shipman*, 35, 533.

Where new trial is granted on both law and facts, this court must review both grounds. *Coleman v. Second Ave. R. Co.*, 38, 201.

When this court may examine facts to ascertain correctness of legal conclusion. *Duffy v. Masterson*, 44, 557.

When this court may review refusal to find fact. *Beck v. Sheldon*, 48, 365.

When lies here from refusal of referee to find facts. *Tallman v. Bresler*, 58, 123.

When facts can be reviewed here. *Platt v. Platt*, 58, 646.

No facts found by referee nor requested—no question in this court upon matter of fact. *Stewart v. Moss*, 79, 629.

#### II. When an appeal does not lie here.

##### (a.) Generally.

Before entry. *Matter of New York Cent., etc., R. Co.*, 60, 112; *McGregor v. McGregor*, 32, 479.

From judgment not final. *Butler v. Lee*, 3 Keyes, 70.

From an obiter dictum. *Van Rensselaer v. Bouton*, 3 Keyes, 260.

Case without exceptions cannot be reviewed here. *Douglass v. Day*, 3 Keyes, 434.

When may not be maintained by party who has released his interest—stay. *Hackley v. Hope*, 4 Keyes, 123.

Cannot be maintained in behalf of one defendant in name of plaintiff who has assigned his interest to another. *Hackley v. Hope*, 2 Abb. 298.

From referee's reopening of case. *Fielden v. Lahens*, 2 Abb. 111.

None lies until the court below has finally disposed of the whole matter before it. *McGregor v. Buell*, 3 Abb. 86.

From decision of one Supreme Court justice. *Gracie v. Freeland*, 1, 228.

In matter not actually passed upon at General Term. *Lake v. Gibson*, 2, 187.

This court cannot review a judgment on a case. *Livingston v. Radcliff*, *Wright v. Douglass*, *Sturgis v. Merry*, *King v. Dennis*, 2, 189.

From Chancery decree, reserving no questions but directing a reference, until after the reference has been had and the report confirmed. *Swarthout v. Curtis*, 4, 415.

From exception at General Term. *McCracken v. Chohwell*, 8, 133.

This court cannot review questions not raised before referee. *Morris v. Husson*, 8, 204.

On decision as to change of location of plankroad toll-gate. *McAllister v. Albion Plankroad Co.*, 10, 353.

In favor of people on judgment on some counts of indictment, others remaining undisposed of. *People v. Merrill*, 14, 74.

From mere matters of practice. *Catlin v. Billings*, 16, 622; *Kellum v. Durfoo*, 78, 484; *Sherman v. Felt*, 2, 186.

For amendable defect of statement in complaint of facts which were allowed to be proved. *Lounsbury v. Purdy*, 18, 515.

From judgment of sale of lands and distribution of proceeds according to report to be made. *Tompkins v. Hyatt*, 19, 534.

From judge's rejection of evidence in support of challenge to favor when he acts as trier. *Costigan v. Cuyler*, 21, 134.

From amendment of complaint by adding averment of negotiation of bill to bank. *Van Duzer v. Howe*, 21, 531.

From exercise of power of amendment. *Richtmeyer v. Remsen*, 38, 206.

From New York Common Pleas, when. *Smith v. White*, 23, 572.

From referee's report as to amount of alimony. *Forrest v. Forrest*, 25, 501.

This court may modify judgment on mandamus. *People v. Supervisors of Richmond*, 28, 112.

Where there are no exceptions. *Weed v. New York & Harlem R. Co.*, 29, 616.

Where no exceptions nor conclusions of fact or of law. *Doty v. Carolus*, 31, 547.

Where there is no statement of facts as required by section 267 of Code. *Essex County Bank v. Russell*, 29, 673.

This court will not review a finding that an assignment was not fraudulent in fact,

if there is any evidence to support it. *Loeschick v. Baldwin*, 38, 326.

Provision that no appeal lies here under chapter 388 of Laws of 1858 is retroactive. *Matter of Palmer*, 40, 561.

From award of arbitrators. *Freeman v. Kendall*, 41, 518; *Bridger v. Pierson*, 45, 600.

From judgment entered on remittitur. *Wilkins v. Earle*, 46, 358; 4 Am. Rep. 655.

From judgment for costs on demurrer where demurrant had election to plead over. *Wilkin v. Ruplee*, 52, 248.

From judgment that a plankroad company is taxable. *People v. Freeman*, 52, 656.

From judgment on order sustaining demurrer but granting leave to amend or reply. *Barker v. Cocks*, 50, 689; *Armstrong v. Weed*, 62, 250.

From action of Croton aqueduct board in relation to sewers, etc., under act of 1865, chapter 381. *Matter of Petition of Ellsworth*, 53, 647.

From refusal to submit under section 261, Code of Procedure. *Hackford v. New York Cent., etc., R. Co.*, 53, 654.

When not maintainable by one entitled to surplus moneys from order for payment of lien. *Easton v. Pickeraigill*, 55, 310.

From award of child in divorce. *Price v. Price*, 55, 656.

On question of partition or sale. *Howell v. Mills*, 56, 226.

On behalf of escaped prisoner. *People v. Genet*, 59, 80; 17 Am. Rep. 315.

From judgment requiring proofs. *Southworth v. Bennett*, 58, 659.

On account of excessive damages. *Maher v. Cent. Park, etc., R. Co.*, 67, 52.

On question of laches. *Wallace v. Castle*, 68, 370.

Where there is no case or exceptions. *Smith v. Starr*, 70, 155.

This court will not decide abstract questions. *People v. Com. Coun. Troy*, 82, 575.

From order of reference — charges made by creditors against assignee. *Matter of Friedman*, 82, 609.

Form of opinion of court below — settled; not reviewable here. *Smith v. Rathburn*, 88, 660.

From refusal to grant alternative mandamus after denial of motion for peremptory. *People v. Fairman*, 91, 385.

For refusal to postpone criminal trial for absent witnesses. *Webster v. People*, 92, 422.

To review determination as to loss of material paper unless error clear. *Kearney v. Mayor of New York*, 92, 617.

Stipulation will not be construed to cut off right of appeal unless it clearly does so. *Stedeker v. Bernard*, 93, 589.

From interlocutory judgment before final judgment. *Victory v. Blood*, 93, 650.

(b.) *From orders.*

From order dissolving injunction. *Van Dewater v. Kelsey*, 1, 533; *Selden v. Vermilya*, 1, 534; *Paul v. Munger*, 47, 469; *Calkin v. Manhattan Oil Co.*, 65, 577; *Young v. Campbell*, 75, 525.

From order refusing to dissolve temporary injunction. *Pfohl v. Sampson*, 59, 174.

When does not lie from order denying application to rehear. *Marvin v. Seymour*, 1, 535.

From order on motion to set aside a judgment for irregularity or as a favor. *Sherman v. Felt*, 2, 186; *Clark v. Dinahart*, 46, 342.

From order vacating foreclosure sale and opening judgment. *McReynolds v. Munn*, 2 Keyes, 214; *Buffalo Savings Bank v. Newton*, 23, 160; *Crane v. Stiger*, 59, 625; *Goodell v. Harrington*, 76, 547; *Dows v. Congdon*, 28, 122.

From order of Chancery on motion for jury trial. *Candee v. Lord*, 2, 269.

From decree directing reference and reserving further directions. *Cruger v. Douglass*, 2, 571; *Clarke v. Brooks*, 1 Abb. 355.

From order refusing injunction against collection of tax but not for want of power. *Hasbrouck v. Kingston Board of Education*, 2 Abb. 340.

From order vacating judgment for fraud and collusion. *Baldwin v. Mayor, etc.*, 2 Keyes, 387; 1 Abb. 75.

From order vacating a regular sale by master or receiver. *Wakeman v. Price*, 3, 334.

From order allowing discontinuance of action for injunction without costs. *Staiger v. Schultz*, 4 Abb. 293.

From order affirming order of surrogate refusing leave to discontinue accounting. *Tompkins v. Soulice*, 4 Abb. 421.

From order punishing for contempt. *New York and N. H. R. Co. v. Ketchum*, 3 Keyes, 24; 3 Abb. 347; *Atlantic, etc., Tel. Co. v. Baltimore, etc., R. Co.*, 87, 355; *Batterman v. Finn*, 40, 340.

From order refusing to punish for contempt. *Cochrane's Est. v. Ingersoll*, 73, 613; *Carrington v. Florida R. Co.*, 52, 583.

From order affirming judge's findings of fact. *Waters v. Green*, 3 Keyes, 385.

From order denying injunction of school officers from collection of tax and disbursement of proceeds. *Hasbrouck v. Kingston Board of Health*, 3 Keyes, 480.

From order denying rehearing on interlocutory decree. *King v. Merchants' Exchange Co.*, 5, 547.

In action in Supreme Court after plea of title in justice's court. *Pugsley v. Kisselburgh*, 10, 420.

From order denying stay until decision of another cause. *James v. Chalmers*, 6, 209.

From order declaring rights of parties and appointing commissioners to make partition—not final. *Beebe v. Griffing*, 6, 465.

In action commenced in justice's court and transferred to County Court on plea of title to land. *Brown v. Brown*, 6, 106.

From order to compel infant heirs to perform contract on sale of land by ancestor. *Hyatt v. Seeley*, 11, 52.

From order relieving from omission to appeal. *Humphrey v. Chamberlain*, 11, 274.

From order refusing leave to appeal after time. *Salles v. Butler*, 27, 638.

From order confirming appraisal of lands taken by railroad. *New York Central R. Co. v. Marvin*, 11, 276.

From order confirming report of commissioners on opening street in New York city. *Matter of Canal and Walker Streets*, 12, 406.

From order by justice vacating or confirming assessment for local improvement in city of New York. *Matter of Dodd*, 27, 629.

From judgment on demurrer to part of answer, leaving issue of fact undecided. *Paddock v. Springfield F. & M. Ins. Co.*, 12, 591.

From order removing cause to U. S. court. *Illius v. New York & N. H. R. Co.*, 13, 597.

From judgment holding demurrer to complaint frivolous and decreeing foreclosure. *Hollister Bank v. Vail*, 15, 593.

From order setting aside judgment and execution for irregularity. *Jones v. Derby*, 16, 242.

From order vacating judgment in ejectment and granting new trial under 2 R. S. 309. *Evans v. Millard*, 16, 619.

From order refusing to set aside execution issued without leave after five years. *Bank of Genesee v. Spencer*, 18, 150.

From order imposing terms of relief from imprisonment for contempt. *People v. Delvecchio*, 18, 352.

From order quashing writ of certiorari to review proceedings of commissioners of assessments. *People v. Stilwell*, 19, 531.

From decision of judge acting as trier of challenge for favor on question of fact. *Sanchez v. People*, 22, 147.

From order striking out answer as sham or irrelevant. *Briggs v. Bergen*, 23, 162; *Commercial Bank of Rochester v. Spencer*, 76, 155.

From order allowing amended complaint after dismissal. *New York Ice Co. v. N. W. Ins. Co.*, 23, 357.

From order denying motion to revive action against survivor and personal representative of deceased jointly. *Union Bank v. Mott*, 27, 633.

From order denying new trial for surprise. *Selden v. Delaware & Hudson Canal Co.*, 29, 634.

From order vacating judgment by default on ground of surprise and fraud. *Dinsmore v. Adams*, 66, 618.

From order for judgment on demurrer unless amendment. *Adams v. Fox*, 27, 640.

From order on insurance company's receiver's application to commence action. *Matter of Petition of Reeve*, 34, 359.

From decision on motion for election. *Kerr v. Hays*, 35, 331.

From order in proceeding to ascertain compensation for land for squares, etc., in New York city. *King v. Mayor, etc.*, 36, 182.

From Special Term order. *Potter v. Van Vranken*, 36, 619.

From order granting new trial on ground that verdict is against weight of evidence. *Young v. Davis*, 30, 134; *Folger v. Fitzhugh*, 41, 228.

From order reversing order striking out answer. *Tabor v. Gardner*, 41, 232.

From order made after verdict giving leave to renew motion. *Miannay v. Blogg*, 41, 521.

From order refusing to set aside regular judgment on unauthorized appearance. *Foot v. Lathrop*, 41, 358.

From order directing receiver as to leasing. *Bolles v. Duff*, 42, 256.

From order on motion to set aside verdict contrary to evidence, or granting new trial for newly-discovered evidence. *Barrett v. Third Ave. R. Co.*, 45, 628.

From order denying motion to interpose supplemental pleading—delay in pleading bankrupt discharge. *Medbury v. Swan*, 46, 200.

From an order about findings before judgment. *Van Slyke v. Hyatt*, 46, 259.

From assessment of damages. *Williams v. Sargeant*, 46, 481.

From order of reversal without granting new trial until judgment is entered. *Mehl v. Vonderwulbeke*, 46, 539.

From order on appeal from order of County Court. *Younghanse v. Fingar*, 47, 99.

From order setting aside issues tried and directing others settled. *Colie v. Tift*, 47, 119.

From order refusing to set aside judgment where the court had jurisdiction. *Schaettler v. Gardiner*, 47, 404.

From decision of referee on settlement of case, nor from order directing re-settlement. *Lefler v. Field*, 47, 407.

From order of substitution after judgment. *Hackett v. Belden*, 47, 624.

From order sustaining demurrer. *People v. Benedict*, 47, 667; *Cambridge Valley Nat. Bank v. Lynch*, 76, 514.

From order reversing order sustaining demurrer. *Coit v. Stewart*, 50, 17.

From order setting aside assessment by sheriff's jury. *Samuels v. Bryant*, 47, 674.

From order denying motion to set aside summons served with complaint because not in right form under section 129 of Code. *McCoun v. New York Cent., etc., R. Co.*, 50, 176.

From order confirming report of Central Park commissioners. *Matter of Central Park Commissioners*, 50, 493.

From order dissolving injunction unless the constitutionality of a State law and deprivation of rights involved. *People v. Schoonmaker*, 50, 499.

From order denying motion for leave to issue execution where facts were disputed. *Shuman v. Strauss*, 52, 404.

From order to sheriff to pay over moneys to await determination of ownership. *Mills v. Davis*, 53, 349.

From order setting aside stipulation — or order for interpleader. *Barry v. Mut. Life Ins. Co.*, 53, 536.

From order refusing a common-law certiorari — immaterial that no other remedy. *People v. Hill*, 53, 547; *People v. Board of Fire Commissioners*, 77, 605.

Before judgment from order refusing to remit cause for further findings. *Quincey v. Young*, 53, 504.

From order amending decision of General Term by another composed of different members. *Buckingham v. Dickinson*, 54, 682.

From order setting aside judgment on referee's report for his misconduct. *Livermore v. Bainbridge*, 56, 72.

From order directing issues in equity case to be tried by jury. *Brinkley v. Brinkley*, 56, 192.

From order refusing such issues. *Colman v. Dixon*, 50, 572.

From order refusing to set aside execution. *Underwood v. Green*, 56, 247.

From order on motion to open judgment. *Depew v. Dewey*, 56, 657.

From order requiring one to make affidavit before referee for motion. *Rogers v. Durant*, 56, 669.

From order setting aside verdict on judge's minutes as against evidence. *Fallon v. Brooklyn City, etc., R. Co.*, 56, 652.

From order as to excessive damages. *Metcalf v. Barker*, 57, 662.

From order granting temporary injunction restraining removal by mortgagor's grantee of erection made by him. *Brown v. Keeney Settlement Cheese Association*, 59, 242.

From order refusing a commission rogatory to France. *Anonymous*, 59, 313.

From order allowing addition of officer's signature to jurat of affidavit of no answer in judgment-roll. *Fawcett v. Vary*, 59, 597.

From order allowing continuance of suit by successors in interest — nor from order allowing amendment of complaint by adding allegations of fraud and trusteeship. *Getty v. Spaulding*, 58, 636.

From order refusing writ of assistance. *Wilbor v. Danolds*, 59, 657.

From order to accept notice of appeal in partition. *Thurber v. Chambers*, 60, 29.

From order amending judgment by inserting statement that defendant was a non-resident not personally served but who had property here subject to attachment. *Bartlett v. McNiel*, 60, 53.

From order of revivor against representatives of deceased joint defendant. *Arthur v. Griswold*, 60, 143.

From order setting aside judicial sale for fraud or irregularity. *Hale v. Clarkson*, 60, 339.

From order refusing to compel separate statement and numbering of causes of action in complaint. *Goldberg v. Utley*, 60, 427.

From order denying motion to remit case for further findings. *Hunt v. Chapman*, 62, 333.

From order for alimony and expenses in divorce unless so grossly excessive as to show abuse of discretion. *Llamosas v. Llamosas*, 62, 618.

From order for bill of particulars — nor from order extending time to demur — nor from order refusing election — nor from order refusing to require causes of action to be separately stated. *People v. Tweed*, 63, 194.

From order requiring bail in second action — nor on matter of costs on discontinuance. *People v. Tweed*, 63, 202.

From order setting aside report of commissioners appraising lands taken by railroad. *Matter of N. Y. Cent., etc., R. Co.*, 64, 60.

To set aside direction for sale by receiver on judgment setting aside conveyance by fraud. *Cole v. Tyler*, 65, 73.

From order reviving a special proceeding against a discharged trustee. *In Matter of Petition of Whittlesey v. Hoguck*, 66, 358.

From order directing receiver to pay over rents pending accounting. *Platt v. Platt*, 66, 360.

From order refusing admission as an attorney. *Matter of Beggs*, 67, 120.

From order vacating arrest on preponderance of proof. *Liddell v. Paton*, 67, 393.

From order compelling all creditors to come in and prove claims in first suit brought by creditor for accounting of general assignee. *Travis v. Myers*, 67, 542.

From order on mere ground that it involves constitutional question. *Patten v. New York Elevated R. Co.*, 67, 484.

From order vacating order setting aside assessment for local improvement in New York city, but not denying prayer of petition. *Matter of Petition of Moore*, 67, 555.

From order, on motion to vacate satisfaction of judgment, that action be brought. *Concklin v. Taylor*, 68, 221.

From order denying attachment. *Sartwell v. Field*, 68, 341.

From order vacating attachment on questions of fact. *Allen v. Meyer*, 73, 1.

From order denying motion to vacate attachment, when jurisdiction appears. *Whitaker v. Imperial Skirt Manuf. Co.*, 78, 621.

From order of reference to take proofs on application for dissolution of life insurance

company. *Matter of Attorney-General v. Continental Life Ins. Co.*, 68, 343.

From order refusing reference of referable case. *Martin v. Windsor Hotel Co.*, 70, 101.

From order of reference in action for accounting, charging fraudulent conspiracy. *Harrington v. Bruce*, 84, 103.

From order allowing filing of exceptions to referee's report of foreclosure sale after judgment. *Martine v. Lowenstein*, 68, 456.

From decision of Supreme Court, as to appraisal of lands. *Matter of Application of Delaware & Hudson Canal Co.*, 69, 209.

From order denying peremptory mandamus, with liberty to demur or take issue. *People v. Clyde*, 69, 603.

From order to show cause in insolvency proceedings. *Matter of Roberts*, 70, 5.

From order for mandamus to corporation to allow stockholders to inspect transfer book. *Matter of Application of Sage*, 70, 220.

From order refusing to set aside verdict for excessive damages. *Peck v. New York Cent., etc., R. Co.*, 70, 587; *Hayes v. Ball*, 72, 418.

When this court will not review discretion of Supreme Court in ordering discharge from arrest unless execution against body was issued — waiver — co-defendant. *New York Guaranty and Indemnity Co. v. Rogers*, 71, 377.

From order to show cause on short notice why party should not be punished for contempt. *Sixth Ave. R. Co. v. Gilbert Elevated R. Co.*, 71, 430.

From order denying mandamus to public officer to enter into contract. *People v. Campbell*, 72, 496.

From order overruling reply as frivolous with leave to reply. *Jones v. Ludlum*, 74, 61.

From order refusing to vacate order of publication of summons when papers in record show proper case — allegation of non-residence — certificate of sheriff. *Howe Machine Co. v. Pettibone*, 74, 68.

From order refusing leave to file supplemental answer. *Spears v. Mayor, etc.*, 72, 442.

From order fixing compensation to sheriff on attachment. *German-American Bank v. Morris Run Coal Co.*, 74, 58.

From order sustaining demurrer until final judgment. *Elwell v. Johnson*, 74, 80.

From order to chamberlain to pay fund and for reference. *Chesterman v. Eyland*, 74, 452.

From order on application of receiver of attachment debtor to move to set aside attachment. *Dunlop v. Patterson Fire Ins. Co.*, 74, 145; 30 Am. Rep. 283.

From order refusing to set aside judgment for deficiency for clerical omission of defendant's name in prayer of complaint; or for non-joinder of defendant. *Tucker v. Leland*, 75, 186.

This court cannot review question whether on motion by lienor to vacate attachment plaintiff should have been confined to original affidavits. *Godfrey v. Godfrey*, 75, 434.

From order refusing to set aside execution for fraud. *Beards v. Wheeler*, 76, 213.

From matter of excess of damages or misconduct of jury. *Gale v. New York Cent., etc., R. Co.*, 76, 594.

From order denying leave to serve amended complaint. *Quimby v. Clafin*, 77, 270.

From order refusing to send back actuary's report of condition of insolvent life insurance company. *Attorney-General v. Atlantic Mut. Life Ins. Co.*, 77, 336.

From order refusing to vacate judgment for deficiency in foreclosure because sale was not confirmed and no application for personal judgment was made. *Moore v. Shaw*, 77, 512.

From order vacating order discharging general assignee and his sureties. *Matter of Horsfalls*, 77, 514.

From order granting new trial in jury case unless it appears to have been granted on law — order affirmed. *Snebley v. Conner*, 78, 218.

From order setting aside judicial sale for unfairness. *Fisher v. Hersey*, 78, 387.

From order reversing order for bringing in new parties and directing cause to be

put on circuit calendar. *Kellum v. Durfoo*, 78, 484.

From order vacating satisfaction of judgment and amending complaint by adding new causes of action. *Hatch v. Central Nat. Bank*, 78, 487.

From order refusing leave to serve affidavit nunc pro tunc in amendment of judgment on offer. *Riggs v. Waydell*, 78, 585.

From order denying leave to renew motion and amendment of order. *Bentley v. Waterman*, 78, 623.

From order refusing to quash writ of certiorari. *Jones v. People*, 79 N. Y. 45.

From order quashing certiorari. *People v. Board of Tax Commissioners*, 85, 655.

When General Term order on assessment not final, not reviewable here. *Matter of Auchmuty*, 79, 622.

From order refusing to vacate reference because of irregularity in proceedings before referee. *Comins v. Hetfield*, 80, 261.

From order amending caption of order after entry. *Mojarrieta v. Saenz*, 80, 553.

From order affirming judgment — judgment should first be entered. *Kilmer v. Bradley*, 80, 630.

From order directing interlocutory judgment and accounting. *Jones v. Jones*, 81, 35.

From order denying motion on part of bail for exoneration after twenty days. *Mills v. Hildreth*, 81, 91.

From order refusing leave to withdraw demurrer and plead after judgment. *Fisher v. Gould*, 81, 228.

From order granting new trial in proceeding to determine and enforce claim against an estate. *Roe v. Boyle*, 81, 305.

From order refusing to vacate judgment on second trial before same referee in absence of designation of new referee. *Catlin v. Adirondack Co.*, 81, 379.

From order denying arrest on merits. *Matter of Townsend v. Nebenzahl*, 81, 644.

From order granting leave to withdraw demurrer and to answer. *Vanderbilt v. Schreyer*, 81, 646.

From order of General Term reversing order for judgment because of frivolousness of answer — discretion of court below



not interfered with. *Elwood v. Roof*, 82, 428.

From order vacating order of arrest discretionary—ground on which based—opinion of court below not resorted to. *Clark v. Lourie*, 82, 580.

From order setting aside order to appear and answer in supplementary proceedings to collect a tax. *Bassett v. Wheeler*, 84, 466.

From order for bill of particulars in action on life insurance policy. *Dwight v. Germania Life Ins. Co.*, 84, 493.

From order directing bill of particulars unless not within power of court. *Witkowski v. Paramore*, 93, 467.

From order allowing defeated party to enter judgment unless successful party enters it. *Wilson v. Simpson*, 84, 674.

When does not lie from order refusing to set aside judgment of foreclosure of railroad mortgage *Peck v. New York and New Jersey Ry. Co.*, 85, 246.

From order confirming report of commissioners of estimate and assessment on street opening in New York. *Matter of Department of Public Parks*, 85, 459.

From order refusing to set aside for misconduct report of commissioners on appraisal of damages for land taken by railroad, or refusing to remit report for statement of grounds. *Matter of Prospect Park, etc., R. Co.*, 85, 489.

From order staying proceedings pending appeal without security. *Granger v. Craig*, 85, 619.

By defendant from order opening inquest on terms. *Brownell v. Ruckman*, 85, 648.

From order of reference on certiorari to correct assessment, nor from order refusing to set aside such order. *People v. Smith*, 85, 628.

From order affirming interlocutory judgment directing accounting. *Walker v. Spencer*, 86, 162.

From order refusing leave to assignee in bankruptcy to come in and defend action in which judgment has been entered. *Keck v. Werder*, 86, 264.

From order allowing counsel fees to purchaser for examining title on relieving

him from purchase at partition sale. *Shriver v. Shriver*, 86, 575.

From order substituting administrators of lunatic in place of deceased committee. *Matter of Beckwith*, 87, 503.

From order to inspect books or setting aside subpoena duces tecum. *Clyde v. Rogers*, 87, 625.

From order denying inspection of books and papers. *Clyde v. Rogers*, 94, 541.

From order adjudging guilty of contempt. *People v. Gilmore*, 88, 626.

From order overruling demurrer—appeal to this court should be from final judgment. *Smith v. Rathbun*, 88, 660.

From order denying writ of prohibition. *People v. Westbrook*, 89, 152.

From order vacating attachment before judgment. *National Shoe and L. Bank v. Mechanics' Nat. Bk.*, 89, 440.

From order vacating attachment unless on ground involving jurisdiction or want of power to grant. *Catlin v. Ricketts*, 91, 668.

From refusal of reargument. *Fleischmann v. Stern*, 90, 110.

From order for payment of fees of referee from fund of insolvent insurance company. *Attorney-General v. Continental L. Ins. Co.*, 93, 45.

From order setting aside report and judgment of referee, though referee disqualified from settling case on appeal from such judgment. Matters not presented below not considered here. *Leonard v. Mulry*, 93, 392.

From order affirming interlocutory judgment. *Raynor v. Raynor*, 94, 248.

From order directing new appraisal of lands condemned for railroad. *Matter of New York, etc., R. Co.*, 94, 287.

#### (c.) Discretionary orders.

No appeal lies from Chancery on discretionary matter of practice. *Fort v. Bard*, 1, 43.

Refusal to admit evidence after testimony has closed is not reviewable in this court. *Williams v. Hayes*, 20, 58.

Does not lie here from discretionary order. *Cushman v. Brundrett*, 50, 296;

*Matter of Kings Co., etc., R. Co.*, 82, 95; *Syracuse, etc., R. Co. v. Syracuse & Onondago R. Co.*, 88, 110.

Appellate court will not review discretion of trial court in refusing to open prisoner's case after summing up to jury. *Wilke v. People*, 53, 525.

When its allowance is made discretionary in the General Term, unless so allowed. *People v. Fowler*, 55, 675.

From order refusing to vacate judgment for irregularity. *Whitney v. Townsend*, 67, 40.

Question of costs. *Herrington v. Robertson*, 71, 280.

From order refusing leave to discontinue on payment of costs, where discretion not abused. *Carleton v. Darcy*, 75, 375.

To review discretion of court below as to examination of witnesses. *Cowing v. Altman*, 79, 167.

Exercise of discretion not reviewable here. *People v. Security Life*, 79, 267; *Watrous v. Kearney*, 79, 496.

Discretion of Special Term reviewed by General Term, not here. *Fleischmann v. Bennett*, 79, 579.

From order amending judgment nunc pro tunc to charge defendants with deficiency. *Grant v. Griswold*, 82, 569.

Application to exonerate sheriff as bail — discretion of court below, not reviewable here. *Grantz v. Griswold*, 82, 572.

From orders as to allowances to attorneys of intervenors. *Attorney-General v. Continental L. Ins. Co.*, 90, 45.

To review discretion in receivership proceedings. *Nicoll v. Boyd*, 90, 516.

To review denial of order to set aside sale under judgment when discretion not abused. *Winter v. Eckert*, 93, 367.

From order vacating attachment — opinion cannot be examined to determine ground of decision. *Brooks v. Mexican Nat. Constr. Co.*, 93, 647.

To review discretion as to limit of time for summing up at criminal trial. *People v. Kelly*, 94, 526.

#### (d.) Defaults.

Does not lie from judgment by default. *Maltby v. Greene*, 1 Keyes, 548; 3 Abb.

144; *Swarthout v. Curtis*, 4, 415; *Flake v. Van Wagenen*, 54, 25; *Innes v. Purcell*, 58, 388.

On report of referee to take account before judgment by default, how reviewable — extra allowance not reviewable. *Darling v. Brewster*, 55, 667.

From order on application to open default. *Miller v. Tyler*, 58, 477.

From order denying motion to open default for laches. *Waide v. De Leyer*, 63, 318.

From order opening judgment by default in absence of abuse of discretion. *Lawrence v. Farley*, 73, 187.

From judgment of affirmance by default, nor from order refusing to open. *Stevens v. Glover*, 83, 611.

#### (e.) Questions of fact.

Facts on jury trial not reviewable here nor at General Term, when any evidence to sustain. *Parker v. Jervis*, 1 Trans. App. 88.

The decision of General Term on conclusions of fact is conclusive and not appealable here. *Bunten v. Orient Mut. Ins. Co.*, 1 Abb. 257.

Where a case contains no findings of fact, an appeal here will not be heard. *City Building and Loan Co. v. Fatty*, 1 Abb. 347.

This court will not reverse on questions of fact. *Chamberlin v. Prior*, 1 Abb. 338.

Questions of fact not reviewable here. *Godfrey v. Johnston*, 1 Keyes, 556; *Esterly v. Cole*, 3, 502; *Finch v. Parker*, 49, 1; *Morrell v. Peck*, 88, 398.

No review of referee's decision unless facts found and legal conclusions stated. *Stratton v. Cornfield*, 2 Keyes, 55.

From referee's decision — facts not found cannot be considered. *Mosher v. Hotchkiss*, 3 Keyes, 161.

This court will not review refusal to find a fact. *Priest v. Price*, 3 Keyes, 222.

Will not review finding of facts by referee not clearly contrary to evidence. *Barker v. White*, 3 Keyes, 617.

This court may not review facts — manner of stating by judge or referee pointed out. *Griscom v. Mayor, etc.*, 12, 586.

Does not lie here from determination of fact in equity suit under Code. *Newton v. Bronson*, 13, 587.

Court cannot determine amount of damage left ambiguous. *Moffet v. Sackett*, 18, 522.

This court will not review facts, but will review refusal to award new trial on reversal below for error of law. *Griffin v. Margardt*, 17, 28.

Does not lie to this court from refusal of judge trying issue of fact to consider testimony as conflicting or pass on credibility of witnesses. *Terry v. Wheeler*, 25, 520.

This court will not review finding of indebtedness on conflicting evidence. *Kerr v. McGuire*, 28, 446.

Referee's finding on conflicting evidence conclusive. *Woodruff v. McGrath*, 32, 255.

This court under a general exception cannot decide that a referee has refused a finding. *Colwell v. Lawrence*, 38, 71.

Does not lie here from order for new trial in action tried by jury, when record shows that it may have been on questions of fact. *Downing v. Kelly*, 48, 433.

This court cannot review facts in equity action. *Vermilyea v. Palmer*, 52, 471.

This court will not review decision on conflicting testimony as to mistake. *Van Tuyl v. Westchester Fire Ins. Co.*, 55, 657.

When findings of referee conclusive on question of fraud. *Taylor v. Guest*, 58, 262.

When this court will affirm referee's decision on questions of fact. *Crane v. Bandonine*, 55, 256.

This court will not review question of impropriety of referee's sitting. *Baird v. Mayor, etc.*, 74, 382.

When question of fact will not be considered. *Thompson v. Bank of North America*, 82, 1.

Decision of court below that mortgage paid conclusive. *Twombly v. Cassidy*, 82, 155.

Question of fact on application for discharge from imprisonment on execution not reviewable here. *Matter of S.*, 85, 630.

Reversal of referee's decision, unless stated to be on facts, law only can be reviewed. *Davis v. Leopold*, 87, 620.

This court cannot review facts in criminal case where no exceptions are taken. *People v. Hovey*, 92, 554; *People v. Boas*, 92, 560.

Does not lie here from order granting new trial in jury case, where material questions of fact are involved, upon which the General Term might have granted it, although both parties desire it. *Bronk v. New York & N. H. R. Co.*, 95.

#### (f.) Questions of waiver.

Does not lie here on question of waiver of irregularity by laches. *White v. Coulter*, 59, 629.

Question of waiver not appealable here. *Pistor v. Hatfield*, 46, 249.

#### (g.) Probate matters.

From surrogate's issue of letters of administration to collector. *McGregor v. Buel*, 24, 166.

From order of surrogate granting leave to issue execution. *Mount v. Mitchell*, 31, 356.

When party to surrogate's decree may not appeal here from judgment discharging executor from imprisonment for contempt. *Matter of Watson v. Nelson*, 69, 536.

From order reversing surrogate's allowances to counsel and not stating ground. *Noyes v. Children's Aid Society*, 70, 481.

From order of surrogate opening proofs on probate of will to allow correction of testimony of witness. *Martinhoff v. Martinhoff*, 81, 641.

From surrogate's decree of probate—facts not reviewable here. *Matter of Ross*, 87, 514. So upon final accounting. *Davis v. Clark*, 87, 623.

Proceedings for probate of will affirmed by Supreme Court—this court no power to review the facts. *Marx v. McGlynn*, 88, 357.

From surrogate's refusal to permit uninterested party to intervene—nor from refusal by Supreme Court to stay proceedings pending other proceedings—nor to

review form of surrogate's order — nor to review surrogate's order to account. *Matter of Halsey*, 93, 48.

(h.) *New trial.*

Does not lie to this court from order of Chancery granting or refusing new trial after verdict on issue of fact. *Lansing v. Russell*, 2, 563.

From judgment reversing judgment of single judge and awarding new trial. *Duane v. Northern R. Co.*, 3, 545.

When does not lie here from order granting new trial. *Lanman v. Lewiston R. Co.*, 18, 493.

On new trial granted here there must be new judgment and appeal to General Term before appeal here. *New York & N. H. R. Co. v. Schuyler*, 34, 30.

From order refusing new trial for surprise. *Bedell v. Chase*, 34, 386; *Donley v. Graham*, 48, 658.

From order denying new trial for surprise and new evidence. *Dalrymple v. Hannum*, 54, 654.

From judgment on verdict after new trial has been denied at General Term. *Van Bergen v. Bradley*, 36, 316.

From order granting new trial. *Lawrence v. Ely*, 38, 42.

From order denying new trial — when. *Coleman v. Pleystead*, 40, 341.

From order denying new trial before judgment. *Miannay v. Blogg*, 41, 521.

From order for new trial unless it appears to have been granted on questions of law. *Wright v. Hunter*, 46, 409.

In case of jury trial, from order granting new trial unless it appears to have been on questions of law. *Sands v. Crooke*, 46, 564.

From order granting new trial if it may have been on facts. *Dickson v. Broadway, etc., R. Co.*, 47, 507.

From order as to new trial for new evidence. *Scoville v. Landon*, 50, 686.

From order denying motion to set aside report of referee for his improper conduct. *Gray v. Fisk*, 53, 630.

From order granting new trial, under Code Pro., section 11, subdivision 2, in ac-

tion by people to oust from office. *People v. Thacher*, 55, 525; 14 Am. Rep. 312.

From order denying new trial for improper intimation as to state of issue. *Shuttleworth v. Winter*, 55, 624.

From order granting new trial, when the evidence was conflicting and the order does not show that it was granted on questions of law alone. *Courtney v. Baker*, 60, 1.

On appeal from judgment alone denial of motion for new trial on judge's minutes cannot be reviewed. *Matthews v. Meyberg*, 63, 656.

From order reversing judgment on trial by court, and not ordering new trial, and on which judgment is not entered. *Rust v. Hauselt*, 69, 485.

From order for new trial for excessive damages and for further costs. *Dodge v. Mann*, 85, 643.

See NEW TRIAL.

(i.) *Costs.*

Lies to General Term but not to this court from order for extra allowance. *People v. New York Cent. R. Co.*, 29, 418.

From order affirming order regarding costs. *McClure v. Supervisors of Niagara*, 3 Abb. 83.

Order for extra allowance not final, etc. *Clarke v. City of Rochester*, 34, 355.

From order of discontinuance of action without costs. *De Barante v. Deyermard*, 41, 355; *Troombley v. Cassidy*, 82, 155.

From order denying readjustment of costs. *People v. Boardman*, 41, 362.

From order of readjustment of costs. *Buffalo, etc., R. Co. v. Johnson*, 42, 215.

From order requiring security for costs. *Gedney v. Purdy*, 47, 676.

About costs in equity. *Taylor v. Root*, 48, 687.

From order granting extra allowance within the statutory limit. *Southwick v. Southwick*, 49, 510.

From order refusing costs of appeal while setting aside judgment for costs on remittitur reversing interlocutory order. *Brown v. Leigh*, 50, 427.

From order as to costs of disbarment. *Matter of Kelly*, 59, 595.

From order granting extra allowance where court had jurisdiction. *Krekeler v. Ritter*, 62, 372.

From order as to costs of action to construe will. *Provost v. Provost*, 70, 141.

From order directing re-taxation and allowing costs of appeal. *Union Trust Co. v. Whiton*, 78, 491.

From unauthorized order obeyed except in respect to costs. *Hall v. Brooks*, 89, 33.

See COSTS.

(k.) Amount involved less than \$500.

Does not lie here from judgment of affirmance involving less than \$500. *Butterfield v. Rudde*, 58, 489.

Where stipulation reduces amount in controversy below \$500. *King v. Galvin*, 62, 238.

Limitation of, to this court applies to judgment as rendered — interest after recovery not to be considered. *Ryan v. Waule*, 63, 57.

How amount in controversy ascertained in suit to enjoin business. *People v. Horton*, 64, 58.

Interest after judgment does not count in determining whether subject-matter exceeds \$500. *Produce Bank v. Morton*, 67, 199.

In action to foreclose mechanic's lien of less than \$500. *Wheeler v. Scofield*, 67, 311.

From judgment for money less than \$500, although more was claimed. *Roosevelt v. Linkert*, 67, 447.

In foreclosure where only question was as to priority of lien of judgment for \$300. *Petrie v. Adams*, 71, 79.

Requisites of order allowing appeal to this court where value less than \$500. *Bastable v. City of Rochester*, 72, 64.

Amount of matter in controversy at General Term determines appealability here. *Brown v. Sigourney*, 72, 122; *Davidson v. Alfaro*, 80, 660.

From order vacating assessment of less than \$500. *Nichols v. Voorhis*, 74, 28.

Where amount involved is less than \$500. *Josuez v. Conner*, 75, 156.

Case of controversy involving less than \$500 — counter-claim, *Wiley v. Brigham*, 81, 1.

Where claim is admitted, and controversy is on counter-claim of less than \$500. *Pennie v. Continental Life Ins. Co.*, 67, 278.

Where claim and counter-claim in controversy aggregate over \$500, appeal lies. *Crawford v. West Side Bank*, 92, 631.

When amount claimed in complaint controlling as to limitation in this court. *Van Gelder v. Van Gelder*, 81, 128.

When claim actually litigated is less than \$500. *St. Clair v. Day*, 89, 357.

### III. Practice.

#### (a.) Generally.

When perfected. *Thompson v. Blanchard*, 2, 561.

General objections to evidence not available. *Shaw v. Smith*, 3 Keyes, 316.

In Chancery cases — how regulated. *McIntyre v. Warren*, 3 Keyes, 185.

Defective record evidence may be supplied on. *Farmers' Bk. of Washington Co. v. Cowan*, 2 Abb. 88.

A foreign statute cannot be read on appeal for the first time without proof of authenticity. *Munroe v. Guillaume*, 3 Abb. 334.

This court will not direct court below to amend order by reversing findings of fact. *Thompson v. Menck*, 4 Abb. 400.

Order reversing order made on motion upon affidavits need not state that it was on facts. *Williams v. Hernon*, 4 Abb. 611.

From judgment of justice of peace is a nullity unless allowed by proper officer within ten days. *Seymour v. Judd*, 2, 464.

Void appeal not cured by appearance to set it aside. *Id.*

Only the facts of the judgment appealed from can be reviewed. *Kelsey v. Western*, 2, 500.

With security, stays proceedings, although time for excepting to sureties has not expired. *Thompson v. Blanchard*, 2, 561.

Effect of enactment of Code of Procedure on appeals in pending equity suits. *Farmers' Loan and Trust Co. v. Carroll*, 2, 566.

Effect of Code of Procedure on right of, in pre-existing suits. *Dunlop v. Edwards*, 3, 341.

Fractions of a day disregarded in computing time for appeal. *Blydenburgh v. Cothel*, 4, 418.

A judgment cannot be affirmed in part and reversed in part when a new trial is granted. *Story v. N. Y. & H. R. Co.*, 6, 85.

Exceptions need not be signed nor sealed. *Zabriskie v. Smith*, 11, 480.

Manner of reviewing judgment on trial by court or referee. *Hunt v. Bloomer*, 13, 341; *Johnson v. Whitlock*, 13, 344.

Objection to defective pleading not raised at trial cannot prevail. *N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co.*, 14, 85.

New ground of objections cannot be raised on. *Durgin v. Ireland*, 14, 322.

This court may enforce stipulation not to appeal. *Townsend v. Masterson, etc.*, *Stone Dressing Co.*, 15, 587.

When final judgment should be given by this court. *Edmondston v. McLoud*, 16, 543.

This court limited to precise questions raised by case. *Titus v. Orvis*, 16, 617.

Dismissal of, on settlement — suppression of facts — prejudice of attorney's lien. *Shank v. Shoemaker*, 18, 489.

This court cannot reverse because exceptions were heard first at General Term by stipulation and not by order. *Lake Ontario, etc., R. Co. v. Marvine*, 18, 585.

In reference under section 271. subdivision 3 of Code, errors in proceedings on trial must be reviewed by exception. *Marshall v. Smith*, 20, 251.

Time for, to this court, in action originating in justice's court, may not be enlarged. *Wait v. Van Allen*, 22, 319.

Where return is imperfect, remedy is by motion to correct. *Bowers v. Tallmadge*, 23, 166.

This court may dismiss before return filed. *Adams v. Fox*, 27, 640.

From judgment to enforce mechanic's lien — findings, effect of — presumptions. *Smith v. Coe*, 29, 666.

This court cannot review judgment on trial by court without finding of facts by it. *Bridger v. Weeks*, 30, 328.

Record should not include proceedings at a former trial. *Wilcox v. Hawley*, 31, 648.

Immaterial error — supplying defect on hearing. *Robert v. Good*, 36, 408.

No reversal for admission of incompetent evidence shown to be harmless. *Watson v. Campbell*, 38, 153.

Exceptions to wholly immaterial evidence are unavailing. *Porter v. Ruckman*, 38, 210.

General exception to charge invalid if any part right. *Walsh v. Kelly*, 40, 556.

Statutes of another State may not be produced in evidence on. *Hunt v. Johnson*, 44, 27; 4 Am. Rep. 631.

General objection to question asked witness disregarded if competent. *Briant v. Trimmer*, 47, 96.

When this court can look into evidence before judge or referee. *Field v. Munson*, 47, 221.

Court will construe charge consistently with affirmance if possible. *Caldwell v. New Jersey Steamboat Co.*, 47, 282.

Error of law must appear from comparisons of conclusions with facts found or admitted. *Baker v. Spencer*, 47, 562.

Statement of facts under Code of Pro., § 333, sub. 2, can alone be considered — if defective sent back for correction. *Jaycox v. Cameron*, 49, 645.

General findings of fact controlled by special. *Phelps v. Vischer*, 50, 69; 10 Am. Rep. 433.

Must stand on theory of the trial. *Home Ins. Co. v. Western Transp. Co.*, 51, 93.

From judgment of General Term does not bring up order denying motion for reargument made after judgment. *Lewis v. Greider*, 51, 231.

On appeal from judgment objection that supplemental complaint is not in aid of original cannot be raised — should appeal from order — objection waived by answering. *Wetmore v. Truslow*, 51, 338.

Order reciting appeal from General Term sufficient although no notice of appeal in case. *Struthers v. Pearce*, 51, 365.

Referee's findings conclusive unless additional findings were requested. *Fabbri v. Kalbfleisch*, 52, 28.

Point cannot be raised that a personal judgment is directed in mechanic's lien proceedings—should move to correct. *Moran v. Chase*, 52, 346.

Unauthorized clause in judgment cannot be corrected on appeal—remedy. *People v. Goff*, 52, 434.

When illegal evidence cannot be considered harmless—condition cannot be imposed—when new trial matter of right. *Anderson v. Rome, etc., R. Co.*, 54, 334.

Point not raised by pleadings on trial or in referee's report cannot be raised on appeal. *Redfield v. Holland Purchase Ins. Co.*, 56, 354; 15 Am. Rep. 424.

From judgment in part—regularity of notice. *Catlin v. Grissler*, 57, 363.

Act 1874, chapter 322, limiting appeals here, took effect May 22, 1874. *Krom v. Levy*, 60, 126.

Rule when two judgments in one record. *Genet v. Davenport*, 60, 194.

Record cannot be received on argument to reverse judgment. *Stilwell v. Carpenter*, 62, 639.

When there is evidence to sustain referee's findings, an order of reversal, not stating that it is on facts, cannot be sustained unless there is error of law. *Foster v. Persch*, 68, 400.

On order of verdict subject to opinion, exceptions cannot be heard—direction of verdict subject to opinion, exceptions to be heard in first instance at General Term, latter clause may be disregarded. *Durant v. Abendroth*, 69, 148; 25 Am. Rep. 158, note.

Motion to dismiss need not specify papers. *Browne v. Taylor*, 69, 627.

From order for new trial—when leave to dismiss will be granted to appellant. *Mackey v. Lewis*, 73, 382.

On certiorari—when second order not brought up—practice as to hearing. *People v. Board of Fire Comm'rs*, 73, 437.

From order granting new trial—appellant takes risk of any exception, whether made ground of reversal or not. *Krekeler v. Thauke*, 73, 608.

Party may urge point raised at trial although not raised in intermediate appellate court. *Cohn v. Goldman*, 76, 284.

When notice of entry of judgment insufficient. *Kelly v. Sheehan*, 76, 325; *Kilmer v. Hathorn*, 78, 228.

This court cannot amend return by inserting exception. *Kenyon v. New York Cent., etc., R. Co.*, 76, 607.

In an equitable action tried before a referee error in receiving evidence cannot be disregarded unless it can be seen that it did no harm. *Footte v. Beecher*, 78, 155.

Notice of entry of judgment must come from prevailing party—notice of appeal to trustee, when not requisite. *Kilmer v. Hathorn*, 78, 228.

Modification by General Term—order must state that it is on questions of fact, unless there is apparent error of law. *Brown v. Gallaudet*, 80, 413.

This court will not amend pleadings to reverse judgment. *Volkening v. DeGraaf*, 81, 268.

This court has no power pending appeal from order refusing to change place of trial, to entertain motion to set aside judgment taken pending appeal—should move in court below. *Veeder v. Baker*, 83, 163.

To give preference on calendar here party must claim it in notice of argument. *Taylor v. Wing*, 83, 527.

Rulings cannot be reviewed on stipulation, no exception appearing. *Briggs v. Waldron*, 83, 582.

When action has proceeded ex delicto, plaintiff cannot on appeal claim reversal because a judgment ex contractu might properly have been rendered if he had so sued. *Lockwood v. Quackenbush*, 83, 607.

Partition not entitled to preference on calendar because construction of will incidentally involved. *Peyser v. Wendt*, 84, 642.

Certificate of return—when insufficient. *Matter of Assignment of Bailey*, 85, 629.

Motion to correct return, granted. *Hobart v. Hobart*, 85, 637.

When reversal presumed to be for error of law—objection not to be first raised here. *Ward v. Craig*, 87, 550.

Error must be shown, cannot be inferred. *Lighton v. People*, 88, 117; *Briant v. Trimmer*, 47, 96.

General Term, under Code, section 1021, may designate what judgment to be entered on affirming order overruling demurrer—appeal should be from final judgment, not order. *Smith v. Rathbun*, 88, 660.

What questions can be considered here in condemnation of land proceedings. *Matter of Lake Shore, etc., R. Co.*, 89, 442.

Notice of appeal cannot be amended so as to enlarge it. *Lavalle v. Skelly*, 90, 546.

Code Civil Procedure, chapter 16, does not apply to certiorari commenced before September 1, 1880. *People v. French*, 92, 306.

Stipulation by attorneys will not dispense with clerk's certificate to return. *Dow v. Darragh*, 92, 537.

Preference in action, where people parties, lost by failure to give notice. *People v. Kinney*, 92, 647.

Essentials to authorize preference here in action for dower. *Bartlett v. Musliner*, 92, 646.

Preference here in action against bank issuing notes allowed on order only where pleadings, etc., do not show right. *Bank of Attica v. Metropolitan Nat. Bank*, 91, 239.

#### (b.) Exceptions.

Cannot be heard here without exceptions. *Douglass v. Day*, 2 Trans. App. 190.

From referee, not heard, where no findings of fact nor exceptions. *Philbin v. Patrick*, 5 Trans. App. 170.

Decision of referee can only be reviewed upon case and exceptions to findings. *Goodyear v. Bishop*, 2 Keyes, 651.

This court cannot review case when there were no exceptions taken. *Bissell v. Studley*, 3 Keyes, 213.

Exception to nonsuit may be ordered to be first heard at General Term—when exceptions sufficient. *Lake v. Artisans' Bank*, 3 Keyes, 276.

Exception does not lie to referee's refusal to find fact outside the issues—decision conclusive unless without or against

all evidence. *Wilsie v. Eaddie*, 4 Abb. 624.

Harmless error affords no ground for reversal. *Onondaga Co. M. Ins. Co. v. Minard*, 2, 98.

General exception to charge involving more than one question of law and not wholly erroneous is unavailable. *Jones v. Osgood*, 6, 233.

Exception to evidence not available unless material. *Howland v. Willetts*, 9, 170.

General exception to single conclusion of law from undisputed evidence is available. *Pratt v. Foote*, 9, 463.

General exception to charge unavailing if any part is right. *Caldwell v. Murphy*, 11, 416.

General objection to an instrument does not cover defect in proof or acknowledgment. *Mabbett v. White*, 12, 442.

Exception does not lie to referee's refusal to find additional facts—should move to send back report. *Rogers v. Wheeler*, 52, 262.

On exceptions to referee's legal conclusions his findings of fact must be assumed correct. *Second Nat. Bk. of Oswego v. Poucher*, 56, 348.

Exception to verdict sufficient to raise point of submission of facts to jury—request unnecessary. *First National, etc., v. Dana*, 79, 108.

Where bill of exceptions fails to disclose that question was litigated at trial and no exception, court will not consider on. *Richmond v. Niagara Fire Ins. Co.*, 79, 230.

In foreclosure, after trial and verdict by jury, if court disregards verdict and makes its own findings, objections and exceptions taken before the jury are effectual. *Carroll v. Deimel*, 95, 252.

#### (c.) Waiver.

Question cannot be first raised here. *Sands v. Shoemaker*, 2 Keyes, 268.

Point that trespass was not on premises described in complaint may not be first raised here. *Thompson v. Bennett*, 2 Keyes, 503.

Point that there was a question for jury cannot be first raised on appeal—should



request submission to jury. *Seymour v. Coving*, 4 Abb. 200; see, also, *Ormes v. Dauchy*, 82, 443; *Winchell v. Hicks*, 18, 558.

Where a witness claimed his privilege of not answering, the reply that the statute of limitation had run against the offense cannot be first raised on appeal. *Henry v. Bank of Salina*, 1, 83.

Objection cannot first be raised on appeal if opportunity below is not improved. *Jencks v. Smith*, 1, 90; *Meakings v. Cromwell*, 5, 136.

When appeal waived by answer. *Brady v. Donnelly*, 1, 126.

On appeal from Chancery, objection that there was a perfect remedy at law cannot be raised for the first time, parties having submitted to jurisdiction. *Clarke v. Sawyer*, 2, 498.

Objection that verdict is against evidence or judgment is erroneous in form cannot first be raised here. *Buck v. Remsen*, 34, 383.

Objection not raised at trial, unavailable—lies from decision contrary to contradicted evidence. *Draper v. Stouvenel*, 38, 219.

Objection to authority of agent not raised at trial cannot be considered here. *Wolf v. Security Fire Ins. Co.*, 39, 49.

Objection cannot be first raised on—estoppel. *Fisher v. Hepburn*, 48, 41.

Questions of constitutionality or pleading cannot first be raised here. *Delaney v. Brett*, 51, 78.

Objection that complaint is insufficient cannot be first raised here. *Hofheimer v. Campbell*, 59, 269.

No objection can first be raised on appeal which might possibly have been obviated below. *Osgood v. Toole*, 60, 475.

Objection of misjoinder of causes of action cannot first be raised on appeal. *Stilwell v. Carpenter*, 62, 639.

General Term reversed judgment—this court will not adopt theory not set up, to sustain. *Stapenhorst v. Wolff*, 65, 596.

Objection to reception of paper in evidence must be raised on trial to be available on appeal. *Howell v. Adams*, 68, 314.

Question of double agency cannot be first raised on appeal. *Duryee v. Lester*, 75, 442.

Objection to form in which plaintiff sues cannot be first raised on appeal. *DeLavallette v. Wendt*, 75, 579; 31 Am. Rep. 494, note.

Want of reply cannot be first raised here. *Muldoon v. Blackwell*, 84, 646.

Objection to availability of counterclaim cannot be first raised on appeal. *Vann v. Rouse*, 94, 401.

Points not raised by pleadings or objections not available on appeal. *Porter v. Wormser*, 94, 431.

Where notice does not specify an interlocutory judgment, it is not open for review. *Reese v. Smyth*, 95.

#### (d.) *Reargument.*

When reargument will not be ordered. *Mason v. Jones*, 3, 875; *Marine Nat. Bk. v. Nat. City Bank*, 59, 67.

Reargument not granted unless plain mistake. *Eaton v. Alger*, 47, 345.

Rehearings on summary applications are only granted on reversal. *Matter of Petition of Peugnet*, 67, 441.

Reargument not granted for omission to present a point. *Rogers v. Laytin*, 81, 642.

#### (e.) *Remittitur.*

Remittitur on reversal by default must be held ten days. *Lyme v. Ward*, 1, 531.

Service of assignment of errors before filing, irregular. *Id.*

Order may be corrected notwithstanding remittitur is filed. *Palmer v. Lawrence*, 5, 455.

Dismissed by this court for want of return, when reinstated. *Spoor v. Fannan*, 16, 620.

Omission to enter order on remittitur disregarded on subsequent appeals. *Chautauqua Co. Bank v. White*, 23, 347.

No judgment can be entered on remittitur reversing interlocutory order. *Brown v. Leigh*, 50, 427.

This court may stay filing of remittitur—what does not constitute filing. *Cushman v. Hatfield*, 52, 653.

One filing remittitur on judgment partly against him cannot appeal from whole judgment. *Genet v. Davenport*, 59, 648.

Cause will not be reinstated after judgment on remittitur. *Jones v. Anderson*, 71, 599.

Until remittitur filed below, and action taken, this court may correct ex parte. *People v. Nelliston*, 79, 638.

(f.) *Costs.*

Costs of, in Supreme Court, cannot be added to remittitur from this court. *McGregor v. Buell*, 1 Keyes, 153.

Judgment affirmed with ten per cent damages. *Wright v. Sanders*, 3 Keyes, 323.

When discretionary. *Ayres v. Western R. Co.*, 49, 660.

In equity case this court may affirm without costs. *Patten v. Stitt*, 50, 591.

Motion to compel appellants' attorney to pay costs on dismissal must be made in court below. *Struffman v. Muller*, 74, 594.

When not in time — re-taxation. *Wilson v. Palmer*, 75, 250.

From one order, when may reverse series — costs. *Stanton v. King*, 76, 585.

(g.) *Case.*

Case on appeal must show where judgment was rendered and its character. *Lahens v. Fielden*, 3 Abb. 1.

Rule as to serving copies of case applies to pending. *Dresser v. Brooks*, 2, 559.

Case and exceptions — proper form of. *Magie v. Baker*, 14, 435.

Judge's findings must be incorporated in case. *Smith v. Grant*, 15, 590.

On appeal from referee case must be made. *Turner v. Haight*, 16, 465.

When case cannot be turned into bill of exceptions. *Gilbert v. Beach*, 16, 606.

On appeal to this court from decision of referee there must be a case containing findings of fact and conclusions of law. *Otis v. Spencer*, 16, 610; *Westcott v. Johnson*, 16, 613.

Referee's conclusions of fact and of law must be in case. *Bissell v. Hamlin*, 20, 519.

Exceptions must be in case to raise question of law. *Ingersoll v. Bostwick*, 22, 425.

Where case contains no evidence, report of referee must be judged by its findings. *Tomlinson v. Mayor, etc.*, 44, 601.

Non-service of copies of case not excused by non-filing of return. *Sage v. Volkening*, 46, 448.

Practice on making case to review referee's decision — exceptions after trial — service. *French v. Powers*, 80, 146.

On appeal from Circuit, case should be transcript of proceedings at trial. General Term no power to direct alteration causing it to state the same untruly. *Carter v. Beckwith*, 82, 83.

Amendments disallowed by trial judge need not be printed on appeal to General Term. *Kilmer v. New York Cent., etc., R. Co.*, 94, 495.

Amendments disallowed need not be printed in case for General Term. *Id.*

(h.) *Probate questions.*

From order reversing surrogate's decree of probate — rules regulating. *Marvin v. Marvin*, 4 Keyes, 10.

Creditor may appeal from decree of distribution by surrogate, although he receives the amount awarded him. *Higbie v. Westlake*, 14, 281.

Supreme Court, on reversing surrogate's decree, need not remit for new hearing. *Schenck v. Dart*, 22, 420.

On appeal from surrogate's decree this court may review facts. *Id.*; *Howland v. Taylor*, 53, 627.

On appeal from surrogate's decree on application for letters of administration Supreme Court cannot receive further evidence nor award an issue. *Devin v. Patchin*, 26, 441.

This court examines facts on appeal from surrogate. *Robinson v. Raynor*, 28, 494.

On appeal from surrogate, improper evidence will not justify reversal if there

was sufficient competent evidence. *Clapp v. Fullerton*, 34, 190.

From surrogate's decree without bond for costs is void. *Matter of Dumesnil*, 47, 677.

Lies to General Term for surrogate's allowances of counsel fees on the merits. *Noyes v. Children's Aid Society*, 70, 481.

Costs on appeal from surrogate are discretionary—construction of order. *Lawrence v. Lindsey*, 70, 566.

On reversal of decree of probate of will Supreme Court must award issue for jury—costs. *Sutton v. Ray*, 72, 482.

Power of this court on appeal from probate of will. *Id.*

Reversal of surrogate's decree refusing probate—General Term should remit. *Dack v. Dack*, 84, 663.

Objection to surrogate's jurisdiction may be first taken on appeal. *Flester v. Shepard*, 92, 251.

Material error as to evidence, unless judgment clearly right, necessitates reversal. *Matter of Will of Smith*, 95, 516.

Surrogate's findings of fact conclusive if there is competent evidence to support them. *Matter of Will of Cottrell*, 95, 329.

#### IV. Powers of General Term.

When General Term cannot review facts in jury case. *Parker v. Jervis*, 3 Keyes, 271.

Right to rehearing at General Term. of Special Term order. *Gracie v. Freeland*, 1, 228.

General Term bound to hear appeal from decree in an equity case involving the merits. *Dillaye v. Blair*, 2, 189.

To General Term of Marine Court—security will stay proceedings. *Roberts v. Donnell*, 31, 446.

Before January 1, 1870, judge might sit in review of his own decision. *Real v. People*, 42, 270.

When General Term may reverse without exceptions. *Brookman v. Hamill*, 46, 636.

Does not lie to General Term of New York Common Pleas from judgment by

default of General Term of Marine Court. *McMahon v. Rauhr*, 47, 67.

General Term may reverse for improper nonsuit by referee. *Scofield v. Hernandez*, 47, 313.

When General Term may correct error in rule of damages by modification of judgment. *Hayden v. Florence Sewing Machine Co.*, 54, 221.

General Term has no power to award judgment for damages on reversal unless facts agreed to. *Cuff v. Dorland*, 57, 560.

Order denying new trial not reviewable by General Term on appeal from judgment. *Thurber v. Harlem, etc., R. Co.*, 60, 326.

General Term no power to review facts except by appeal from order granting or refusing a new trial. *Boos v. World Mut. Life Ins. Co.*, 64, 236.

Lies to General Term from order discharging imprisoned debtor. *Matter of Brady*, 69, 215.

General Term cannot render judgment for plaintiff on reversal although facts were found in favor of plaintiff. *Ehrichs v. DeMill*, 75, 370.

When opinion of General Term may be looked into, to learn ground of order—order for modification of judgment. *Salmon v. Gedney*, 75, 479.

Order of County Court dismissing from judgment of justices not appealable to Supreme Court. Code, § 1342. *Andrews v. Long*, 79, 573.

General Term may amend order of reversal by stating that it was on facts—judgment absolute cannot be pronounced unless it is certain that defeated party cannot succeed on new trial. *Guernsey v. Miller*, 80, 181.

Lies to General Term from order directing judgment on account of frivolousness in answer before entry of judgment. *Elwood v. Roof*, 82, 428.

General Term may conform complaint to proof. *Harris v. Turnbridge*, 83, 92; 88 Am. Rep. 398.

Plaintiff in partition dying pending, from order requiring purchaser to complete, General Term may enter order nunc pro tunc as before death. *Bergen v. Wyckoff*, 84, 659.

Reversal by General Term in jury case need not state whether one of law or fact — judgment absolute — modification. *Goodwin v. Conklin*, 85, 21.

When General Term may amend order by ante-dating. *Matter of Beckwith*, 87, 503.

If recovery had on two separate causes of action — General Term may reverse as to one and affirm other. *Crim v. Starkweather*, 88, 339; 42 Am. Rep. 250.

### V. Undertakings.

General Term may not dismiss appeal because appellant has not filed new undertaking ordered by Special Term. *Genter v. Fields*, 1 Keyes, 483.

Nature of undertaking to sustain appeal. *Langley v. Warner*, 1, 606.

Only one undertaking requisite on, in judgment in replevin awarding different sums to different defendants. *Smith v. Lynes*, 2, 569.

Sureties bound by statutory increase of amount of damages after execution of undertaking. *Hornor v. Lyman*, 4 Keyes, 237.

On undertaking to stay execution parties not liable when appeal is dismissed. *Drummond v. Husson*, 14, 60.

Exception to sureties on appeal waived by respondent's failing to attend on justification, although sureties also fail. *Ballard v. Ballard*, 18, 491.

Sureties on appeal from order to General Term, reversed there but affirmed here, are liable. *Robinson v. Plimpton*, 25, 484.

Undertaking need not state consideration nor be under seal. *Doolittle v. Dininny*, 31, 350.

Undertaking — "intends to appeal" valid. *Forrest v. Havens*, 38, 469.

Sureties on, to General Term, not liable for costs of appeal here — release of sureties on appeal here discharges former sureties. *Hinckley v. Kreitz*, 58, 583.

Undertaking only enforceable to the extent which the statute exacts. *Post v. Doremus*, 60, 371.

Cases must be served although sureties are excepted to. *Wade v. DeLeyer*, 63, 318.

Undertaking necessary on appeal here under Code Pro., § 11, subd. 4. *Cowdin v. Teal*, 67, 581.

Sureties not released by bankrupt discharge of judgment debtor pending appeal. *Knapp v. Anderson*, 71, 466.

When new undertaking not required in case of insolvency of one surety. *Dering v. Metcalf*, 72, 613.

New undertaking, sureties failing to justify, may be given within the time for appeal. *Blake v. Lyons & Fellows Mfg Co.*, 75, 611.

Cause not properly on calendar without undertaking. *Raymond v. Richmond*, 76, 106.

When surety of receiver may maintain appeal here. *Matter of Guardian Sav. Inst.*, 78, 408.

When leave granted to supply undertaking for costs. *Architectural Iron Works v. City of Brooklyn*, 85, 652.

Effect of failure of sureties to justify. *Manning v. Gould*, 90, 476.

Application to dispense with security cannot be made here, but must be to court from which appeal is taken. *Hill v. Peekskill Sav. Bk.*, 95.

See UNDERTAKING.

### VI. New trial.

When new trial granted here, this court must have deemed pleadings sufficient. *New York, etc., R. Co. v. Ketchum*, 1 Trans. App. 116.

Order for new trial cannot be made subject to admission of certain evidence. *Bruce v. Davenport*, 3 Keyes, 472.

Appeal from order for new trial — rule as to. *East River Bank v. Kennedy*, 4 Keyes, 279.

Appeal does not lie to Supreme Court from order granting new trial in justice's court under section 366 of Code of Pro. *Wavel v. Wiles*, 24, 635.

Appellate court cannot reverse and render final judgment, but must order new trial. *Astor v. L'Amoureux*, 8, 107.

On appeal from order granting new trial order must be affirmed unless it appears that it was founded on erroneous conclu-

sion of law and not on different conclusion of fact. *Miller v. Schuyler*, 20, 522.

On appeal from order granting new trial order to be affirmed if possible on any view of evidence. *Sanford v. Eighth Ave. R. Co.*, 23, 343; *Macy v. Wheeler*, 30, 231.

General Term may not order reduction of verdict as the alternative of a new trial. *Cassin v. Delaney*, 38, 178.

Does not lie to Supreme Court from order of Brooklyn City Court granting new trial. *Baker v. Remington*, 45, 323.

On appeal from judgment in equity action where verdict on specific questions was rendered, General Term cannot set it aside and order new trial. *Jackson v. Andrews*, 59, 244.

On reversal new trial must be granted unless certain that defeated party cannot succeed. *Foot v. Aetna Life Ins. Co.*, 61, 571.

When judgment for services is erroneous General Term must grant new trial. *Whitehead v. Kennedy*, 69, 462.

Construction of judgment absolute to be entered on affirmance of order for new trial. *Hiscock v. Harris*, 80, 402.

See ante I, b, II, a, b, h; NEW TRIAL.

## VII. Appeal in general.

### (a.) Miscellaneous matters.

On appeal from judgment alone regularity of order of reference cannot be inquired into. *Van Marter v. Hotchkiss*, 4 Abb. 484.

Effect of enactment of Code of Procedure on right of appeal. *Mayor v. Schermerhorn*, 1, 423; *Spaulding v. Kingsland*, 1, 426; *Butler v. Miller*, 1, 428; *Brown v. Fargo*, 1, 429; *Grover v. Coon*, 1, 536; *Rice v. Floyd*, 1, 608; *Tilley v. Phillips*, 1, 610. Statute taking away the right of appeal in pending action not unconstitutional. *Grover v. Coon*, 1, 536.

Error in reducing plaintiff's judgment cannot be corrected on defendant's appeal. *Weisser v. Denison*, 10, 68.

Irregular form of judgment cannot be availed of on appeal. *Johnson v. Carnley*, 10, 570.

Special Term cannot, on motion, vacate a judgment on a referee's report for errors of law. *Dana v. Howe*, 13, 306.

Rule of stare decisis applied on second appeal although court not unanimous on first. *Oakley v. Aspinwall*, 13, 500.

Where referee's report sets forth an agreement reciting a good consideration this court will not inquire into consideration. *Cady v. Allen*, 18, 573.

Judgment on award reviewable by writ of error and not by appeal. *Isaacs v. Beth Hamedrash Society*, 19, 584.

That judgment is absolute when it should have been in the alternative is not ground of appeal. *Ingersoll v. Bostwick*, 22, 425.

On appeal from inferior court, under section 344 of Code, Supreme Court cannot reverse for excessive damages. *Thurber v. Townsend*, 22, 517.

County Court should not reverse judgment of justice of peace unless clearly unjustifiable by evidence. *Burnham v. Butler*, 31, 480.

On different objections, some good and some bad, a bad one prevailing, decision will not be sustained on others unless they can be obviated on new trial. *Bascom v. Smith*, 31, 595.

On mere exception to nonsuit the only question is on sufficiency of evidence. *Magee v. Osborn*, 32, 669.

Immaterial error not prejudicing party, not ground of reversal. *Tenney v. Berger*, 93, 524; 45 Am. Rep. 263.

When error not harmless. *Greene v. White*, 37, 405.

Election to remit or take new trial cannot be relieved against. *Hitchings v. Van Brunt*, 38, 335.

Appeal lies from absolute order in supplementary proceedings directing debtor to pay a sum of money. *Locke v. Mabbett*, 2 Keyes, 459; 3 Abb. 68.

On appeal from judgment, order sustaining demurrer to one of the answers may be reviewed. *Ayres v. Western R. Corp.*, 45, 260.

Unless appeal taken from order overruling demurrer judgment conclusive. *De Puy v. Strong*, 37, 372.

Appellant may not allege as error what was put into judgment at his request. *Proestler v. Kuhn*, 49, 654.

When appellate court may render final judgment—several appeals must come up together. *Muldoon v. Pitt*, 54, 269.

Stare decisis. *Joslin v. Cowee*, 56, 626.

Review of facts—when judgment absolute imperative. *Godfrey v. Mosher*, 66, 250.

Trifling error as to interest disregarded in absence of specific objection. *Mercer v. Vose*, 67, 56.

Judgment for survivors without being so expressed, not ground of appeal. *Reeder v. Sayre*, 70, 180.

When trespass does not affect title to real estate. *Scully v. Sanders*, 77, 598.

Refusal of trial court to find on law—when not reversible error. *Loeb v. Hellman*, 83, 601.

#### (b.) Presumptions.

In absence of objection where opportunity was given, all reasonable inferences will be made to uphold judgment. *Jencks v. Smith*, 1, 90.

Judgment presumed right—suspending for resettlement of case—this court cannot review facts. *Rice v. Isham*, 1 Keyes, 44.

This court presumes nothing against judgment. *Carman v. Pultz*, 21, 547.

Justice's return to certiorari must and is presumed to contain all the testimony. *Orcutt v. Cahill*, 24, 578.

Reversal presumed to have been on law unless otherwise stated. *Marco v. Liverpool and London Ins. Co.*, 35, 664; *Baldwin v. Van Deusen*, 37, 487.

Findings by referee will be presumed to sustain judgment if consistent with evidence. *Valentine v. Conner*, 40, 248.

Presumption to support judgment. *Chesebrough v. Tompkins*, 45, 289.

Order of reversal must show that it was granted on facts or it will be deemed to be on law—opinion cannot be resorted to. *Sheldon v. Sheldon*, 51, 354.

On case to review referee's findings of fact, it is assumed that case contains all

the evidence to support them. *Perkins v. Hill*, 56, 87.

General Term is presumed to have reviewed the facts unless record shows contrary. *Verplanck v. Member*, 74, 620.

#### (c.) Questions of fact.

Facts only reviewable through findings. *City Building and Loan Co. v. Fatty*, 4 Trans. App. 311.

Order of reversal on facts must so state. *Thompson v. Mink*, 2 Keyes, 82.

Provision that judgment shall be presumed not to have been reversed on facts does not apply to orders. *Williams v. Hernon*, 3 Keyes, 99.

How questions of fact on decision of court or referee reviewed here. *Farnham v. Hotchkiss*, 2 Abb. 93.

When justice's return does not state that he has returned all the evidence, judgment will not be reversed on ground of defect of evidence to support some items of account in suit. *Low v. Payne*, 4, 247.

Referee's finding of facts—general conclusion—specific request and exception. *Grant v. Morse*, 22, 323.

Referee's finding that an assignment is not fraudulent in fact is conclusive on Supreme Court. *Ball v. Loomis*, 29, 412.

Supplementary finding of facts by General Term disregarded. *Phelps v. McDonald*, 26, 82.

This court will not set aside finding of facts as against weight of evidence. *Burgess v. Simonson*, 45, 225.

When request for submission of question of fact not necessary. *Low v. Hall*, 47, 104.

If referee's decision is based in part on facts not proven, it must be reversed, although it might legally have been rendered on the facts found. *Matthews v. Coe*, 49, 57.

When General Term reverses on facts it need not specify errors in order—may reverse as to one and affirm as to other joint defendants. *Hubbell v. Meigs*, 50, 480.

From order as to new trial in jury case when facts and law were before the court—this court will render absolute judgment

instead of dismissing. *Arnold v. Robertson*, 50, 683.

Where application to remit case to referee for findings of fact has been denied, the materiality of the facts may be determined on appeal. *Meucham v. Burke*, 54, 217.

When appellate court cannot discriminate as to evidence received for all defendants. *Devyr v. Schaefer*, 55, 447.

When finding of fact will not justify reversal. *Caswell v. Davis*, 58, 223; 17 Am. Rep. 233.

When this court will send case back for referee to pass on question of fact. *Potter v. Carpenter*, 71, 74.

Order reversing judgment on trial without jury, not stating that it is reversed on facts, cannot be reversed except for error of law—opinion may not be looked into. *Van Tassel v. Wood*, 76, 614.

Plaintiff on appeal may claim facts as established altogether at variance with complaint. *Cowing v. Altman*, 79, 167.

When it does not appear that reversal was on facts, request to suspend decision to obtain order from General Term was on facts as well as law will not be granted—amendment should have been made before argument. *Hamlin v. Sears*, 82, 327.

Refusal to find fact, when error of law. *James v. Cowing*, 82, 449.

On appeal from order reversing decision of judge “upon the law and the facts” this court may review the facts. *Van Wyck v. Watters*, 81, 353.

Findings of fact presumed as authorized by the evidence. *Parker v. Baxter*, 86, 586.

Rule as to presumption in favor of facts found. *Armstrong v. DuBois*, 90, 95.

Decision as to facts upheld by evidence will be sustained. *Dillon v. Cockcroft*, 90, 649.

Stipulation as to existence of facts not objected to cannot be disregarded on appeal. *Whiting v. Edmunds*, 94, 309.

Case as settled controls as to facts at trial. *Scott v. Morgan*, 94, 508.

#### (d.) Waiver.

Unless party asks to go to jury, he is deemed to have acquiesced in judge's holding of fact. *Mallory v. Tioga R. Co.*, 3 Keyes, 354.

Objection not taken at trial cannot be raised here. *Jenkins v. Wheeler*, 2 Abb. 442.

When right waived by enforcement of part of judgment in appellant's favor. *Bennett v. Van Syckel*, 18, 481.

When objection to answer cannot be raised on appeal. *Ashley v. Marshall*, 29, 494.

Appeal from judgment in appellant's favor, waived by enforcing judgment. *Knapp v. Brown*, 45, 207.

A party's adopting part of judgment in his favor waives right of appeal from that against him when both connected and dependent. *Murphy v. Spaulding*, 46, 556.

Right of appeal not waived by contesting claims on interlocutory accounting. *Barker v. White*, 58, 204.

Agreement to waive—estoppel—dismissal. *Ogdensburgh, etc., R. Co. v. Vermont, etc., R. Co.*, 63, 176.

When party appealing from order in part does not adopt the rest. *Wallace v. Castle*, 68, 370.

Appeal from denial of motion waived by renewal on further affidavits. *Harris v. Brown*, 93, 391.

Complaint containing offer to assign bond and mortgages, objection, not raised on trial, that no tender was made, not available on appeal. *Whitney v. Martine*, 88, 535.

#### (e.) Disposition of judgment.

Where only error is excessive damages, appellate court may affirm on condition of reduction. *Sears v. Conover*, 3 Keyes, 113.

When justice's judgment should not be reversed. *Stephens v. Wider*, 32, 351.

Refusal to nonsuit will be reversed only in clear case. *Metcalf v. Mattisons*, 32, 464.

Judgment affirmed with damages for delay and violation of rule 25. *Maher v. Carman*, 38, 25.

Error as to one item of damages necessitates reversal in toto. *Wolstenholme v. Wolstenholme File Mfg. Co.*, 64, 272.

Judgment cannot be sustained for distinct cause of action from that alleged. *Southwick v. First Nat. Bk. of Memphis*, 84, 420.

Verdict cannot be sustained on ground taken from party by trial judge. *Wangler v. Swift*, 90, 38.

Reversal of assessment erroneous for excess of \$7.01 held proper. *Matter of Deering*, 93, 361.

Upon appeal here under stipulation where order of reversal affirmed, judgment absolute must pass, although evidence would have justified a smaller judgment. *Gray v. Supervisors of Tompkins*, 93, 603.

### APPEARANCE.

Voluntary, equivalent to service of summons and complaint. *Christal v. Kelly*, 88, 285.

See ATTORNEY AND CLIENT; JUDGMENT.

### Application of Payments.

See PAYMENT.

### APPORTIONMENT.

Rent leases executed by testator, accruing after termination of life estate, cannot be apportioned between life tenant and remainderman, but go to the latter. *Marshall v. Moseley*, 21, 280.

See LANDLORD AND TENANT; WILL.

### APPRENTICE.

Power of commissioners of public charities of New York city to bind. *People v. Weissenbach*, 60, 385.

Released from obligation to master by his voluntary enlistment in government military service. *Johnson v. Dodd*, 56, 76.

See MASTER AND SERVANT.

### APPROPRIATION.

A letter advising consignee of draft to order of a third person, payable when the goods are sold, is a specific appropriation. *Lowery v. Steward*, 25, 239.

### Appurtenances.

See DEED; EASEMENT.

### ARBITRATION AND AWARD.

What is general submission — partial award invalid — but not unless omitted matter was brought to arbitrator's attention. *Jones v. Welwood*, 71, 208.

What is a conditional submission. *Merritt v. Thompson*, 27, 225.

Construction of submission — immaterial errors of arbitrators. *Fudickar v. Guardian Mut. Life Ins. Co.*, 62, 392.

Submission by agent — when wife of principal bound by. *Smith v. Sweeny*, 35, 291.

Agreement to discontinue trade or pay damages — submission as to, when valid. *Curtis v. Gokey*, 68, 300.

Executors may submit — extending time by parol — mutual promises — guaranty of performance of award. *Wood v. Tunnickliff*, 74, 38.

Force of agreement to arbitrate disputes arising under contract — construction of, as to canal tolls. *President, etc., of Delaware and Hudson Canal Co. v. Pennsylvania Coal Co.*, 50, 250.

Executory covenant not discharged by parol arbitration — sealed submission changed to parol by parol agreement to accept — estoppel. *French v. New*, 2 Abb. 209.

Married woman may submit to arbitration. *Pulmer v. Davis*, 28, 242.



Agreement to arbitrate operating as cancellation of lease. *Harris v. Hiscock*, 91, 340.

Arbitration of claim to freehold in realty is absolutely void and not to be ratified. *Wiles v. Peck*, 26, 42.

Controversy as to equitable title to lands cannot be submitted. *Olcott v. Wood*, 14, 32.

When award within submission. *Curtis v. Gokey*, 68, 300.

Submission between partnership and creditor — when bar to action against one partner — conflict of laws — omission to cover some property. *Backus v. Fobes*, 20, 204.

Submission of cause of action to arbitration works discontinuance of action thereon, although arbitrators do not consent to act, and the submission is not acknowledged. Omission to appeal from order setting cause down for trial does not waive submission. *McNulty v. Solley*, 95, 240.

Covenant in lease for arbitration as to value of premises as basis of rent — arbitrators not agreeing, and being about to appoint an umpire, as provided, court will not enjoin them and adjudge rights of parties — construction of covenant. *Livingston v. Sage*, 95, 289.

Construction of award — indorsement of three where but two had signed. *Ott v. Schroepfel*, 5, 432.

Award less comprehensive than submission is prima facie valid. *Id.*

Award embracing matters submitted and others not submitted is good as to former, and the latter may be disregarded. *Doke v. James*, 4, 568.

Award being delivered, arbitrators cannot make another to cure error. *Id.*

Evidence to contradict the intention expressed on face of the award is incompetent. *Id.*

On submission to three, providing that any two may sign award, the three must sit and hear. *Bulson v. Lohnes*, 29, 291; *Cruger v. Hudson River R. Co.*, 12, 190.

Submission is valid without agreement for judgment on award. *Howard v. Sexton*, 4, 157.

Arbitrators may act without being sworn. *Id.*

Failure to take oath may be waived — when two disagree and a third is brought in there must be a rehearing. *Day v. Hammond*, 57, 479; 15 Am. Rep. 522.

Error of judgment no ground for setting aside award. *Perkins v. Giles*, 50, 228; *Morris Run Coal Co. v. Salt Co. of Onondaga*, 58, 687.

Award set aside for refusal to hear pertinent and material testimony — court determines whether arbitrators exceeded or refused to exercise powers — when decision not reviewable. *Halstead v. Seaman*, 82, 27; 37 Am. Rep. 536.

Award without evidence if hearing waived valid and bars action on claim. *Wiberly v. Matthews*, 91, 648.

Agreement after written submission to accept parol award, void as to a covenant under seal. *French v. New*, 28, 147.

Consent to accept copy of award is binding. *Gidley v. Gidley*, 65, 169.

Provision in contract that disputes should be settled by arbitrators, no bar to action on contract. *Haggart v. Morgan*, 5, 422.

And the submission is no bar where the arbitrators have failed to make award within the limited time. *Id.*

Award is bar to suit on original cause of action — discharges surety when it extends time of payment. *Coleman v. Wade*, 6, 44.

Award, to operate as a bar, must be pleaded. *Brazill v. Isham*, 12, 9.

Award must be certain and final. *Hiscock v. Harris*, 74, 108.

By State auditors, may be impeached for the claimant's fraud. *State of Michigan v. Phenix Bank*, 33, 9.

Action lies in Supreme Court on award, although submission provides for judgment in County Court. *Burnside v. Whitney*, 21, 148.

When submission revoked by one party pending hearing, the other, paying the arbitrators' fees, may recover them from him. *Miller v. Prest. of Junction Canal Co.*, 41, 98.

**ARCHITECTS.**

Action for pay for plans — effect of taking them back. *Nourry v. Lord*, 3 Abb. 392; 2 Keyes, 617.

See CONTRACT; MECHANICS' LIEN.

**ARREST (CIVIL).**

Laws 1879, chapter 542, as to arrest when complaint charges fraud does not apply to actions then commenced. *Humphrey v. Hayes*, 94, 594.

Reasonably clear case must be made. *Cormier v. Hawkins*, 69, 188.

Affiant not required to state sources of his knowledge of matters alleged positively. *Pierson v. Freeman*, 77, 589.

Sworn complaint is affidavit for arrest. *Palmer v. Hussey*, 59, 647.

Cannot be granted on complaint setting out two causes of action, upon only one of which an arrest is proper. *Bowen v. True*, 53, 640.

Cannot issue on complaint stating a bailable and a non-bailable cause of action. *Madge v. Puig*, 71, 608.

Complaint need not affirmatively show cause for arrest, when it is outside cause of action. *Bowery Nat. Bk. v. Duryee*, 74, 491.

In action on judgment of another State, defendant liable to arrest if original cause of action would have warranted. *Baxter v. Drake*, 85, 502.

To justify an execution, under Code of Procedure, the record need not show liability to arrest; order of arrest is sufficient. *Corwin v. Freeland*, 6, 560.

Arrest and attachment proper in same action. *Rockford, etc., R. Co. v. Boody*, 56, 456.

Practice as to — pleading and evidence when right to is dependent on extrinsic facts. *Segelken v. Meyer*, 94, 473.

When order may issue on judgment modified so that execution cannot issue. *Mott v. Union Bank*, 4 Trans. App. 291.

Banker receiving deposits, knowing his hopeless insolvency. *Anonymous*, 67, 598.

Party who has elected to take judgment as for goods sold cannot maintain order of arrest for conversion. *Fields v. Bland*, 81, 239.

In action to recover personal property, where defendant has sold it to put it beyond the owner's reach. *Barnett v. Selling*, 70, 492.

Not proper where action is founded on agent's acceptance for moneys collected. *Farmers and Mechanics' Nat. Bk. of Buffalo v. Sprague*, 52, 605.

When constructive factor may be arrested. *Standard Sugar Refinery v. Dayton*, 70, 486.

Under Code of Pro., § 179, sub. 4, cannot be had except for actual personal fraud. *Hathaway v. Johnson*, 55, 93; 14 Am. Rep. 186.

Not proper here for cutting down telegraph line in another State. *American Union Telegraph Co. v. Middleton*, 80, 408.

Police property clerk detaining stolen property under order of court, not liable to. *Simpson v. St. John*, 93, 363.

Sheriff discharged from liability by approval of bail by default, and default cannot be opened. *Lewis v. Stevens*, 93, 57.

When bail not exonerated by surrender under Code of Pro., § 179, sub. 3 — sheriff liable under section 201. *McKenzie v. Smith*, 48, 143.

Where sureties fail to justify, court may exonerate sheriff on his surrender of prisoner to custody. *Brady v. Brundage*, 59, 310.

After giving bail defendant has right to be at large until failure of bail to justify — Code, § 186 et seq. *Arteaga v. Conner*, 88, 403.

While debtor is imprisoned creditor cannot proceed against sureties on securities. *Koenig v. Steckel*, 58, 475.

After defendant's body taken on execution, order of arrest not revived by reversal of the judgment. *People v. Bowe*, 81, 43.

Undertaking in unauthorized form, void. *Cook v. Freudenthal*, 80, 202.

Undertaking accepted by sheriff, when valid as agreement of parties though not in pursuance of statute — surrender — laches. *Toles v. Adee*, 84, 222.

Bail may be given after execution against property is issued. *Bostwick v. Goetzal*, 57, 582.

When plaintiff cannot claim money deposited under Code of Pro., § 197. *Commercial Warehouse Co. v. Graber*, 45, 393.

Surety on bond for discharge released by neglect to proceed against principal. *Toles v. Adeo*, 91, 562.

On execution, remedy for illegal. *Smith v. Knapp*, 30, 581.

See FALSE IMPRISONMENT ; INSOLVENCY.

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**Arson.**

See CRIMINAL LAW.

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**Assault.**

See CRIMINAL LAW.

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**ASSAULT AND BATTERY.**

Not justifiable in preventing unauthorized use of right of way. *McMillan v. Cronin*, 75, 474.

Evidence of provocation ; of plaintiff's bad character ; of specific acts of immorality of witness. *Corning v. Corning*, 6, 97.

In resisting attempt to cut hay on side of highway—evidence of title in defendant competent. *Bliss v. Johnson*, 73, 529.

Nonsuit—joint assault, defect of evidence against one—motion for discharge. *Labar v. Koplin*, 4, 547.

See DAMAGES ; EVIDENCE ; PLEADING.

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**ASSESSMENT.**

For street improvements according to benefit is constitutional. *People v. Mayor, etc.*, 4, 419.

For improvement is not "taxation." *Roosevelt Hospital v. Mayor, etc.*, 84, 108.

An assessment where only two of the three assessors acted is void, and cannot be cured by ratification by the common council. *Doughty v. Hope*, 1, 79.

Requisites of publication of redemption notice. *Id.*

Commissioner to assess benefit may be trustee of society to be assessed—assessment of church property—death of one assessor. *People v. Mayor, etc.*, 63, 291.

Assessors having jurisdiction not personally liable for erroneously overruling claim of exemption. *Foster v. Van Wyck*, 2 Abb. 167 ; 3 Trans. App. 196.

When assessors not individually liable for erroneous assessment. *Williams v. Weaver*, 75, 30.

Assessors individually liable for assessment without jurisdiction. *Mygatt v. Washburn*, 15, 316.

Assessors liable for error in determining question of residence of owner of personal property and thereby assessing a non-resident. *Dorwin v. Strickland*, 57, 492.

Assessors personally liable for knowingly assessing lands of non-resident to owner personally—estoppel by acquiescence of agent. *Hilton v. Fonda*, 86, 339.

For paving—burden of proof to vacate—"prior paving." *Matter of Petition of Brady*, 85, 268.

For sidewalks, under Laws of 1854, chapter 384—action to annul certificate of sale—costs. *Newell v. Wheeler*, 48, 486.

For drainage—void unless grant of easement has been procured. *People v. Haines*, 49, 587.

Of consequential damages of land-owners for grading street, when void. *Howell v. City of Buffalo*, 15, 512.

For street improvement, when a lien. *Morange v. Mix*, 44, 315.

Void when not made against owners. *Chapman v. City of Brooklyn*, 40, 372.

Made by village authorities, when not assailable collaterally for want of jurisdiction. *Porter v. Purdy*, 29, 106.

When further may be ordered by city. *Meech v. City of Buffalo*, 29, 198.

For expense to gas company by reason of street improvement where pipes were relaid not allowable against adjoining land-owners. *Matter of Deering*, 93, 361.

For local improvement—when not void, although benefited lands omitted. *Baldwin v. City of Oswego*, 2 Keyes, 132.

For local improvement — oath of commissioners made void by addition of "to the best of his ability" — commissioners may not require objections to be made in writing unless statute so directs — waiver of defect. *Merritt v. Village of Port Chester*, 71, 309; 27 Am. Rep. 47.

When action lies to set aside. *Hatch v. City of Buffalo*, 38, 276.

When action will not lie to set aside. *Guest v. City of Brooklyn*, 69, 506.

When may be canceled of record. *Curnen v. Mayor*, 79, 511.

Having been judicially declared void, moneys collected under it may be recovered without its being vacated. *Horn v. Town of New Lots*, 83, 100; 38 Am. Rep. 402.

Where assessors err in determining what property is benefited by improvement, remedy is certiorari, not action. *Kennedy v. City of Troy*, 77, 493.

Payment of an assessment for local improvement, regular on its face, is not voluntary and may be recovered back on its being set aside. *Peyser v. Mayor, etc.*, 70, 497; 26 Am. Rep. 624.

Payment of apparently valid but really invalid assessment may be recovered back. *Strusburgh v. Mayor, etc.*, 87, 452.

When action lies by tenant covenanting "to pay all assessments" to recover back money paid on assessment afterward set aside. *Purcell v. Mayor, etc.*, 85, 330.

Under act of 1871, ch. 670, § 12, when voidable for fraud. *Dederer v. Voorhies*, 81, 153.

Assessment pursuant to ex parte order of court, not conclusive on stockholder in action to recover same. *Cuykendall v. Corning*, 88, 129.

If record does not show petitioner assessed, fatal to application to vacate. *Matter of Churchill*, 82, 288.

Assessors cannot be compelled by mandamus to make oath to assessment-roll. *People v. Fowler*, 55, 252.

See BANK; CONSTITUTIONAL LAW; CORPORATION; INSURANCE; LANDLORD AND TENANT; NEW YORK CITY; TAXATION.

## ASSIGNMENT.

Parol, of cause of action valid. *Hooker v. Eagle Bank of Rochester*, 30, 83.

Consideration is an essential element to support an equitable assignment. *Tallman v. Hoey*, 89, 537.

Expression of consideration in. *Chautauque County Bank v. Risley*, 19, 369.

Of thing in action presumed to be upon sufficient consideration. *Eno v. Crooke*, 10, 60.

Order on specified fund not assignment unless on consideration. *Alger v. Scott*, 54, 14.

Of non-negotiable chose in action by one having apparent ownership confers title on bona fide purchaser, but recital is not evidence of valuable consideration against real owner. *Moore v. Metropolitan Nat. Bk.*, 55, 41; 14 Am. Rep. 173.

Order for money due from another, when is. *Hall v. City of Buffalo*, 2 Abb. 301.

A bill of exchange drawn against a consignment, and a mere letter of advice, do not operate to appropriate the proceeds to payment of the bill. *Cowperthwaite v. Sheffield*, 3, 243.

Joint owner cannot assign joint property. *Gates v. Andrews*, 37, 657.

Fraudulent — when no defense to creditor at large in possession. *Andrews v. Durant*, 18, 496.

Of land, when declared fraudulent, trustee not accountable for rents received and applied before suit or lien. *Collumb v. Read*, 24, 505.

Of stock — construction — continuing security. *Merchants' Nat. Bk. of Whitehall v. Hall*, 83, 338; 38 Am. Rep. 434.

Of chose in action, cannot be impeached for fraud by attaching creditor in defense of action by assignee for conversion. *Castle v. Lewis*, 78, 131.

When order by contractor on municipal board amounts to equitable assignment. *People v. Comptroller of City of New York*, 77, 45.

Order on fund in hands of comptroller of city is an assignment. *Hall v. City of Buffalo*, 1 Keyes, 193.

When order on fund is an equitable. *Brill v. Tuttle*, 81, 454; 37 Am. Rep. 515.

Equitable — order for moneys. *Southard v. Walsh*, 77, 301.

Of cause of action — not general. *Tiemeyer v. Turnquist*, 85, 516; 39 Am. Rep. 674.

Of chattels after conversion gives assignor right of action — consideration not to be inquired into by strangers. *McKeage v. Hanover Fire Ins. Co.*, 81, 38; 37 Am. Rep. 471.

Right of re-entry for non-payment of rent is assignable. *Van Rensselaer v. Ball*, 19, 100.

Cause of action for conversion is assignable. *Richtmeyer v. Remsen*, 38, 206.

Of all one's interest in goods carries right of action against carrier for non-delivery. *Waldron v. Willard*, 17, 466.

Right of action for money lost in gaming is assignable. *Meech v. Stoner*, 19, 26.

The interest of next of kin of person killed by negligence in recovery therefor is assignable. *Quinn v. Moore*, 15, 432.

Of chattels to be manufactured, as collateral security, is valid. *Smith v. Beatie*, 31, 542.

Of expectancy, to secure existing debt, valid. *Stover v. Eylesheimer*, 3 Keyes, 620; 4 Abb. 309.

Of mere expectancy is valid in equity when the subject comes into existence. *Field v. Mayor, etc.*, 6, 179.

Where parts of a demand are severally assigned, a suit may be maintained by one of the assignees to enforce his part. *Id.*

Payment by debtor to original creditor after notice of assignment is no defense against assignee. *Id.*

Of expectancy in trust fund, when valid — consideration — gift. *Ham v. Van Orden*, 84, 257.

Cause of action may be assignable, although assignor or assignee may be disabled from maintaining action in this State. No fraud to assign to resident to avoid objection to an attachment by non-resident. *McBride v. Farmers' Bank*, 26, 450.

Contract to plant and sell crop, assignable by buyer without seller's assent. *Sears v. Conover*, 4 Abb. 179.

Construction and validity of equitable assignment of unenforceable claims against New York city. *Jones v. Mayor of New York*, 90, 387.

Claim for balance of unpaid purchase-money of chattels does not pass by transfer of acceptances given for part of price but not received in payment. *Battle v. Coit*, 26, 404.

Of judgment against manufacturing corporation carries remedy against trustees for not signing annual report. *Bolen v. Crosby*, 49, 183.

Assignment of debt held valid without notice to debtor. *Coates v. First Nat. Bk. of Emporia*, 91, 20.

Assignee of non-negotiable chose in action must notify debtor in order to protect himself against payment to assignor — constructive notice. *Heermans v. Ellsworth*, 64, 159.

Assignee of judgment takes subject to equities. *Blydenburgh v. Thayer*, 1 Trans. App. 221; 1 Abb. 156.

Sub-assignee of mortgage takes subject to equities between his assignor and the mortgagee. *Bush v. Lathrop*, 22, 535.

The assignment of the principal debt carries with it the necessary collaterals. *Dorsheimer v. Nichols*, 1 Abb. 519.

Absolute, may be shown by parol to be a collateral security. *Mulford v. Muller*, 1 Keyes, 31.

Of claim in suit, as collateral security, does not render assignee liable for costs. *Wolcott v. Holcomb*, 31, 125.

See CONTRACT; CORPORATION; INSURANCE; LANDLORD AND TENANT; MORTGAGE; NEGOTIABLE INSTRUMENT; PATENT.

## ASSIGNMENT FOR CREDITORS.

Direct to certain creditors is not in trust — acceptance presumed — delivery — foreign attachment — conflict of laws. *Van Buskirk v. Warren*, 2 Keyes, 119.

Executed in name of debtor and acknowledged by attorney for that purpose valid — act 1860, chapter 340. *Lowenstein v. Flaurand*, 82, 494.

By copartners, not void because one of assignors is an infant. *Yates v. Lyon*, 6, 344.

Of all debtor's property, more fully described in schedule, carries property not specified in schedule. *Platt v. Lott*, 17, 478.

Of all property, referring to schedule, carries it, although schedule names none — partnership may prefer debts not of firm. *Turner v. Jaycox*, 40, 470.

Preferred creditor taking place of assignee and purchasing preferred debts — duty to other creditors. *Chapman v. Thomas*, 4 Keyes, 216.

When not shown to be fraudulent in fact — omission of property from schedule — relationship of assignee to assignor. *Shultz v. Hoagland*, 85, 464.

By non-resident, carries property here. *Ockerman v. Cross*, 54, 29.

Under one for benefit of single creditor, United States have no right to priority. *Bouchand v. Dias*, 1, 201.

General assignment with preferences valid if free from fraud. *Hauselt v. Vilmar*, 76, 630.

When not void in law. *Livermore v. Northrup*, 44, 107.

Assignee may not carry on business — not entitled to commissions on value of mortgaged property, but only to what he got therefor. *Matter of Accounting of Dean*, 86, 398.

Provision for working up stock avoids. *Dunham v. Waterman*, 17, 9.

Where assignee is a lawyer, provision for counsel fee avoids. *Nichols v. McEwan*, 17, 22.

Void for agreement with preferred creditors to enable assignor to continue business in name of another. *Haydock v. Coope*, 53, 68.

Under New Jersey statute — construction of statute — when assignment valid. *Boese v. King*, 78, 471.

What is finding of good faith — not void for exoneration of assignee for liability for uncollectible debts — may authorize appointment of attorney. *Casey v. Janes*, 37, 608.

Solvency does not avoid; direction to convert into cash. *Ogden v. Peters*, 21, 23.

Construction of — rule that general words are restricted by schedule subordinate to rule that intention shall govern. *Emigrant Ind. Sav. Bank v. Roche*, 93, 374.

Direction to pay debts "to grow due," valid; provision to pay debts for which assignor "may be rendered liable," applies only to past debts. *Brainerd v. Dunning*, 30, 211.

Authorizing sale on credit, void. *Barney v. Griffin*, 2, 365; *Nicholson v. Leavitt*, 6, 510; *Kellogg v. Slauson*, 11, 302; *Porter v. Williams*, 9, 142; *Townsend v. Stearns*, 32, 209.

And cannot be cured by new instrument. *Porter v. Williams*, 9, 142.

Direction to "convert into cash, or otherwise dispose of to best advantage," avoids. *Rapalee v. Stewart*, 27, 310.

Authority to convert property into "money or available means" renders void. *Brigham v. Tillinghast*, 13, 215.

Authority to sell at such time and in such manner as seems to assignee most for benefit of creditors does not avoid. *Townsend v. Stearns*, 32, 209.

Authority to assignee to convert into money within such convenient time as to him may seem meet, at public or private sale, does not avoid. *Benedict v. Huntington*, 32, 219.

When not construed to authorize sale on credit. *Kellogg v. Slauson*, 11, 302.

Not void for forbidding sale on credit, nor for conditional preference, nor for directing payment of sheriff's fees on certain attachment proceedings against assigned goods. *Grant v. Chapman*, 38, 293.

To pay specified creditors, without providing for others, and reconvey residue, void on its face. *Barney v. Griffin*, 2, 365.

Assignment of part of debtor's property to certain creditors in person, preserving surplus, is valid, being but a mortgage. *Leitch v. Hollister*, 4, 211.

For one particular creditor and return of surplus valid. *Dunham v. Whitehead*, 21, 131.

Provision that assignee shall not be liable for loss, except from gross negligence or willful misfeasance, renders void. *Litchfield v. White*, 7, 438.

Omission to assign right to redeem lands from execution does not vitiate. *Dow v. Platner*, 16, 562.

Assignor may confer power to compromise doubtful debts. *Id.*

When authority to compromise avoids. *McConnell v. Sherwood*, 84, 522; 38 Am. Rep. 537.

Power to compromise—how construed—evidence—declarations of assignor after assignment, incompetent. *Coyne v. Weaver*, 84, 386.

It is lawful to prefer those who will release for a certain amount. *Spaulding v. Strang*, 37, 135.

Preference of certain creditors to a certain extent, on condition of discharge, not void as against others. *Spaulding v. Strang*, 38, 9.

Preferences lawful—authority to assignee to employ attorneys, etc., and have compensation, not unlawful. *Jacobs v. Remsen*, 36, 668.

Preference with view to benefit assignor avoids. *Elias v. Farley*, 3 Keyes, 398.

Direction for sale and conversion, when not deemed to vest absolute discretion. *Jessup v. Hulse*, 21, 168.

Innocence of assignee will not uphold fraudulent. *Griffin v. Marquardt*, 17, 28.

By corporation, in contemplation of insolvency, void. *Sibell v. Remsen*, 33, 95.

Husband may prefer debt to wife. *Jaycox v. Caldwell*, 51, 395.

Preference of landlord for rent with intent to secure future gratuitous occupation for assignor avoids. *Elias v. Farley*, 2 Abb. 11.

When mortgagee cannot compel assignee to pay taxes. *Matter of Assignment of Lewis*, 81, 421.

Action by assignee of firm against accommodation indorser of note of one partner—indorser being preferred, cannot compel application of moneys. *Leiley v. Bergen*, 67, 346.

By firm, presumptively void, for preferring individual to firm creditors. *Hurlbert v. Dean*, 2 Keyes, 97.

By portion only of partners of firm property cannot be impeached by creditors

of assignors on ground that other partners did not join. *Adee v. Cornell*, 93, 572.

Appropriation by insolvent firm of firm property to individual debts, avoids. *Wilson v. Robertson*, 21, 587.

By insolvent partnership—action by creditor for accounting and distribution—all bound by decree. *Kerr v. Biodgett*, 48, 62.

When cause of action for fraud against partners does not pass by. *Calkins v. Smith*, 48, 614; 8 Am. Rep. 575.

Reservation of surplus in partnership assignment, when fatal. *Collomb v. Caldwell*, 16, 484.

Not avoided by giving priority of payment to a usurious judgment. *Murray v. Judson*, 9, 73; *Chapin v. Thompson*, 89, 270.

Cannot be invalidated by assignor's declarations subsequent—evidence to invalidate. *Cuyler v. McCartney*, 40, 221.

Testimony of assignor that he meant to gain time—what is not direction for immediate sale without regard to creditor's interest—direction to pay amount of notes not due to indorsers and not to holders. *Griffin v. Marquardt*, 21, 121.

When finding of fraud not sustainable. *Putnam v. Hubbell*, 42, 106.

Assignor's remaining in possession unexplained is evidence of fraud, and so are his declarations during possession. *Adams v. Davidson*, 10, 309.

Want of change of possession is only presumptive evidence of fraud. *Ball v. Loomis*, 29, 412.

Evidence inadmissible that parties did not agree that assignee should retain possession. Party impeaching may inquire of assignor his intent in making assignment. *Forbes v. Waller*, 25, 430.

Assignment transfers right of action for wrongful conversion. *McKee v. Judd*, 12, 622.

Assignees may not purchase assigned property. *Colburn v. Morton*, 3 Keyes, 296.

One assignee cannot assign his interest to co-assignees. *Thacher v. Candee*, 3 Keyes, 157.

When assignee may demand assignor's bank deposit as against a demand of the

bank charged against it. *Beckwith v. Union Bank*, 9, 211.

Assignee may sue to set aside fraudulent conveyance by assignor. *McMahon v. Allen*, 35, 403.

Assignee takes title subject to levy under execution. *Mumper v. Rushmore*, 79, 19.

Purchaser from assignee on credit estopped to deny assignee's power so to sell. *Small v. Ludlow*, 20, 155.

And cannot defend on ground that plaintiff took transfer of claim from assignee agreeing to apply it in payment of the cestui que trust. *Id.*

"Misconduct," "incompetency"—what sufficient for removal. *Matter of Petition of Cohn*, 78, 248.

Must be acknowledged. *Hardmann v. Bowen*, 39, 196.

Bill of sale, absolute on face, but really in trust for creditors, must be acknowledged. *Britton v. Lorenz*, 45, 51.

Failure of assignor to make schedule—new assignment. *Juliand v. Rathbone*, 39, 369.

Requirements as to inventory—promissory notes—fraudulent mortgage—verification—delivery. *Pratt v. Stevens*, 94, 387.

Cannot be set aside by simple contract creditor. *Reubens v. Joel*, 13, 488.

Cannot be set aside by receiver appointed in supplementary proceedings. *Kennedy v. Thorp*, 51, 174; *Bostwick v. Menck*, 40, 383.

Not void because bond not approved. *Thrasher v. Bentley*, 59, 649.

Omission to deliver verified schedules not fatal. *Produce Bank v. Morton*, 67, 199.

Effect of assignees not giving security—concurrence of assignees, when necessary—one not giving security cannot act. *Brennan v. Willson*, 71, 502.

Not avoided by subsequent bankrupt proceedings against assignor—filing bond not essential to title of assignee. *Bostwick v. Burnett*, 74, 317.

Action by assignee for proceeds of collections in hands of agent—trust not discharged—assignment of claim to him—

release by executor of deceased partner of assignors. *Stanford v. Lockwood*, 95.

Proceedings to compel accounting by assignee—requisites of petition—absence of bond no defense. *Matter of Assignment of Farnam*, 75, 187.

Action for accounting of assignee—counter-claim. *Duffy v. Duncan*, 35, 187.

Assignee can only be compelled to account for benefit of all creditors. *Schuchle v. Reiman*, 86, 270.

Sureties of assignee not liable upon judgment in favor of creditors, declaring assignment void. *People v. Chalmers*, 60, 154.

Judge of Common Pleas of New York city may act under act of 1860, etc.—referee may not take and state account of assignee. *Matter of Accounting of Morgan*, 56, 629.

Fees of assignee. *Barney v. Griffin*, 2, 365.

Assignor cannot provide higher compensation for assignee than is allowed executors, etc. *Id.*

Not avoided by provision for just and reasonable compensation to assignee. *Campbell v. Woodworth*, 24, 304.

Commissions of assignee are only upon moneys actually received. *Matter of Hulburt*, 89, 259.

Assignee entitled to full indemnity for expenditures. *Colburn v. Morton*, 1 Abb 378.

When assignee for creditors not liable to arrest for disobedience of judgment in action to set aside assignment. *Myers v. Becker*, 95, 486.

See BANKRUPTCY; CONFLICT OF LAWS; INSOLVENCY.

## ASSOCIATION.

When not a partnership—when should not be dissolved by court. *Lafond v. Deems*, 81, 507.

When member cannot be struck from rolls without notice, although he has failed to give notice of change of resi-



dence. *Wachtel v. Noah Widows and Orphans' Society*, 84, 28; 83 Am. Rep. 478.

Member of voluntary unincorporated association cannot maintain action against, nor can assignee. *McMahon v. Rauhr*, 47, 67.

See CORPORATION; MANUFACTURING COMPANY; RELIGIOUS SOCIETY.

### Assumpsit.

See ACTION; CONTRACT; PLEADING.

## ATTACHMENT.

- I. *When attachment lies.*
- II. *Parties.*
- III. *Jurisdiction.*
- IV. *Affidavit.*
- V. *Practice.*
- VI. *Summons and service.*
- VII. *Undertaking.*
- VIII. *Levy.*
- IX. *Motion to vacate or dissolve.*
- X. *Sales.*
- XI. *Costs and fees.*

### I. *When attachment lies.*

Requisites for issue, under 2 R. S. 3, § 1, etc. *Staples v. Fairchilds*, 3, 41; also *Van Alstyne v. Erwine*, 11, 331.

Creditor after judgment may maintain action to enforce lien of, by setting aside fraudulent assignment by debtor. *Mechanics and Traders' Bk. v. Dakin*, 51, 519.

Proceeds of execution in hands of sheriff liable to, against judgment creditor—levy. *Wehle v. Conner*, 83, 231.

May be made of deposit drawn upon by check which has been certified and deposited by another. *Bills v. National Park Bk.*, 89, 343.

Shares of non-resident in foreign corporation doing business here not liable to. *Plimpton v. Bigelow*, 93, 592.

### II. *Parties.*

Against absconding debtor—application showing absconding merely from city of

New York, and not from State, void on face. *Castellanos v. Jones*, 5, 164.

Against foreign corporation—service on trustee. *Wright v. Douglass*, 7, 564.

Non-residence must be distinctly proved, and cannot be inferred from mere addition or description. *Payne v. Young*, 8, 158.

May issue in favor of firm, some members of which are non-resident. *Renard v. Hargous*, 13, 259.

Against non-resident—all creditors share—effect of French concordat. *Matter of Bonuauffé*, 23, 169.

Against one partner may be levied on partnership property. *Smith v. Orser*, 42, 132.

Against foreign corporation—sheriff or plaintiff may assume prosecution of actions brought by the corporation on stock subscriptions—effect of, on other creditors attaching—death of sheriff. *O'Brien v. Glenville Woolen Co.*, 50, 128.

May issue against National bank of another State. *Robinson v. Nat. Bk. Newberne*, 81, 385; 37 Am. Rep. 508.

From State court may not issue against insolvent National bank. *National Shoe and L. Bk. v. Mechanics' Nat. Bk.*, 89, 467.

Against insolvent National bank invalid under Federal statute though bank thereafter increased its capital and paid other debts—Federal statute not repealed by act of July 12, 1883. *Raynor v. Pacific Nat. Bk.*, 93, 371.

### III. *Jurisdiction.*

Requisites of application under 2 R. S. 18, § 62—jurisdiction. *Van Alstyne v. Erwine*, 11, 331.

Jurisdiction of New York city Superior Court to issue. *Kerr v. Mount*, 28, 659.

Requisites of jurisdiction in supplementary proceedings against judgment debtor. *Miller v. Adams*, 52, 409.

### IV. *Affidavit.*

Sufficient statement of applicant's title in affidavit for. *Hall v. Stryker*, 27, 596.

One sued for seizing goods under, may show that prior sale by defendant in attachment to claimant was in fraud of creditors. *Id.*

In justice's court — requisites of affidavit, bond and return. *Bascom v. Smith*, 81, 595.

Affidavit must state that same claimant is "over and above all counter-claims"—construction of affidavit to vacate. *Rupert v. Haug*, 87, 141.

#### V. Practice.

Filing report and recording appointment of trustees, directory. *Wood v. Chupin*, 13, 509.

For contempt, how issued—omission of seal from bond not fatal—pleading. *Kelly v. McCormick*, 28, 318.

Sureties on bond for release cannot raise objection that complaint does not show issue of execution against principal. *Id.*

Merger in judgment. *Lynch v. Crary*, 52, 181.

Attachment and arrest, proper in one action. *Rockford, etc., R. Co. v. Boody*, 56, 456.

When absconding of defendant sufficiently stated. *Mayor, etc., v. Genet*, 63, 646.

Action in Marine Court cannot be commenced by short attachment against resident of county. *Haviland v. Wehle*, 65, 85.

Summons need not be first served—debtor may be non-resident although he has a place of business here. *Wallace v. Castle*, 68, 370.

Jurisdiction—deposition of witness *Allen v. Meyer*, 73, 1.

Publication of summons—order on thirtieth day after granting, publication in one paper on that day and in another on next, invalid. *Taylor v. Troncoso*, 76, 599.

Request of defendant to suspend—estoppel—affidavit may be used on second application—publication of summons—when second attachment valid. *Mojarieta v. Suenz*, 80, 547.

Of judgment cannot be executed by serving copy warrant on attorney. *Matter of Claim of Flandrow*, 84, 1.

Junior attaching creditor could move to set aside prior, for want of jurisdiction in affidavit. *Jacobs v. Hogan*, 85, 243.

Order against third person to deliver debtor's property to sheriff not authorized. *Hall v. Brooks*, 89, 33.

#### VI. Summons and service.

Void for failure to serve or publish summons—not made valid by defendant's appearance. *Blossom v. Estes*, 84, 614.

When voluntary appearance equivalent to service of summons. *Catlin v. Ricketts*, 91, 668.

Service of, upon executor where special administrator acting, insufficient to bind estate. *Matter of Flandrow*, 92, 256.

When last day to serve summons is Sunday, service may be on Monday—misstatement in summons as to time to answer not jurisdictional error, and summons amendable. *Gibbon v. Freel*, 93, 93.

#### VII. Undertaking.

What is non-resident. *Haggart v. Morgan*, 5, 422.

Sureties on bond are estopped from denying non-residence. *Id.*

Bond under 2 R. S. 12, § 55, is not invalid for having but one surety. *Ward v. Whitney*, 8, 442.

In Marine Court attachment good without bond—appearance to set aside, no waiver. *Tiffany v. Lord*, 65, 310.

Moneys deposited in lieu of undertaking on appeal, subject to attachment by third person. *Dunlop v. Patterson Fire Ins. Co.*, 74, 145; 30 Am. Rep. 283.

When action to restrain suit on undertaking to discharge attachment not maintainable. *Kelly v. Christal*, 81, 619.

Undertaking given to discharge attachment—discharge in bankruptcy no defense to action. *McCombs v. Allen*, 82, 114.

#### VIII. Levy.

Levy on real property is effectual without taking actual possession. *Burkhardt v. McClellan*, 1 Abb. 263; *Rogers v. Bonner*, 45, 379.

Levy on securities pledged—what is insufficient specification in notice to holder. *Clarke v. Goodridge*, 41, 210.

How attachment executed on property incapable of manual delivery—notice. *O'Brien v. Merchants and Traders' Fire Ins. Co.*, 50, 128.

Attachment may be levied before service of summons—county judge may issue in Supreme Court in case not triable in his county. *Webb v. Bailey*, 54, 164.

#### IX. Motion to vacate or dissolve.

Need not be made to judge who granted—construction of affidavit to vacate. *Ruppert v. Haug*, 87, 141.

Attachment may not be vacated pending plaintiff's appeal from judgment for part of demand. *Wright v. Rowland*, 4 Abb. 649.

Attachment cannot be discharged by offer to pay judgment from which plaintiff has appealed. *Wright v. Rowland*, 4 Keyes, 165.

Sheriff may uphold seizure by showing that claimant's title is fraudulent—judgment as evidence. *Rinchev v. Stryker*, 28, 45.

On motion to vacate attachment, if affidavits are used by mover plaintiff may introduce affidavits to rebut them. *Yates v. North*, 44, 271.

Neither sheriff nor attaching creditor can maintain suit to set aside debtor's fraudulent assignment of property attached. *Thurber v. Blanck*, 50, 80.

Right of subsequent lienor to vacate or modify attachment—moving papers—proof by affidavit. *Steuben Co. Bank v. Alberger*, 75, 179.

When judgment creditor may move to vacate—statement of material facts on information and belief insufficient. *Steuben Co. Bank v. Alberger*, 78, 252.

Subsequent lienor may move to vacate attachment though levy made under—Code, § 682, means actual, not constructive application. *Woodmansee v. Rogers*, 82, 88.

Denial of motion to vacate on one ground does not bar second motion on another. *Steuben Co. Bank v. Alberger*, 83, 274.

Right of lienor to set aside—voluntary transferee of part of property has right. *Trow's Printing, etc., Co. v. Hart*, 85, 500.

Receiver of National bank, not a party, may move to vacate. *National Shoe and Leather Bank v. Mechanics' Nat. Bank*, 89, 440.

Attachment creditor seeking to vacate prior attachment must prove his levy valid—opinion of attorney is not proof. *Tim v. Smith*, 93, 87.

#### X. Sales.

Interest of principal in sales and collections in hands of agent is "incapable of manual delivery"—principal being member of firm, levy as on credits of firm cannot reach such moneys—assignment by principal before levy. *Greentree v. Rosenstock*, 61, 588.

When attachment does not defeat title under previous sale by unrecorded deed. *Lamont v. Cheshire*, 65, 30.

When payment of moneys to plaintiff on sale under, after vacating of, not a conversion. *Day v. Bach*, 87, 56.

#### XI. Costs and fees.

Fees of sheriff—how regulated in Marine Court. *Tiffany v. St. John*, 65, 314; 22 Am. Rep. 612.

Auctioneer's fees. *Griffin v. Helmbold*, 72, 437.

Attorney's lien held superior to attachment by creditor of client. *Williams v. Ingersoll*, 89, 508.

See CONTEMPT; SHERIFF; SUPPLEMENTARY PROCEEDINGS.

#### Attempt.

See CRIMINAL LAW.

### ATTORNEY AND CLIENT.

- I. Admission of attorneys.
- II. Removal of.
- III. Retainer of.

IV. *Powers of.*V. *Liability of.*VI. *Proceedings against.*VII. *Compensation of.*VIII. *Lien of.*IX. *Substitution of.*X. *Privileged communications.*XI. *Client.*I. *Admission of attorneys.*

Constitution does not restrict legislature in determining qualifications. *Matter of Cooper*, 22, 67.

Citizen of another State not entitled to admission as matter of right. *Matter of Henry*, 40, 560.

Alien cannot be admitted to the bar. *Matter of O'Neill*, 90, 584.

II. *Removal of.*

Disbarment — practice. *In re Percy*, 36, 651.

May be subjected to costs for improperly instituting disbarment proceedings and imprisoned for non-payment. *Matter of Kelly*, 62, 198.

Attorney may be disbarred for colluding to procure fraudulent divorce. *Matter of Gale*, 75, 526.

Order disbaring for misconduct based on evidence reviewable on facts in this court — affidavit may originate proceedings but is not evidence on the trial. *Matter of Eldridge*, 82, 161; 37 Am. Rep. 558.

What justifies — mode of proceeding — service of copy of charges — pardon — order as bar. *Matter of an Attorney*, 86, 563.

III. *Retainer of.*

Being enjoined as attorney for one client does not limit his professional action for another having different interests. *Slater v. Merritt*, 75, 268.

Party in court on attachment to punish for contempt may be represented by. *Watrous v. Kearney*, 79, 496.

IV. *Powers of.*

May demand assignment under non-imprisonment act. *Steward v. Biddlecum*, 2, 103.

Stipulation postponing execution fraudulently issued may be valid. *Read v. French*, 28, 285.

Attorney may not purchase client's land in litigation. *Case v. Carroll*, 35, 385.

Of another State may recover here as assignee. *Winfield v. Potter*, 38, 67.

Cannot settle and release cause of action without authority. *Barrett v. Third Ave. R. Co.*, 45, 628.

May not satisfy judgment without payment. *Beers v. Hendrickson*, 45, 665.

Has no implied power to compromise or release judgment without payment, nor to settle suit. *Mandeville v. Reynolds*, 68, 528.

Cannot consent to commencement of new action against his client or create new cause of action. *Arthur v. Homestead Fire Ins. Co.*, 78, 462; 34 Am. Rep. 550.

V. *Liability of.*

Not liable for referee's fees. *Judson v. Gray*, 11, 408.

When liable for costs. *Voorhees v. McCartney*, 51, 387.

Collecting and paying over, cannot be ordered to refund. *Matter of Wilmerdings v. Fowler*, 55, 641.

Liable to sheriff for his fees on execution. *Campbell v. Cothran*, 56, 279.

Not liable for services of stenographer. *Bonyng v. Field*, 81, 159.

Only liable for sheriff's fees on execution when judgment satisfied, or execution countermanded. *Van Kirk v. Sedgwick*, 87, 265.

When may not be compelled to surrender insurance policy. *Matter of H—*, an Attorney, 87, 521.

Neglect of attorney to pay over moneys to which plaintiff was entitled though alleged to have been received in a fiduciary capacity and converted, held not to constitute a tort. *Segelken v. Meyer*, 94, 473.

Refusing to state whether his client directed execution sale, estopped from de-

nying his own responsibility. *Ford v. Williams*, 24, 359.

#### VI. Proceedings against.

When not liable to punishment as for contempt for abuse of confidence of court. *People v. Randall*, 73, 416.

In an action brought by a client to set aside a transaction with an attorney the burden is on the attorney to show want of fraud. *Mason v. Ring*, 3 Abb. 210.

When purchase of chose in action by prohibited (2 R. S. 288, § 71), using to compel party to do particular thing not violation of statute. *Moses v. McDivitt*, 88, 62.

#### VII. Compensation of.

What evidence of value admissible — account rendered and its effect. *Case v. Hotchkiss*, 1 Abb. 324.

Assignment of judgment for costs to attorney prevents set-off against debt from client to judgment debtor. *Ely v. Cook*, 28, 365 ; 2 Abb. 14.

Assignment of prospective costs to attorney cannot be defeated by set-off of a prior judgment. *Perry v. Chester*, 53, 240.

An attorney cannot be deprived of his contingent compensation where his client settles without his consent. *Marsh v. Holbrook*, 3 Abb. 176.

Attorney entitled to compensation irrespective of merits of suit — account stated. *Case v. Hotchkiss*, 3 Keyes, 334.

Contract for contingent compensation — settlement by client. *Hitchings v. Van Brunt*, 38, 335.

Attorney who is a broker cannot charge counsel fees for conversations about the business unless by agreement. *Walker v. American Nat. Bk.*, 49, 659.

Partnership of attorneys may recover for services although one of them was not admitted to practice in the particular court. *Harland v. Lilienthal*, 53, 438.

Provision that they may contract for compensation is not retroactive. *Whitehead v. Kennedy*, 69, 462.

Attorney assigned to defend prisoner cannot recover for services from county. *People v. Board of Supervisors of Niagara County*, 78, 622.

Receiver of insurance company not liable for services of attorney to company after receiver appointed. *Barnes v. Newcomb*, 89, 108.

Compensation of attorney cannot be fixed in proceeding of which client has not notice. *Goddard v. Stiles*, 90, 199.

Facts held to constitute unprofessional conduct furnishing defense to action for services. *Chatfield v. Simonson*, 92, 209.

Attorney for clients not of record, not entitled to their funds in court not procured by his services or to enforcement of lien thereon for services. *Attorney-Gen. v. North. Amer. L. Ins. Co.*, 93, 387.

Contract to conduct proceeding is entire, and withdrawal by attorney without cause or notice forfeits right to compensation — employment by client of counsel unfriendly to attorney sufficient cause for withdrawal. *Tenney v. Berger*, 93, 524 ; 45 Am. Rep. 263.

Acting adversely to client's interest, not entitled to compensation — bound by contract as to terms of service. *Andrews v. Tyng*, 94, 16.

#### VIII. Lien.

Code has not abolished lien for costs. Lien extends to any portion of damages agreed. *Rooney v. Second Ave. R. Co.*, 18, 368.

Has lien on judgment for costs — when payment to nominal party is fraud against real party in interest. *McGregor v. Comstock*, 28, 237.

When judgment is for damages and costs notice must be given. *Marshall v. Meech*, 51, 140 ; 10 Am. Rep. 572.

Reversal — notice — assignment. *Pulver v. Harris*, 52, 73.

One attorney has no lien for individual claim on client's papers held by his firm. *Bowling Green Sav. Bk. v. Todd*, 52, 489.

Lien for compensation — agreement for contingent fees — settlement by client.

## 54 ATTORNEY AND CLIENT, IX.—ATTORNEY-GENERAL.

*Wright v. Wright*, 70, 96, 98; *Coughlin v. New York Cent., etc., R. Co.*, 71, 443; 27 Am. Rep. 75.

Attorney has lien for services to executor on moneys of estate. *Matter of Application of Knapp*, 85, 284.

When invalid as against estate on employment of executor—tender—parties. *Lawrence v. Townsend*, 88, 24.

When effectual. *Ward v. Craig*, 87, 550.

Agreement with client that services shall be paid from moneys from suit creates lien superior to attachment. *Williams v. Ingersoll*, 89, 508.

On judgment does not prevent discharge of judgment on account of bankruptcy. *Blumenthal v. Anderson*, 91, 171.

### IX. Substitution of.

Notice of motion to quash when notice to appoint another attorney has been given. *Jewell v. Schouten*, 1, 241.

Refusing to go on with suit because client does not furnish money, court may substitute another with discretion as to terms. *Matter of H.* —, 93, 381.

### X. Privileged communications.

Confidential communications. *Mulford v. Muller*, 3 Abb 330; *Yates v. Olmsted*, 56, 632.

Words used in a legal proceeding and pertinent to the controversy are privileged. *Garr v. Selden*, 4, 91.

Communication by client to attorney in presence of opposing party not confidential. *Whiting v. Barney*, 30, 330.

Attorney employed to draw deed may testify to directions received from and transactions between both parties. *Hebbard v. Haughian*, 70, 54.

Suit need not be pending—evidence of opinion as to whether attorney was acting as counsel, incompetent. *Bacon v. Frisbie*, 80, 394; 36 Am. Rep. 627.

To what exclusion extends—common attorney of both parties. *Root v. Wright*, 84, 72; 28 Am. Rep. 495.

### XI. Client.

When client bound by attorney's directions to sheriff for levy—construction of stipulation. *Armstrong v. Dubois*, 4 Keyes, 291.

Attorney issuing executions and directing levy according to client's direction and indemnifying sheriff not liable as trespasser. *Ford v. Williams*, 13, 578.

Where a client assigns to his attorney an interest for a grossly inadequate price, although to defraud his creditors, reassignment will be ordered. *Ford v. Harrington*, 16, 285.

When client liable for costs to opposite party in ejectment, although prosecution without his knowledge. *Hamilton v. Wright*, 37, 502.

When suitor has sustained damage by contempt of attorney remedy is by summary proceeding. *Foster v. Townshend*, 68, 203.

Agreement for contingent fee—collusive settlement by client when upheld—attorney cannot acquire interest in cause of action not assignable. *Coughlin v. New York Cent., etc., R. Co.*, 71, 443; 27 Am. Rep. 75.

Client liable for attorney's proceeding under statute subsequently declared unconstitutional. *Poucher v. Blanchard*, 86, 256.

Client discontinuing action cannot question regularity on behalf of attorney. *McBratney v. Rome, etc., R. Co.*, 87, 467.

See COSTS; EVIDENCE; JUDGMENT; TRIAL.

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## ATTORNEY-GENERAL.

Cannot be compelled to bring suit to try title to office. *People v. Fairchild*, 67, 334.

May waive appeal and discontinue action to annul contract for canal repairs—when oral agreement binding. *People v. Stephens*, 52, 306.

Unless authorized by statute cannot appoint special counsel to act for him. *Attorney-General v. Continental Life Ins. Co.*, 88, 571.

**Attornment.**

See LANDLORD AND TENANT.

**AUCTION.**

Purchaser cannot avoid purchase at, on ground of prior private sale by owner. *Minturn v. Main*, 7, 220.

If secret vendee, bids sale is voidable, but purchaser must offer to rescind and to return goods. *Id.*

Auctioneer may maintain action for price although he has received his fees. *Id.*

Where auctioneer strikes off property for less than he is authorized to do, the owner is not bound but he is. *Bush v. Cole*, 28, 261.

Auctioneer not liable in damages on contract of sale where he made no memorandum. *Baltzen v. Nicolay*, 53, 467.

An agreement signed by one employing auctioneer alone is sufficient under the

statute to authorize commissions in excess of the prescribed rate. *Carpenter v. Le Count*, 93, 562.

Of lands — on vendor's failure to make title purchaser may recover his deposit with interest — judgment against vendor is bar to action against auctioneer — payment to clerk of court for vendor. *Cockroft v. Muller*, 71, 367.

See JUDICIAL SALE.

**Average.**

See INSURANCE ; SHIP AND SHIPPING.

**Avoidance.**

See CONTRACT ; INFANCY.

**Award.**

See ARBITRATION AND AWARD.

**B.**

**Bail.**

See ARREST AND BAIL ; CRIMINAL LAW.

**BAILMENT.**

- I. *What constitutes.*
- II. *What does not constitute.*
- III. *Bailee's lien.*
- IV. *Surrender by bailee.*
- V. *Denial of title by bailee.*
- VI. *Conversion by bailee.*

I. *What constitutes.*

Delivery of wheat to be made into flour, when bailment and not sale. *Mallory v. Willis*, 4, 76 ; *Wadsworth v. Allcott*, 6, 64 ; *Foster v. Pettibone*, 7, 433.

Evidence to show ownership as executors ; of usage, inadmissible, when terms are plain. *Wadsworth v. Allcott*, 6, 64.

II. *What does not constitute.*

Receipt, when does not constitute. *Eaton v. Alger*, 2 Abb. 5.

Tow-boat owners are not bailees. *Wells v. Steam Nav. Co.*, 2, 204.

Agreement by a miller to take wheat and give flour therefor is not a bailment, but a sale. *Norton v. Woodruff*, 2, 153.

Transfer of note on agreement to account for it, not a bailment. *Eaton v. Alger*, 2 Keyes, 41.

III. *Bailee's lien.*

One hired to saw a certain quantity of logs, sawing and delivering part has a

lien therefor on the rest. *Morgan v. Congdon*, 4, 552.

Bailee can hold for lien against attachments against bailor. *Truslow v. Putnam*, 4 Abb. 425.

#### IV. Surrender by bailee.

Delivering to bailor's wife, not equivalent to delivery to bailor when bailee was ordered not to deliver except on bailor's written direction. *Koving v. Manly*, 49, 192; 10 Am. Rep. 346.

Bailee may surrender to true owner. *Western Trans. Co. v. Barber*, 56, 544.

#### V. Denial of title by bailee.

Bailee of money to be paid on condition to another cannot set up that other's want of interest, or fraud, in his action therefor. *McKay v. Draper*, 27, 256.

Limitation of doctrine that bailee cannot deny title of bailor. *Cook v. Holt*, 48, 275.

#### VI. Conversion by bailee.

Bailee liable for conversion for refusing delivery because of levy afterward found invalid. *Rogers v. Weir*, 34, 463.

Bailee refusing to surrender property to owner on indemnity against adverse claimant is guilty of conversion—damages. *Ball v. Liney*, 48, 6; 8 Am. Rep. 511.

Where wife gets husband's property from bailee by fraud he may sue both therefor, but it is no bar to the husband's action against him. *Koving v. Manly*, 49, 192.

See AGISTER; BANK; CARRIER; CONVERSION; INNKEEPER; PLEDGE; WAREHOUSEMAN.

### BANK

#### I. Acts of incorporation.

#### II. Banking business.

(a.) Collections.

(b.) Deposits.

(c.) Lien of bank.

(d.) Certificate of deposit.

(e.) Title to deposit.

(f.) Payment.

#### III. Banking powers.

#### IV. Liability of banks.

(a.) Generally.

(b.) Suits by or against.

(c.) Certification of checks by.

(d.) Usury of.

(e.) Negligence of.

(f.) Insolvency of.

(g.) Taxation of.

#### V. Bank officers.

(a.) Generally.

(b.) Directors.

(c.) Cashier.

(d.) President.

#### VI. Rights and liabilities of stockholders.

#### VII. Individual banking.

#### VIII. Savings banks.

#### IX. National banks.

#### I. Acts of incorporation.

Not subject to provisions of 1 R. S. 588, except as incorporated in general bank act of 1838. *Leavitt v. Blatchford*, 17, 521.

Requisites of proof of incorporation in action by. *Leonardsville Bank v. Willard*, 25, 574.

#### II. Banking business.

#### (a.) Collections.

Right of collecting bank to proceeds of collections for claim against remitting bank—usage. *Commercial Bank of Clyde v. Marine Bank*, 3 Keyes, 337.

An arrangement between banks to collect for each other and credit balance due, the collections being mingled with the general funds of the bank, held to create the relation of debtor and creditor simply. *People v. City Bank of Rochester*, 93, 582.

#### (b.) Deposits.

Suspended right of set-off, when revived—operative against assignee of deposit. *Robinson v. Howes*, 20, 84.

May set up fraud of customer in getting discounts, in defense or counter-claim in his action for subsequent deposits, al-



though it has paid the money. *Andrews v. Artisans' Bank*, 26, 298.

Where deposit is attached, bank may not deduct amount of a check not presented but which the teller had agreed to pay — chargeable with notice of contents of attachment. *Duncan v. Berlin*, 60, 151.

Depositor not precluded from recovering moneys charged against him for payment of checks on indorsements forged by his clerk, by neglect to examine pass-book. *Welsh v. German-American Bank*, 73, 424; 29 Am. Rep. 175.

May receive deposit as collateral security for performance of contract between two others — action for — parties — costs. *Bushnell v. Chautauqua Co. Nat. Bank*, 74, 290; 30 Am. Rep. 319.

May not retain balance of customer's deposit to pay unmatured indebtedness to bank — set-off. *Jordan v. Nat. Shoe and Leather Bank*, 74, 467.

Relation between bank and its trustees that of principal and agent — between trustees and depositors, trustee and cestui que trust. *Hun v. Cary*, 82, 65; 37 Am. Rep. 546.

Authority to agent to deposit does not imply authority to check out. *Bates v. First National Bank*, 89, 286.

#### (c.) Lien of bank.

Does not exist as to securities pledged for particular debt. *Wyckoff v. Anthony*, 90, 442.

#### (d.) Certificate of deposit.

The restraint upon issues by Laws of 1840 is not confined to paper designed for circulation as money, but includes a certificate of deposit. *Leavitt v. Palmer*, 3, 19.

A trust deed executed as security therefor falls with it. *Id.*

Manner of signing — evidence of good faith of holder, when not required. *Barnes v. Ontario Bank*, 19, 152.

Is mere receipt — evidence admissible to explain — notice to produce. *Hotchkiss v. Mosher*, 48, 478.

Depositor not concluded by certificate of deposit signed by president individually — parol evidence admissible — question of fact. *Coleman v. First National Bank of Elmira*, 53, 388.

Cannot be set off against claim on discounted note. *Munger v. Albany City National Bank*, 85, 580.

#### (e.) Title to deposits.

What is a delivery of money to bank. *Hotchkiss v. Artisans' Bank*, 2 Keyes, 564.

When property to bill transmitted to bank for credit vests in bank. *Scott v. Ocean Bank*, 23, 289.

Receiving notes for collection from another bank gets no better title than the latter had — demand. *McBride v. Farmers' Bank*, 26, 450.

Cannot hold pledge except for specific loan in absence of agreement. *Duncan v. Brennan*, 83, 487.

Title to check deposited vests in bank. *Metropolitan Nat. Bank v. Loyd*, 90, 530.

#### (f.) Payment.

When draft deemed paid by bank. *Weedsport Bank v. Park Bank*, 2 Keyes, 561.

What amounts to payment of note by check on — effect of book-entries. *Pratt v. Foote*, 9, 463.

Dividends must be paid in cash — custom to contrary inadmissible. *Ehle v. Chittenango Bank*, 24, 548.

Payment to paying teller in absence of receiving teller, valid. *East River Nat. Bank v. Gove*, 57, 597.

General deposit by maker of overdue note held by bank does not operate as payment to discharge indorser — optional with bank whether to apply it. *National Bank of Newburgh v. Smith*, 66, 271; 23 Am. Rep. 47, note.

Charging notes discounted for customer to his account as they mature, according to custom, is payment. *Crocker v. Whitney*, 71, 161.

When receiver not bound to pay amount of check to owner remitting for collec-

tion—trust. *People v. Merchants and Mechanics' Bank*, 78, 269; 34 Am. Rep. 532.

Payment of forged checks—customer owes no duty to bank, to examine returned vouchers. *Welch v. German-American Bank*, 73, 424; *Weisser v. Denison*, 10, 68; *Frank v. Chemical National Bank*, 84, 209; 38 Am. Rep. 501.

### III. Banking powers.

Sale at discount of Canada bank bills—Laws of 1830, chapter 295—taking in payment a draft—Laws of 1839, chapter 355, § 3; 1850, chapter 251—seller may surrender draft and recover. *Buffalo City Bank v. Codd*, 25, 163.

May sell foreign bank notes except for circulation. *Sacketts Harbor Bank v. Codd*, 18, 240.

May assign judgment in which it has no beneficial interest without resolution of directors. *Eno v. Crooke*, 10, 60.

Power to borrow—restraints upon. *Curtis v. Leavitt*, 15, 9.

May not make an accommodation indorsement. *Bank of Genesee v. Patchin Bank*, 13, 309.

Notes of, on time and interest, on a purchase of State stocks are void in any hands. *Bank Commissioners v. St. Lawrence Bank*, 7, 513.

Although the stocks were pledged to payment of its circulating notes. *Id.*

May not purchase State stocks to sell nor to raise money except as security or in payment of loan or debt. *Tallmage v. Pell*, 7, 328.

May not subscribe for railroad stock. *Nassau Bank v. Jones*, 95, 115.

When may not sell collaterals at private sale—offset or counter-claim. *Strong v. Nat. Mechanics' Banking Ass'n*, 45, 718.

Refusing to redeem its bills in specie, the bank superintendent may sell its securities deposited with him. *Metropolitan Bank v. Van Dyck*, 27, 400.

### IV. Liabilities of banks.

#### (a.) Generally.

Receiving and sending to its corresponding bank paper for collection, and

the latter sending to its own corresponding bank, the first corresponding bank is alone liable to the depositing bank. *Montgomery County Bank v. Albany City Bank*, 7, 459.

Cannot protect itself by payment of check with forged indorsement. *Morgan v. Bank of State of New York*, 11, 404.

Assignment of certificate of withdrawn stock—valid against bank granting certificate and subsequently lending on faith thereof. *Callanan v. Edwards*, 32, 483.

When becomes liable to drawee of check. *Oddie v. Nat. City Bank of New York*, 45, 735; 6 Am. Rep. 160.

Not liable to action on unaccepted check. *Aetna Nat. Bank v. Fourth Nat. Bank*, 46, 82; 7 Am. Rep. 314.

When not protected by confiscation proceedings in refusing to pay check to payee. *Risley v. Phoenix Bank of City of New York*, 83, 318; 38 Am. Rep. 421, note; affirmed, 30 Alb. L. J. 30.

Liable to correspondent for amount paid on check with forged indorsement. *Bank of Brit N. Amer. v. Merchants' Nat. Bank*, 91, 106.

Payment upon forged indorsement—holder liable to drawee paying, though certified. *Id.*

Liable to association depositing with it though managed by its officers. *Fishkill Savings Institution v. Bostwick*, 92, 564.

#### (b.) Suits by and against banks.

Cannot recover amount paid by it on checks forged by depositor's clerk, and returned with pass-book. *Weisser v. Denison*, 10, 68.

Defense of paying depreciated bills on loan must be pleaded. *Codd v. Rathbone*, 19, 37.

Where one acts as agent of another, not liable in action brought to recover money alleged to have been extorted—remedy against other bank. *Amer. Nat. Bank v. Wheelock*, 82, 118.

Transaction as to check left for collection held to discharge drawer and render collecting bank liable to owner. *Briggs v. Central Nat. Bank*, 89, 182; 42 Am. Rep. 285.

May recover back payment on check with forged indorsement notwithstanding delay in discovering forgery—interest to be added from time of payment. *Corn Exch. Bank v. Nassau Bank*, 91, 74; 43 Am. Rep. 655.

An arrangement between banks to collect for each other held to render each simply debtor to the other for amount collected. *People v. City Bank of Rochester*, 93, 582.

(c.) *Certification of check by.*

Or note, equivalent to acceptance of bill on demand. *Meads v. Merchants' Bank of Albany*, 25, 143.

President may not certify his own checks, and no one can recover on such certification—holding for long period as security implies bad faith. *Clafin v. Farmers and Citizens' Bank of Long Island*, 25, 293.

Effect of—how canceled—rights of bank afterward. *Irving Bank v. Wetherald*, 36, 335.

Binding as to bona fide holder although there were no funds—custom. *Cooke v. State Nat. Bank of Boston*, 52, 96; 11 Am. Rep. 667.

Does not guarantee genuineness of filling up. *National Bank of Commerce in New York v. National Mechanics' Banking Association in New York*, 55, 211; 14 Am. Rep. 232; *Clews v. Bank of New York*, 89, 418; 42 Am. Rep. 303, note.

Does not guarantee against alterations in body. *Marine Nat. Bank v. Nat. City Bank*, 59, 67; 17 Am. Rep. 305.

Bound by statement of teller that its apparent certification of check is genuine. *Continental Nat. Bank v. Nat. Bank of Commonwealth*, 50, 575.

Evidence of custom to regard certification of checks as importing obligation to pay notwithstanding forgery of filling up inadmissible—not estopped by teller's assertion that check was genuine. *Security Bank of New York v. National Bank of the Republic*, 67, 458; 23 Am. Rep. 129.

(d.) *Usury of.*

Organized under general act not within provision of safety fund act restricting interest. *International Bank v. Bradley*, 19, 245.

Is bound for loan to it although evidenced by draft illegally issued and transferred to another bank for a rate of interest forbidden by safety fund act. *Oneida Bank v. Ontario Bank*, 21, 490.

Bank reserving interest forbidden by its charter, the loan is void—indorser of discounted paper not liable. *Bank of Salina v. Alvord*, 31, 473.

National—subject to State usury laws. *First Nat. Bk. of Whitehall v. Lamb*, 50, 95; 10 Am. Rep. 95.

Liable to penalties of National bank act for taking excessive interest on business paper—conflict with State law. *Johnson v. Nat. Bank of Gloversville*, 74, 329; 30 Am. Rep. 302.

In action by, on note, usurious interest cannot be recovered, but twice the amount of such interest cannot be counter-claimed. *National Bank of Auburn v. Lewis*, 81, 15. (See 75, 516; 31 Am. Rep. 484.)

Release of penalty for usury by insolvent debtor valid. *Getman v. Second Nat. Bk.*, 89, 136.

State banks not relieved from penalties of usury by act of 1870. *Farmers' Bank v. Hale*, 59, 53.

Limitation of rate of discount—credit to borrower is “payment”—business paper subject to the limitation. *Nash v. White's Bank of Buffalo*, 68, 396.

National—forfeiture for usury—accommodation indorser may set off—affects series of renewals. *National Bank of Auburn v. Lewis*, 75, 516; 31 Am. Rep. 484.

(e.) *Negligence of.*

Receiving bill for collection is liable for default of its agents and correspondents. *Commercial Bank of Pennsylvania v. Union Bank of New York*, 11, 203.

Employed to collect note—liable for neglect of notary in protesting. *Ayrault v. Pacific Bank*, 47, 570; 7 Am. Rep. 489.

When not negligent in collecting note — taking and presenting draft — evidence of damage. *Indig v. National City Bk. of Brooklyn*, 80, 100.

Liability of, for negligence in collection of draft *First Nat. Bk. v. Fourth Nat. Bk.*, 89, 412.

(f.) *Insolvency of.*

Insolvent, may not transfer to one of its directors, bonds in exchange for its own stock, either at common law or under 1 R. S. 589. *Gillet v. Moody*, 3, 479.

Stockholders postponed to creditors in settlement of bank's affairs. *Hollister v. Hollister Bank*, 2 Abb. 367; 2 Keyes, 245.

Unlawful transfer of assets — void as to receiver subsequently appointed unless bona fide purchaser — director chargeable with notice — purchaser with notice may not recoup the consideration paid. *Gillet v. Phillips*, 13, 114.

Provisions of act of 1849, concerning insolvent, constitutional — proceedings under. *Empire City Bank*, 18, 199.

May not transfer or assign in contemplation of insolvency. "Contemplation of insolvency." *Robinson v. Bank of Attica*, 21, 406.

Dividend by receiver. *Matter of Hollister Bank*, 23, 508.

Payment by insolvent bank of check to depositor, not a transfer or assignment in contemplation of insolvency. *Dutcher v. Importers and Traders' Nat. Bank*, 59, 5.

Receiver may not allow set-off of demand assigned after his appointment — ratification or waiver ineffectual for same purpose. *Van Dyck v. McQuade*, 85, 616.

(g.) *Taxation of.*

United States bonds not taxable by State, but franchise exercised by investment in such bonds may be taxed. *Monroe Savings Bank v. City of Rochester*, 37, 365.

National — State taxation of stock. *People v. Comm'rs of Taxes*, 35, 423; *City of Utica v. Churchill*, 33, 160; reversed, 3 Wall. 573.

National — actual value of shares is basis of taxation — this applies to State banks converted into National banks. *People v. Comm'rs of Taxes and Assessments*, 67, 516.

National bank shares cannot be assessed under act of 1865. *First Nat. Bank of Sandy Hill v. Fancher*, 48, 524.

Taxation of stockholder — deduction for real estate must be reckoned on value of capital stock. *People v. Comm'rs of Taxes and Assessments*, 69, 91.

National — assessment of stock — separate items in roll — place of assessment — owner not entitled to deduction for debts. *Williams v. Weaver*, 75, 30.

When entitled to deduction from tax for building erected on leased land. *People v. Comm'rs of Taxes*, 80, 573.

V. *Bank officers.*

(a.) *Generally.*

Officers making illegal loans liable for actual loss only. *Knapp v. Roche*, 94, 329.

(b.) *Directors.*

Knowledge acquired in individual capacity not chargeable to bank — no presumption that such knowledge communicated. *Atlantic State Bank v. Savery*, 82, 291.

Chargeable with notice of matters of ordinary business known to cashier. *New Hope and Delaware Bridge Co. v. Phenix Bank*, 3, 156.

Ratification by silence and acquiescence. *Id.*

(c.) *Cashier*

Purchase of land for, by cashier, not necessarily invalid although bank not authorized to buy lands. *White v. Lester*, 4 Abb. 585.

Clerk, acting as temporary cashier, has no implied authority to transfer property of the bank — demand and refusal — evidence of conversion. *Potter v. Merchants' Bank*, 28, 641.

When cashier not liable to, for negligence—care required of. *Commercial Bank of Albany v. Ten Eyck*, 48, 305.

When bank not bound by unauthorized acceptance by assistant cashier. *Pope v. Bank of Albion*, 57, 126.

Bank liable for conversion of bonds by cashier. *Fishkill Sav. Inst. v. Nat. Bk. of Fishkill*, 80, 162; 36 Am. Rep. 595.

Liability of sureties on bond of defaulting cashier. *Bostwick v. Van Voorhis*, 91, 353.

Cashier is not liable to bank for neglect of duty in failing to comply with its rules when compliance is prevented or excused by acts of directors. A bank on discovering a misappropriation of its funds can only ask their return or the property purchased with them. It cannot ask both, and is bound by its election. *Second Nat. Bk. of Oswego v. Burt*, 93, 233.

Cashier may bind by agreement with creditor as to application of funds. *Coats v. Donnell*, 94, 168.

#### (d.) President.

When bank chargeable with knowledge of president acquired in series of transactions—parties—costs. *Holden v. New York and Erie Bank*, 72, 286.

When bank chargeable with conversion of collateral securities by president with knowledge of manager. *Cutting v. Marlow*, 78, 454.

#### VI. Rights and liabilities of stockholders.

Conditional subscriptions for organizing cannot be enforced without performing the conditions—alteration of articles—certificate by subscriber—excess of subscriptions over amount authorized. *Burrows v. Smith*, 10, 550.

When stockholders may transfer stock free from lien. *Bank of Attica v. Manufacturers and Traders' Bank*, 20, 501.

Personal liability of stockholders. *Matter of Oliver Lee & Co.'s Bank*, 21, 9.

Alteration of charter—married woman liable as stockholder—transfer of stock—

apportionment of debts *Matter of Reciprocity Bank*, 22, 9.

Provision forbidding transfer of stock until shareholder shall discharge debts due the bank, includes unmatured liabilities. *Leggett v. Bank of Sing Sing*, 24, 283.

Stockholders personally liable only as prescribed by charter. *Lowry v. Inman*, 46, 119.

Having permitted transfer of stock upon a forged power of attorney and canceled the certificates, may be compelled to issue new certificates or pay the value. *Pollock v. National Bank*, 7, 274.

Title to stock passes by assignment and delivery of certificate without transfer on books. *Leitch v. Wells*, 48, 585.

#### VII. Individual banking.

Who liable as general partner in individual bank. *Julian v. Watson*, 43, 571.

"Individual banker" defined—action for penalty under act of 1875, chapter 371, section 49. *People v. Doty*, 80, 225.

#### VIII. Savings banks.

Loss of pass-book excuses non-production. *Warhus v. Bowery Sav. Bank*, 21, 543.

When protected by regulations by payment to holder of pass-book with forged order. *Schoenwald v. Metropolitan Sav. Bank*, 57, 418.

Negligence in paying to wrong claimant. *Appleby v. Erie County Sav. Bank*, 62, 12; *Allen v. Williamsburgh Sav. Bank*, 69, 314.

Preference over other creditors of insolvent banks extends only to deposits and not to loans—loan not made a deposit by want of authority to make the loan. *Rosenback v. Manufacturers and Builders' Bank*, 69, 358.

What are proper allowances on settlement of accounts of receiver of savings bank *Matter of Guard Sav. Inst.*, 78, 408.

Mortgage executed by trustee to make deficiency caused by loss on loan—not invalid within act of 1875, chapter 371—

trustees personally liable for deficiency. *Best v. Thiel*, 79, 15.

Deposit "in trust" — payment to depositor valid until notice from beneficiary. *Boone v. Citizens' Sav. Bank*, 84, 83; 38 Am. Rep. 498, note.

When trustee not liable to receiver for dividends unlawfully paid. *Van Dyck v. McQuade*, 86, 38.

When liable on contract by president authorized by resolution of directors — voidable pledge of stock. *Sistare v. Best*, 88, 527.

Payment to administrator of joint depositor presenting book after notice does not release from liability to other to extent of deposits made. *Mulcahey v. Emigrant, etc.*, *Bk.*, 89, 435.

Deposit by parent in trust for child creates trust. *Willis v. Smyth*, 91, 297.

Judgment creditor not entitled to preference over depositor. *People v. Mechanics, etc.*, *Sav. Institution*, 92, 7

#### IX. National banks.

Provision against transfer of stock until liabilities to, paid, gives no lien. *Conklin v. Second Nat. Bk. of Oswego*, 45, 655.

Can deal in government securities. *Van-Lewen v. First Nat. Bk. of Kingston*, 54, 671; *Yerkes v. Nat. Bank*, 69, 382; 25 Am. Rep. 208.

What sufficient evidence of appointment of receiver under 13 U. S. Stat. at Large, 99, § 50. *Platt v. Beebe*, 57, 339.

Gratuitous bailee — when and when not responsible for special deposit — evidence. *First Nat. Bank v. Ocean Nat. Bank*, 60, 278; 19 Am. Rep. 181; *Pattison v. Syracuse Nat. Bk.*, 80, 82; 36 Am. Rep. 582.

Liable for bonds received for exchange for registered bonds, and stolen. *Yerkes v. Nat. Bk. of Port Jervis*, 69, 382; 25 Am. Rep. 208.

Mortgage on real estate to secure future debt to, void. *Crocker v. Whitney*, 71, 161; Contra, *Simons v. First Nat. Bk. of Union Springs*, 93, 269.

May take married woman's note charging her separate estate. *Third Nat. Bk. v. Blake*, 73, 256.

In another State, liable to attachment in courts of this State. *Robinson v. Nat. Bk. of Newberne*, 81, 385.

Attachment from State court against insolvent National bank will not lie. U. S. R. S., § 5798. *Nat. Shoe and L. Bk. v. Mechanics' Nat. Bk.*, 89, 467.

Loan enforceable although exceeding one-tenth of capital. U. S. R. S., § 5200. *Duncomb v. New York, Housatonic, etc., R. Co.*, 84, 190.

Receiver of National, when no proceeding under National banking act for forfeiture of charter, may maintain action against directors for negligence — if receiver is one of the negligent directors, one stockholder may sue in behalf of all, may be brought in State court. *Brinckerhoff v. Bostwick*, 88, 52.

Attachment against insolvent bank invalid (U. S. R. S., § 5242) though capital afterward increased and other debts paid. Federal statute declaring invalidity not repealed by statute of 1883. *Raynor v. Pacific Nat. Bk.*, 93, 371.

Drafts by one firm on another in a different place are bona fide bills of exchange under section 29 of the National banking act, though the two firms are composed of the same persons. *Second National Bank of Oswego v. Burt*, 93, 233.

#### BANKRUPTCY.

- I. Jurisdiction.
- II. Effect of assignment.
- III. Powers and duties of assignee.
- IV. Preferences.
- V. Proof of claims.
- VI. Fiduciary capacity.
- VII. Payment.
- VIII. Actions by or against assignee.
- IX. Practice.
- X. Discharge.
- XI. Effect of discharge.

##### I. Jurisdiction.

Of U. S. District Court in proceeding by assignee in. *Chemung Canal Bank v. Judson*, 8, 254.

Supreme Court has jurisdiction of action by assignee to recover estate—assignee takes real estate subject to incumbrances valid except as against judgment creditors. *Cook v. Whipple*, 55, 150; 14 Am. Rep. 202.

Assignee suing need not establish jurisdiction of bankrupt court—what must show. *Cone v. Purcell*, 56, 649.

State court has jurisdiction of action by assignee to recover debt due bankrupt. *Kidder v. Horrobin*, 72, 159.

State court has jurisdiction of action by assignee to recover property fraudulently assigned by bankrupt—appearance of aliens and non-residents gives jurisdiction. *Olcott v. Maclean*, 73, 223.

Mortgage preferring individual to firm debt, when not void as against the act—submitting to jurisdiction of State court. *Hewitt v. Northrup*, 75, 506.

State courts have jurisdiction of action by assignee to set aside chattel mortgage and compel accounting by mortgagee. *Ansley v. Patterson*, 77, 156.

## II. Effect of assignment.

Bankruptcy of husband does not authorize proceeding to charge wife's separate estate for her debt contracted before marriage. *Vanderheyden v. Mallory*, 1, 452.

But creditor may prove claim against husband in bankruptcy. *Id.*

Proceedings against mortgagor or mortgagee do not suspend action of foreclosure. *Lenihan v. Hamann*, 55, 652.

Assignment dissolves attachment of State court. *Miller v. Bowles*, 58, 253.

General assignment without preferences before bankrupt proceedings is not void as against bankrupt act. *Thrasher v. Bentley*, 59, 649; *Haas v. O'Brien*, 66, 597.

Proceedings do not avoid prior general assignment with preferences when no claim made under bankruptcy proceedings. *Bostwick v. Burnett*, 74, 317.

Assignment discharges lien of attachment levied within four months of commencement of proceedings, proprio vigore. *Duffield v. Horton*, 73, 218.

Involuntary proceedings do not prevent indictment in State court for false pretenses. *Abbott v. People*, 75, 602.

## III. Powers and duties of assignee.

Assignee under act of 1841, having notice of foreclosure suit though not made party, is bound by decree. *Cleveland v. Boerum*, 24, 613.

Time for assignee to sue for injury to property—mere wrong-doer cannot impeach proceedings. *Stevens v. Hauser*, 39, 302.

Assignee cannot maintain action of conversion against mortgagor or purchaser for value of equity of redemption—but may redeem. *Winslow v. Clark*, 47, 261.

Corporation not liable for negligence of assignee in involuntary bankruptcy. *Metz v. Buffalo, Corry & Pittsburgh R. Co.*, 58, 61; 17 Am. Rep. 201.

Assignee of insolvent railroad, when not liable to action of negligence causing death. *Cardot v. Barney*, 63, 281.

Assignee's title vests from filing of petition. *Morris v. First Nat. Bk. of New York*, 68, 362.

Assignee may sue to set aside fraudulent chattel mortgage. *Southard v. Benner*, 72, 424.

Warrant to marshal does not authorize him to take property in possession of a third person claiming title. *Doyle v. Sharpe*, 74, 155; reversed, 102 U. S. 686.

When right to disaffirm pledge of securities for usury passes to assignee. *Dalton v. Smith*, 86, 176.

## IV. Preferences.

When creditor not chargeable with knowledge of attorney in another State of insolvency of debtor confessing judgment. *Hoover v. Greenbaum*, 61, 305; affirmed, 91 U. S. 308.

Giving indorsed note is not fraudulent preference. *Dalrymple v. Hillenbrand*, 62, 5; 20 Am. Rep. 438.

Case of unlawful preference—reasonable cause to believe insolvency. *Upham v. New York Loan and Trust Co.*, 76, 1.

Release by insolvent of penalty for usury to National bank valid if not a preference. *Getman v. Second Nat. Bk.*, 89, 136.

Chattel mortgage executed as renewal of old mortgage not a fraudulent preference. *Brackett v. Harvey*, 91, 214.

#### V. Proof of claims.

When creditor releases collateral mortgage by proving debt. *Merchants' Nat. Bank of Syracuse v. Comstock*, 55, 24; 14 Am. Rep. 168.

When lien of factor and principal passes with notes to transferees, and is extinguished by proof as unsecured and acceptance of dividend. *Johnson v. Dickinson*, 78, 42.

Proof of claim pending action for fraud in sale—election. *Moller v. Tuska*, 87, 166.

#### VI. Fiduciary capacity.

Moneys received by agent having interest in them under contract, discharge good defense. *Barber v. Sterling*, 68, 267.

Collateral securities pledged for a loan are not held in—discharge bars action. *Hennequin v. Clews*, 77, 427; 33 Am. Rep. 641, note.

Conversion by agent is not in a—must be “actual” as distinguished from “constructive” fraud. *Palmer v. Hussey*, 87, 303.

#### VII. Payment.

What is not a payment by insolvent within four months of filing petition within prohibition of act. *Tyler v. Brock*, 68, 418.

#### VIII. Actions by or against assignee.

Action may be brought on original debt and a new promise proved to avoid discharge. *Dusenbury v. Hoyt*, 53, 521; 13 Am. Rep. 543.

When assignee cannot recover amount of check paid by insolvent bank to depos-

itor. *Dutcher v. Importers and Traders Nat. Bank*, 59, 5.

Assignee cannot maintain action to recover collaterals usuriously pledged, without offering to pay sum loaned. *Wheelock v. Lee*, 64, 242.

Sale of lands by assignee cannot be collaterally assailed—interest under will. *Smith v. Scholtz*, 68, 41.

Limitation as to actions against assignee—when action for conversion of stock is barred—notice of action. *Esmond v. Appar*, 76, 359.

#### IX. Practice.

One indebted to bankrupt cannot set off a demand purchased after filing of petition. *Smith v. Brinkerhoff*, 6, 305.

Petition by one partner of bankrupt firm works same result as if all petitioned. *Id.*

The purchaser will take the seller's share of the estate and nothing more. *Id.*

Innocent under-statement of claim does not invalidate composition. *Beebe v. Pyle*, 71, 20.

Declarations of bankrupt as against assignee—statute of limitations. *Von Sacks v. Kretz*, 72, 548.

Proceedings as constructive notice—investing of assigned property. *Page v. Waring*, 76, 463.

When right of set-off does not arise. *Munger v. Albany City Nat. Bank*, 85, 580.

Order in, relieving sheriff from liability for failure to sell under execution. *Dorance v. Henderson*, 92, 406.

#### X. Discharge.

In pleading discharge facts cannot be averred, but when discharge is offered in evidence, jurisdiction is presumed prima facie. *Ruckman v. Cowell*, 1, 505.

When fraud in discharge may be proved without pleading it. *Id.*

Requisites of plea of discharge under voluntary provisions. *McCormick v. Pickering*, 4, 276.

Note by third person to creditor in consideration of withdrawal of opposition to



discharge is void, although the bankrupt was ignorant of it. *Bell v. Leggett*, 7, 176.

Discharge, under act of 1841, when set up as a bar to an action, may be defeated by proof of fraudulent transfers in contemplation of bankruptcy. *Caryl v. Russell*, 13, 194.

Discharge under English act — English statute must be proved — when not operative here. *Monroe v. Guillaume*, 3 Keyes, 30.

Discharge not assailable in State court because improperly granted. *Ocean Nat. Bank v. Olcott*, 46, 12.

Stay of judgment on subsequent discharge — laches — merger. *Monroe v. Upton*, 50, 593.

When discharge may be impeached in State court for fraud — territorial jurisdiction of court granting discharge is an issuable fact. *Poillon v. Lawrence*, 77, 207.

Composition does not discharge fraudulent debt. *Argall v. Jacobs*, 87, 110; 41 Am. Rep. 357.

Judgment against bankrupt may be discharged notwithstanding attorney's lien. *Blumenthal v. Anderson*, 91, 171.

#### XI. *Effect of discharge.*

Discharge extinguishes judgment, and creditor seizing goods under is trespasser, but not so of officer. *Ruckman v. Cowell*, 1, 505.

Discharges a judgment obtained pending the proceedings, if founded on a precedent debt, and discharges the costs. *Clark v. Rowling*, 3, 216.

Of one joint obligor, who has assumed whole obligation and indemnified his co-obligor, bars recovery by latter for his payment of obligation. *Crafts v. Mott*, 4, 603.

Covers claim against carrier for loss of goods. *Campbell v. Perkins*, 8, 430.

Releases liability as co-surety on replevin bond, although suit was undetermined when discharge was granted. *Tobias v. Rogers*, 13, 59.

When discharge bars lien under sections 51 and 52 of statute of uses and trusts. *Ocean National Bk. v. Olcott*, 46, 12.

Debt against corporation not discharged though proven. *Anson Brass and Copper Co. v. New Lamp-Chimney Co.*, 53, 123.

Only cuts off claims provable at date of petition. *Robinson v. Pesant*, 53, 419.

Of judgment debtor pending appeal does not release sureties on undertaking. *Knapp v. Anderson*, 71, 466.

Confession of judgment after discharge — fraudulent trust before discharge — action by creditors after two years — evidence of declarations — plea of discharge. *Dewey v. Moyer*, 72, 70.

No defense in action of tort. *Hun v. Cary*, 82, 65; 37 Am. Rep. 546; *Bradner v. Strang*, 89, 299.

No defense to action on undertaking given to discharge attachment. *McCombs v. Allen*, 82, 114.

When discharge does not affect rights of parties for whom bankrupt has made deposit as agent in name of another. *Falkland v. St. Nicholas' Nat. Bank*, 84, 145.

No defense to action on judgment rendered after it in court of another State. *Revere Copper Co. v. Dimock*, 90, 33.

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#### BASTARDY.

Compromise money paid to superintendent of poor may be recovered back when it appears that there was no pregnancy. *Rheel v. Hicks*, 25, 289.

See PARENT AND CHILD.

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#### Battery.

See ASSAULT AND BATTERY; CRIMINAL LAW.

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#### Bawdy-House.

See CRIMINAL LAW; LANDLORD AND TENANT.

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#### Benevolent Society.

See CORPORATION; WILL.

**Bequest.**

See WILL.

**BETTING AND GAMING.**

Contract to buy gold coin in future not void — option to deliver — intent. *Bigelow v. Benedict*, 70, 202; 26 Am. Rep. 573.

Option sale of stock when not gaming contract — presumed legal in absence of proof. *Story v. Solamon*, 71, 420.

"Straddle" stock contract, not necessarily a wager — burden of proof. *Harris v. Tumbidge*, 83, 92; 38 Am. Rep. 398.

Contract for driving horse for prizes and premiums, when valid — pools — entrance fees. *Harris v. White*, 81, 532.

Action lies for money lost at, and represented by ivory markers purchased by the loser from the defendant. *Meech v. Stoner*, 19, 26.

Action lies by master against keeper of gaming-house for his moneys lost there by his servant. *Caussidiere v. Beers*, 2 Keyes, 198.

Loser may recover his deposit from stakeholder although paid to winner, without demand, and without joining other contributors. *Ruckman v. Pitcher*, 1, 392.

Action for stake — limit of recovery — party plaintiff — interest — defense, that stake was in prohibited circulation. *Ruckman v. Pitcher*, 20, 9.

Erroneous instruction as to evidence of direction to surrender stakes. *Storey v. Brennan*, 15, 524.

Bond not void as wager. *Wheaton v. Fay*, 62, 275.

See CONTRACT.

**Bigamy.**

See CRIMINAL LAW.

**BILL OF LADING.**I. *Effect of delivery as to title.*II. *General matters.*I. *Effect of delivery as to title.*

Indorsee of bill of lading obtained by fraud gets no better title than his indorser. *Dows v. Perrin*, 16, 325.

Title passes by delivery, if so intended, although not indorsed. *City Bank v. Rome, etc., R. Co.*, 44, 136.

Title of transferee of, as collateral security as against consignee. *Marine Bank of Chicago v. Wright*, 48, 1.

Delivery as security operates as delivery of the goods — papers need not be filed as chattel mortgage. *First Nat. Bank of Cincinnati v. Kelly*, 57, 34.

When order for delivery of goods does not transfer title under bill of lading — conversion — damages — factors' act. *Mechanics and Traders' Bank v. Farmers and Mechanics' Nat. Bank*, 60, 40.

Securing draft — effect of delivery. *Magoun v. Sinclair*, 66, 30.

Delivery without indorsement carries title to goods — agreement to deliver "regular bill indorsed" — evidence — damages. *Merchants' Bank of Canada v. Union R. etc., Co.*, 69, 373.

When delivery does not vest title except in trust as specified in indorsement. *Farmers and Mechanics' Nat. Bank v. Hazeltine*, 78, 104; 34 Am. Rep. 518.

Equities between one making advances on faith of, and consignee holding warehouse receipt wrongfully delivered by owner. *Hazard v. Fiske*, 83, 287.

When bill of lading transfers title — intention of parties necessary. *Brand v. Focht*, 1 Abb. 185.

Owner of merchandise loses title as against bona fide holder of instrument in nature of — right of stoppage in transitu. *Rawls v. Deshler*, 4 Abb. 12; 3 Keyes, 572.

When protects party advancing. *Western Trans. Co. v. Marshall*, 4 Trans. App. 366.

II. *General matters.*

Assignee of, cannot hold carrier for "deficiency of quantity" of goods purchased before shipment. *Meyer v. Peck*, 28, 590.

What amounts to. *Dows v. Greene*, 24, 638.

Third persons affected with constructive notice of its contents when acquiring title under it. *Farmers and Mechanics' Nat. Bank v. Logan*, 74, 568; *Farmers and Mechanics' Nat. Bank v. Atkinson*, 74, 587.

Exemption for barratry — "mariners" — "theft." *Spinetti v. Atlas Steamship Co.*, 80, 71; 36 Am. Rep. 579.

Compulsory payment by master for deficiency — when recoverable from consignor. *Van Santen v. Standard Oil Co.*, 81, 171.

Presumption of ownership from possession and from acceptance of accompanying draft — acceptance may be shown by parol. *Sprague v. Hosmer*, 82, 466.

Usage not competent to contradict. *Simmons v. Law*, 3 Keyes, 217.

See CARRIER; RAILROAD; SHIP AND SHIPPING.

## BILL OF PEACE.

In favor of county against numerous holders of notes to determine rights in one action. *Board of Supervisors of Saratoga Co. v. Deyoe*, 77, 219.

## BILL OF PARTICULARS.

Office of — remedy for defects. *Mathews v. Hubbard*, 47, 428.

May be required from plaintiff in crim. con. *Tilton v. Beecher*, 59, 176; 17 Am. Rep. 337.

In action by attorney-general under act 1875, chapter 49, court may order. *People v. Tweed*, 63, 194.

May be ordered on behalf of plaintiff — action on policy of life insurance — times and places that insured had bronchitis and spitting of blood, also as to other insurances and applications therefor. *Dwight v. Germania Life Ins. Co.*, 84, 493.

Annexed to a complaint is amendable. *Melvin v. Wood*, 3 Abb. 272.

For omission to serve when ordered, court may strike out complaint. *Gross v. Clark*, 87, 272.

## Bill of Sale.

See ASSIGNMENT; MORTGAGE — *Chattel*; SALE.

## Bills and Notes.

See BANK; NEGOTIABLE INSTRUMENT; PAYMENT; SURETY; USURY.

## Board of Audit.

See COURTS.

## Boarding-house Keeper.

See INNKEEPER.

## Boilers.

See NEGLIGENCE.

## BONDS.

- I. Generally.
- II. Indemnity.
- III. Requisites of.
- IV. Sureties on.
- V. Actions on.

### I. Generally.

An unsealed instrument payable to bearer is valid as a "bond" under an act directing issue by commissioners "under their official signatures." *People v. Mead*, 24, 114.

When obligee is out of State, and no place of payment is specified, readiness to pay is sufficient without tender. *Hale v. Patton*, 60, 233; 19 Am. Rep. 168.

Under non-imprisonment act — when not voidable for mistake — not void as wager. *Wheaton v. Fay*, 62, 275.

On administration, not void because of mistake in name of surrogate's county — revocation of letters — accounting — decree binding on sureties. *Gerould v. Wilson*, 81, 573.

By railroad company — stolen and forged — condition precedent — waiver — negligence. *Maas v. Missouri, etc., Ry. Co.*, 83, 223.

## II. Indemnity.

On bond by A. to indemnify B. against his note to C., C. cannot recover. *Turk v. Ridge*, 41, 201.

Does not inure to benefit of third party unless so intended — extinguishment of interest. *Simson v. Brown*, 68, 355.

What covered in a particular case. *Hart v. Messenger*, 46, 253.

Want of consideration — construction. *Home Ins. Co. v. Watson*, 59, 390.

Evidence of consideration — damages — effect of possession of, by principal. *Belloni v. Freeborn*, 63, 383.

To pay debts of firm — when not simple indemnity — when creditors may proceed against estate of obligee. *Kohler v. Matlage*, 72, 259.

Against mortgage — requisites of complaint — evidence of damages — objections. *Beers v. Shannon*, 73, 292.

To officer — not construed to cover unauthorized trespass — ratification — knowledge of attorney. *Clark v. Woodruff*, 83, 518.

## III. Requisites of.

Indorsement on, when does not constitute signers joint obligees. *Brown v. Champlin*, 66, 214.

To secure discounts, "to be binding for one year only from date," covers all paper discounted in the year though not maturing until afterward. *Davis v. Cope-land*, 67, 127.

By special administrator, need not state actual appointment — burden of proof. *Dayton v. Johnson*, 69, 419.

Joint, in business and for benefit of partnership, regarded as partnership obligation although executed individually and individual in purport. *Berkshire Woolen Co. v. Juillard*, 75, 535; 31 Am. Rep. 488.

To bank, for exhibition as asset to bank department — construction — considera-

tion — public policy — ultra vires — estoppel — conditional delivery. *Hurd v. Kelly*, 78, 588; 34 Am. Rep. 567.

Seizure and sale of property of one on execution against another not a breach of condition of official bond. *People v. Lucas*, 93, 585.

## IV. Sureties on.

Liability of sureties in insolvency proceedings. *Cobb v. Harmon*, 23, 148.

Delivery on condition that another sign — when surety released. *People v. Bostwick*, 32, 445. See *Dillon v. Anderson*, 43, 231; *Guild v. Thomas*, 25 Am. Rep. 706, note.

When surety cannot question for alteration. *Russell v. Freer*, 56, 67.

## V. Actions on.

In action on, of indemnity for money paid, obligee may recover to amount of penalty with interest as damages. *Lyon v. Clark*, 8, 148; *Brainerd v. Jones*, 18, 35.

Laborers on public works cannot maintain action on bond given by contractor to State when the contract has been sublet. *McCluskey v. Cromwell*, 11, 593.

On attachment, conditionally delivered, and surrendered — when action lies on. *Bennett v. Brown*, 20, 99.

When assignee of bond and mortgage may recover on bond although he has bought the premises at execution sale under subsequent judgment. *Southworth v. Scofield*, 51, 513.

See APPEAL; EXECUTOR AND ADMINISTRATOR; OFFICE AND OFFICER; SHERIFF; TOWN BONDING; UNDERTAKING.

## BOUNDARY.

### I. Generally.

### II. Practical location.

#### I. Generally.

On a city street carries to the center. *Bissell v. N. Y. Cent. R. Co.*, 23, 61.

By "side of lane"—when fee remains in grantor. *Mott v. Mott*, 68, 246.

By a cliff on shore of bay—title to land between cliff and high-water mark. *Trustees, etc., v. Kirk*, 84, 215; 38 Am. Rep. 215.

"Along the high-water mark of pond" is a fixed line. *Cook v. McClure*, 58, 437; 17 Am. Rep. 270.

"To the bank of a creek" carries grant not to the center, but to low-water mark. *Halsey v. McCormick*, 13, 296. See 23 Am. Rep. 23; 28 id. 75.

When carries to center of creek. *Seneca Nation of Indians v. Knight*, 23, 498.

Oral evidence admissible to identify. *Coleman v. Manhattan, etc., Co.*, 94, 229.

## II. Practical location.

What is—boundary between town of Rochester and Hardenburgh patent. *Hunt v. Johnson*, 19, 279.

When not effective to change true line. *Reed v. McCourt*, 41, 435.

Invalid except when there is uncertainty. *Vosburgh v. Tator*, 32, 561.

On faith of improvements, binding. *Laverty v. Moore*, 33, 658.

When boundary disputed, practical location by agreement is binding—revocation. *Wood v. Lafayette*, 46, 484.

Occupation to, and maintenance of division fence, when evidence of practical location. *Jones v. Smith*, 64, 180.

Long acquiescence in, will not be disturbed. *Avery v. Empire Woolen Co.*, 82, 582. See *Turner v. Baker*, 27 Am. Rep. 289, note.

Must be acquiesced in for long time. *Corning v. Troy Iron and Nail Factory*, 44, 577; *Reed v. McCourt*, 41, 435.

With twenty years' acquiescence binding. *Reed v. Farr*, 35, 113.

Oral agreement on division line, acted on for only five years, not binding. *Terry v. Chandler*, 16, 354.

But acquiesced in for forty years is conclusive although founded in mistake. *Baldwin v. Brown*, 16, 359.

Evidence—actual possession not necessary. *Ratchliffe v. Gray*, 3 Trans. App. 117.

Agreed upon under mistake of facts, not binding. *Coon v. Smith*, 29, 392.

See ADVERSE POSSESSION; DEED; JURISDICTION; WATER AND WATER-COURSE.

## Breach of Promise of Marriage.

See ABATEMENT AND REVIVOR; DAMAGES; MARRIAGE.

## BOUNTIES.

Act as to, constitutional—repeal by implication. *Powers v. Shepard*, 48, 540.

By town for enlistments—consideration. *Carver v. Creque*, 48, 385.

Agreement as to, on enlistment of substitute. *Decker v. Saltzman*, 59, 275.

## BRIDGE.

When franchise to erect, not exclusive. *Fort Plain Bridge Co. v. Smith*, 30, 44.

Congress may authorize bridging of a navigable stream—obstruction of stream—Brooklyn bridge. *People v. Kelly*, 76, 475.

Action for destruction of bridge and loss of tolls by carrying away of another bridge subsequently built. *Chenango Bridge Co. v. Paige*, 83, 178; 38 Am. Rep. 407; 27 N. Y. 87; reversed, 3 Wall. 51.

When tax for, legally imposed. *Hill v. Board of Supervisors*, 12, 52.

Toll-bridge taxable as real estate. *Hudson River Bridge Co. v. Patterson*, 74, 365.

Between towns—no joint liability to build unless there is in each town a lawful highway to connect—"opened and worked." *Beckwith v. Whalen*, 70, 430.

On line dividing towns to be maintained by towns jointly—notice and waiver. *Day v. Day*, 94, 153.

Between towns—act of 1857, chapter 639, confers no authority to build bridge over a marsh. *Matter of Freeholders of Irondequoit*, 68, 376.

Proceedings to compel repair, under act of 1857, chapter 639, do not lie where bridge is wholly in one town. *Matter of Petition of Freeholders of Cattaraugus Co.*, 59, 316.

See HIGHWAY; NEGLIGENCE.

## BROKERS

- I. *Contracts and authority of.*
- II. *Commissions of.*

### I. *Contracts and authority of.*

A general authority to a broker to buy and load a vessel does not, in absence of sufficient custom, give him the right to borrow the money to make the purchase upon his personal credit. *Bank of State of Indiana v. Bugbee*, 1 Abb. 86.

Act of 1866, chapter 547, imposing duty on brokers' sales on imported merchandise not unconstitutional under State Constitution, but is under Federal. *People v. Moring*, 3 Abb. 539.

Principal may repudiate purchase by broker misrepresenting facts, and recover from him moneys paid. *Levy v. Loeb*, 89, 386.

Title to note pledged by broker entrusted with it for sale. *Farwell v. Importers, etc.*, *Bank*, 90, 483.

### II. *Commissions, etc.*

A broker employed to sell is entitled to his commissions when he has found a purchaser at the authorized terms. *Barnard v. Monnot*, 1 Abb. 108.

When broker is entitled to commissions for selling real estate. Interference of owner. *Briggs v. Rowe*, 1 Abb. 189; 4 Keyes, 424.

For sale of land — effecting agreement, is entitled to compensation, although agreement is not reduced to writing. *Barnard v. Monnot*, 3 Keyes, 203.

Statute restricting commissions for negotiating loans applies to all without respect to time. *Cook v. Phillips*, 56, 310.

To sell patent — not entitled to commissions for obtaining customer who formed partnership with patentee. *Fraser v. Wyckoff*, 63, 445.

For purchase of bonds — when principal not liable for deficiency on sale — commissions from both sides. *Levy v. Loeb*, 85, 365.

See AGENCY; DAMAGES; FACTOR; INSURANCE; STOCK BROKER.

## BROOKLYN.

- I. *Boundary of.*
- II. *Liability for negligence.*
- III. *Streets and improvements.*
- IV. *Taxation and assessments.*
- V. *Miscellaneous.*

### I. *Boundary of.*

Boundary between New York and Kings counties is actual low-water line on Brooklyn side. *Atlantic Dock Co. v. City of Brooklyn*, 3 Keyes, 444; 1 Abb. 24.

### II. *Liability for negligence.*

City not exempted by charter from liability for negligence of officers in performing duty of city. *Hardy v. City of Brooklyn*, 90, 435; 43 Am. Rep. 182.

Liability for negligence of Gowanus canal commissioners. *New York, etc., Co.*, *v. City of Brooklyn*, 71, 580.

Commissioners for street improvement held not liable to one injured at draw-bridge crossing. *Fitzpatrick v. Slocum*, 89, 358.

### III. *Streets and improvements.*

Construction of act of 1879, chapter 385, section 4, as to letting contracts for sewerage. *Matter of Leeds*, 53, 400.

Determination of common council that a petition for an improvement was signed by a majority of the land-owners, is conclusive. *Matter of Petition of Kiernan*, 62, 457.

Board of water and sewage commissioners may act without petition. *People v. City of Brooklyn*, 65, 349.

When liable to ejectment from lands deeded to city by railroad company for street. *Strong v. City of Brooklyn*, 68, 1.

Construction of acts for opening North Thirteenth street. *Matter of Application of City of Brooklyn*, 73, 179.

Act of 1868, chapter 631, for widening certain streets, constitutionality—validity of assessment. *Matter of Sackett, etc., Streets*, 74, 95.

Has no power by extending streets to deprive owners of water-front and uplands of right to build piers within line prescribed by law. *City of Brooklyn v. New York Ferry Co.*, 87, 204.

Street railways in, and validity and construction of legislation concerning. *People v. Brooklyn, etc., R. Co.*, 89, 75.

Liable for lands taken for Sackett street improvement. *Sage v. City of Brooklyn*, 89, 189.

#### IV. Taxation and assessment.

Act of 1854, chapter 384, section 33, as to deeds on tax sales, makes deed evidence only of regularity of sale and not of assessment. *Rathbone v. Hooney*, 58, 463.

Requisites to jurisdiction in summary proceedings by grantee of tax title under act of 1854, chapter 384, title 5, section 33—certiorari. *People v. Andrews*, 52, 445.

Signer of petition for repaving may move to set aside assessment for want of authority. *Matter of Petition of Sharp*, 56, 257; 15 Am. Rep. 415.

Act of 1872, chapter 812, making reassessment valid. *Matter of Van Antwerp*, 56, 261.

Assessment in 1872 for filling lots, ordered by council without petition, void. *Matter of Banta*, 60, 165.

Acts for establishment of Prospect park do not authorize assessment for lands outside the city. *Matter of Lands in Flatbush*, 60, 398.

Assessment under act of 1869, chapter 744, section 2—resolution as certificate—signing list. *Sorchan v. City of Brooklyn*, 62, 339.

Action to set aside assessment as irregular and fraudulent. *Boyle v. City of Brooklyn*, 71, 1.

Act of 1874, amending charter, did not confirm assessments laid without jurisdiction. *People v. City of Brooklyn*, 71, 495.

Power of courts to relieve from assessment—act of 1875, chapter 633, section 13. *Matter of Petition of Mead*, 74, 216.

Summary proceedings to recover land sold for taxes—proof of service of notice of sale must be by common-law evidence—affidavit not competent. *People v. Walsh*, 87, 481.

Defective verification of roll invalidates tax sale, and payments can be recovered back—registrar can warrant validity of certificate of sale. *Brevoort v. City of Brooklyn*, 89, 128.

Construction of Laws of 1880, chapter 572, in relation to unpaid taxes. *People v. O'Keefe*, 90, 419.

Statute of 1882, chapter 363, validating irregular taxes, does not validate previous tax sale—right of owner to mandamus. *Matter of Clementi v. Jackson*, 92, 591.

#### V. Miscellaneous.

Treasurer of Inebriates' Home entitled to excise moneys as against board of police and excise—may compel payment by mandamus. *People v. Board of Police and Excise*, 63, 623.

Common council may prohibit unlicensed cartmen. *City of Brooklyn v. Breslin*, 57, 591.

When police board may remove policeman for incapacity. *People v. Board of Police and Excise*, 69, 408.

Appointment of clerk by justice of peace must be approved by mayor—if he return it with objections, requires two-third vote of common council to validate. *People v. Schroeder*, 76, 160.

Justice of the peace no jurisdiction where summons served outside of the city limits. *Geraty v. Reid*, 78, 64.

City Court rendered judgment against defendant residing and served with process outside of city—void for want of jurisdiction. *Hoag v. Lamont*, 60, 96; *Landers v. Staten Island R. Co.*, 53, 450.

City Court cannot, by consent, acquire jurisdiction not conferred by statute. *Davidsburgh v. Knickerbocker L. Ins. Co.*, 90, 526.

Election law, act 1872, chapter 575, constitutional. *People v. Livingston*, 79, 279.

Acts of 1871, chapter 47; 1875, chapter 258, as to supplying water, construed — contract under. *Kingsley v. City of Brooklyn*, 78, 200.

### BUILDING ASSOCIATION.

Trustees need not sign copy articles to be filed. *Second Manhattan Building As-*

*sociation v. Hayes*, 2 Keyes, 192; 4 Abb. 183.

See CORPORATION.

### Burglary.

See CRIMINAL LAW.

### Burial.

See CEMETERY ASSOCIATION; DEED.

## C.

### CANALS.

- I. Generally.
- II. Officials.
- III. Collectors.
- IV. Contractors.
- V. Appraisals and awards.

#### I. Generally.

Damages for enlargement of Erie, construction of statutes. *Danforth v. Suydam*, 4, 66.

On abandonment of canals, used for canals, title continues in State. *Rexford v. Knight*, 11, 308.

Commissioners not bound to repair bridges over State basin at Albany. *Follett v. People*, 12, 268.

When use of elevator in canal is not illegal obstruction. *People v. Horton*, 64, 610.

Easement in water of State canals not obtainable by prescription. *Burbank v. Fay*, 65, 57.

#### II. Officials.

Auditor not bound by unauthorized draft by canal commissioner. *People v. Schoonmaker*, 13, 238.

Commissioner not authorized to appraise damage by permanent appropriation of water. *Id.*

Canal board on reversing or modifying award of appraisers must state grounds. Resolution for rehearing is an application in writing. *People v. Gardner*, 24, 583.

Where commissioners alter highway, portion not embraced within canal still belongs in fee to adjoining owner. *Higgins v. Reynolds*, 31, 151.

Power of board to appoint superintendent of repairs. *People v. Bell*, 38, 386.

Right of commissioners to take materials from adjoining premises — extraordinary repairs — appropriation of land, what is. *Ten Broeck v. Sherrill*, 71, 276.

#### III. Collectors.

Construction of "collectors of tolls on the canals." *People v. Benton*, 27, 387.

In spite of act April 19, 1859, the canal board could appoint an assistant collector of tolls on June 9, 1859. *People v. Benton*, 29, 534.

#### IV. Contractors.

When mandamus does not lie to contracting board. *People v. Contracting Board*, 27, 378.

Contractor liable to one injured by his negligent repairs. *Robinson v. Chamberlain*, 84, 389.



Contractor liable for negligence in repairs injuring another. *French v. Donaldson*, 57, 496.

Contractor for State liable in trespass for injury to lands by blasting in construction of canal. *St. Peter v. Denison*, 58, 416 17 Am. Rep. 258.

Contractor for repairs, when liable for damage by neglect — assignability of claim. *Fulton Fire Ins. Co. v. Baldwin*, 37, 648.

When allowance for work not embraced in contract proper. *People v. Dayton*, 55, 367.

When board may not be enjoined. *People v. Canal Board*, 55, 390.

Waiver by State of cause of action against contractors for fraud — act of 1870, chapter 55. *People v. Stephens*, 71, 527.

#### V. Appraisals and awards.

Appraisers may hear claims however old — all need not be present during taking of all of evidence. *People v. Thayer*, 63, 348.

Action to set aside award of appraisers not maintainable — remedy is appeal to board. *People v. Wasson*, 64, 167.

Award of appraisers for damages cannot be attacked collaterally — excess of jurisdiction — legislative appropriation. *People v. Schuyler*, 69, 242.

Mandamus lies to appraisers to make return to appeal. *People v. Canal Appraisers*, 73, 443.

### CARRIERS.

#### I. Carriers of goods.

1. *Who are.*
2. *Contract of shipment.*
3. *Exemption from negligence by contract.*
4. *Connecting lines.*
5. *Neglect and delay by, during transportation, and damages.*
6. *Carriers of animals.*
7. *Duty on arrival of goods at destination.*
8. *Delivery.*
9. *Freight charges and lien for.*
10. *Miscellaneous.*

#### II. Carriers of passengers.

1. *Who are passengers.*
2. *Duties of carriers to passengers.*
3. *Rules as to tickets and ejection of passengers.*
4. *Liability for assaults on passengers.*
5. *Baggage.*
6. *Miscellaneous.*

#### I. Carriers of goods.

##### 1. Who are.

Tow-boat owners are not common carriers. *Wells v. Steam Nav. Co.*, 2, 204.

Tow-boat owner, not — presumption where boat is owned by master and cargo by another — concurrent injury. *Arctic Fire Ins. Co. v. Austin*, 69, 470; 25 Am. Rep. 221.

Liability of charterer of canal boat for a single trip, retaining charge. *Campbell v. Perkins*, 8, 480.

Who is also warehouseman — when presumed to receive goods as carrier. *Ladue v. Griffith*, 25, 364.

Special employment does not show a common carrier. *Allen v. Sackrider*, 37, 341.

Railroad mortgage trustees, foreclosing and buying in and operating road, are carriers. *Rogers v. Wheeler*, 43, 598.

When canal boat owner not common carrier. *Fish v. Clark*, 49, 122.

Express company is. *Belger v. Dinsmore*, 51, 166; 10 Am. Rep. 575.

When liable as, on bill of lading for forwarding across Isthmus of Darien — evidence of custom inadmissible. *Simmons v. Law*, 4 Abb. 241.

##### 2. Contract of shipment.

When bill of lading reads, "shipped in good order," the burden is on the carrier to show that an injury happened before shipment. *Price v. Powell*, 3, 322.

Declarations of master of vessel are competent to show such injury, if made before delivery. *Id.*

Mere receipt for goods does not exclude parol evidence of the contract. Admissions of agents. *McCotter v. Hooker*, 8, 497.

Is not estopped by admission in bill of lading that goods are in "good order." *Ellis v. Willard*, 9, 529.

When owner demands and receives goods at an intermediate point, he is liable for full agreed freight, unless waived. *Id.*

Effect of issue of separate bills of lading of cargo shipped by one and belonging to several. *Wright v. Baldwin*, 18, 428.

Oral agreement of shipment controls although inconsistent with bill of lading subsequently given and not assented to. *Bostwick v. Baltimore & Ohio R. Co.*, 45, 712.

Railroad may agree on special rates of freight. *Nelson v. Hudson R. R. Co.*, 48, 498.

Bill of lading is conclusive evidence of contract. *Long v. New York Cent. R. Co.*, 50, 76.

Not concluded by statement of amount of goods in bill of lading — when consignee liable for freight. *Abbe v. Eaton*, 51, 410.

Bill of lading, "quantity guaranteed," binds carrier for specified quantity — evidence of meaning — measurer's returns not competent — admission of agents. *Bissel v. Campbell*, 54, 353.

When custom of parties effectual to control contract of shipment. *Shelton v. Merchants' Dispatch Trans. Co.*, 59, 258.

Shipper bound by conditions of bill of lading delivered before shipment, although differing from prior oral agreement. *Germania Fire Ins. Co. v. Memphis, etc., R. Co.*, 72, 90; 28 Am. Rep. 113.

Shipper chargeable with notice of contents of bill of lading delivered before shipment — evidence of prior negotiations incompetent. *Hill v. Syracuse, etc., R. Co.*, 73, 351; 29 Am. Rep. 163, note.

Bound by agreement to carry for stipulated sum. *Baldwin v. Liverpool, etc., Steamship Co.*, 74, 125; 30 Am. Rep. 277.

Construction of bill of lading partly written and partly printed. *Miller v. Hannibal & St. Joseph R. Co.*, 90, 430; 43 Am. Rep. 179.

### 3. *Exemption from negligence by contract.*

May limit liability by express agreement. *Dow v. New Jersey Steam Nav. Co.*, 11, 485.

From loss or damage does not excuse gross carelessness of servants. *Guillaume v. Hamburg & Am. Packet Co.*, 42, 212; 1 Am. Rep. 512.

For loss or damage by fire does not cover case of carrier's negligence — duty to adopt improvements in machinery, etc. *Steinweig v. Erie Ry.*, 43, 123; 3 Am. Rep. 673.

Limitation in baggage express company's receipt — when not binding. *Blossom v. Dodd*, 43, 264; 3 Am. Rep. 701.

When exemption inures to connecting carriers — deviation renders liable. *Maghee v. Camden & Amboy R. Co.*, 45, 514; 6 Am. Rep. 124.

Through contract — exemption from liability for fire — burden of proof. *Lamb v. Camden & Amboy R. Co.*, 46, 271; 7 Am. Rep. 327.

When purchaser of goods to be sent by railroad is bound by seller's agreement to release company from risks of transportation. *Nelson v. Hudson R. R. Co.*, 48, 498.

Where he is exempted from liability by contract except for his negligence, the burden of proof of negligence is on plaintiff. *Cochran v. Dinsmore*, 49, 249.

Must be clear. *Edsall v. Camden & Amboy R. and Transp. Co.*, 50, 661.

Express company — when acceptance of receipt for baggage with limitation of liability is binding. *Belger v. Dinsmore*, 51, 166; 10 Am. Rep. 575.

May not exempt himself from liability for loss by his own negligence — express contract to carry beyond terminus overrides general provision to contrary. *Condict v. Grand Trunk Ry. Co.*, 54, 500.

May stipulate against losses through negligence — construction of contract. *Magnin v. Dinsmore*, 56, 168.

When exemption in bill of lading does not apply after arrival — when carrier liable for acts of his servants after arrival. *Gleadell v. Thomson*, 56, 194.

Does not cover loss by his own negligence. *Westcott v. Fargo*, 61, 542; 19 Am. Rep. 300.

When carrier limits liability unless value stated, shipper's silence estops him as to ordinary negligence. *Magnin v. Dinsmore*, 62, 35; 20 Am. Rep. 442.

When carrier stipulates for exemption unless value of goods is stated, the shipper's silence releases, although carrier makes no inquiry. *Magnin v. Dinsmore*, 70, 410; 26 Am. Rep. 608.

Shipper bound by limitation of liability in receipt which he understands to constitute a contract, although he does not read it. *Kirkland v. Dinsmore*, 62, 171; 20 Am. Rep. 475.

From liability "from whatsoever cause arising" does not include his own negligence. *Maynard v. Syracuse, etc., R. Co.*, 71, 180; 27 Am. Rep. 28.

When acceptance of receipt from baggage express company does not establish contract for exemption — omission to read. *Madan v. Sherard*, 73, 329; 29 Am. Rep. 153.

When stipulation for exemption from liability so construed as not to include his own negligence. *Holsapple v. Rome, etc., R. Co.*, 86, 275; *Nichols v. N. Y. Cent. R. Co.*, 89, 370.

Liability of carrier for injury to goods awaiting delivery — special contract held not to avoid liability. *McKinney v. Jewett*, 90, 267.

Liable for loss from his negligence though by contract goods are "at owner's risk." A failure to deliver on demand at destination is prima facie evidence of negligence. *Canfield v. Baltimore & Ohio R. Co.*, 93, 532; 45 Am. Rep. 268.

At owner's risk — liability — presumption from accident. *French v. Buffalo & Erie R. Co.*, 2 Abb. 196.

Mail agent in postal car, riding on free pass — stipulation for exemption of railroad liability for negligence is void. *Seybolt v. New York, Lake Erie & Western R. Co.*, 95,

delivered to a carrier, may sue the carrier for not delivering it. *Green v. Clarke*, 12, 343.

May be bound as principal for entire route made up of several connecting carriers, although separate tickets are issued. *Quinby v. Vanderbilt*, 17, 306.

Receiving goods to be delivered to a second, remains liable as insurer although latter neglects to receive them, so long as he retains possession. *Goold v. Chapin*, 20, 259.

Intermediate consignee not liable for freight of part of cargo delivered, when carrier has lost or converted the rest. *Davis v. Pattison*, 24, 317.

Delay of transportation to get bill of back charges, subjects to liability for injury to goods by freshet. *Michaels v. New York Cent. R. Co.*, 30, 564.

Beyond terminus — liable for unnecessary deviation beyond instructions. *Johnson v. New York Cent. R. Co.*, 33, 610.

Intermediate, liable until delivery or notice to next. *McDonald v. Western R. Co.*, 34, 497.

Merely receiving goods addressed to a place beyond the terminus of his own route binds only to delivering to next carrier. *Root v. Great Western R. Co.*, 45, 524.

Reasonable time must elapse for second carrier to take from first — custom. *Mills v. Mich. Cent. R. Co.*, 45, 622; 6 Am. Rep. 152.

Liability of express company to "forward" beyond its own route — evidence of contract — book entries. *Reed v. United States Express Co.*, 48, 462; 8 Am. Rep. 561.

Contract to carry beyond route not implied from mark on goods or use of printed blank — cannot impose exemption from liability on behalf of connecting carrier. *Babcock v. Lake Shore Ry. Co.*, 49, 491.

On contract for through transportation exemptions inure to connecting carriers although not so expressly provided. *Manhattan Oil Co. v. Camden & Amboy R. and Trans. Co.*, 54, 197.

Contract to deliver to connecting carriers and fixing entire freight does not give second benefit of exemption of first — delivery at common warehouse with notice

#### 4. Connecting lines.

The owners of property delivered to a forwarder for transportation, and by him

makes second liable. *Aetna Ins. Co. v. Wheeler*, 49, 616.

Provision in shipping receipt as to mode of forwarding beyond terminus may not be contradicted by parol. *Hinckley v. New York Cent., etc., R. Co.*, 56, 429.

When not excused from delivering to next, by demand of agreement to exempt from liability. *Rawson v. Holland*, 59, 611; 17 Am. Rep. 394.

Who liable for negligence — measure of damages. *Sherman v. Hudson R. R. Co.*, 64, 254.

Pro rata freight — storing instead of delivering — recovery of charges of antecedent carrier. *Western Transp. Co. v. Hoyt*, 69, 230; 25 Am. Rep. 175.

Connecting, when entitled to limitation in bill of lading — negligence — delay. *Whitworth v. Erie Ry. Co.*, 87, 413.

Part owner of one of several connecting lines may be liable as carrier over whole route — damages — lost time, proper element, without specific proof of value. *Ward v. Vanderbilt*, 4 Abb. 521.

##### 5. Neglect and delay during transportation, and damages.

Liable for goods destroyed by accidental fire on float at place of destination before reasonable time for consignee to remove them. *Miller v. Steam Nav. Co.*, 10, 431.

Contracting to deliver merchandise within given time, not excused by freezing of canal. *Harmony v. Bingham*, 12, 99.

Not liable for delay of freight caused by accumulation without his fault. *Wibert v. N. Y. & Erie R. Co.*, 12, 245.

Is not liable for value of property by omission to deliver within reasonable time, but only for damages. *Scovill v. Griffith*, 12, 509.

Railroad liable for damage from delay of freight by strike of employees. *Blackstock v. N. Y. & Erie R. Co.*, 20, 48.

That detention caused by willful act of conductor no defense. *Weed v. Panama R. R.*, 17, 362.

Liable for injury by act of God if his unreasonable delay contributed. *Read v. Spaulding*, 30, 630.

Excused where property taken from him by legal process. *Bliven v. Hudson R. Co.*, 36, 403.

Not liable for loss by necessary jettison — construction of bill of lading. *Price v. Hartshorn*, 44, 94; 4 Am. Rep. 645.

Measure of damages — evidence — letter — conversations. *Sturgess v. Bissell*, 46, 462.

When liable for depreciation of goods after arrival and before notice to consignee. *Zinn v. New Jersey Steamboat Co.*, 49, 442; 10 Am. Rep. 402.

Acceptance of cargo is not per se discharge of vessel and owner from liability for injury to cargo in transit. *Home Ins. Co. v. Western Transp. Co.*, 51, 93.

Not excused for loss of property by fact that it was marked with name of fictitious firm in whose name owner was doing business. *Wood v. Erie Ry. Co.*, 72, 196; 28 Am. Rep. 125.

Action for goods stolen from packages delivered — burden is on plaintiff to show stealing done while in possession of defendant and before the delivery to consignee — insufficient proof. *Canfield v. Baltimore, etc., R. Co.*, 75, 144.

When liable for loss of perishable property. *Tierney v. New York Cent., etc., R. Co.*, 76, 305.

Liable for injury to cargo carried on deck by shipper's consent — paying freight does not bar suit for damages. *Schwinger v. Raymond*, 83, 192; 38 Am. Rep. 415.

##### 6. Carriers of animals, and damages.

Not insurer against injuries arising from nature and propensities of the animals, and not preventable by diligent care. *Clarke v. Rochester & Syracuse R. Co.*, 14, 570; *Maynard v. Syracuse, etc., R. Co.*, 71, 180; 27 Am. Rep. 28.

Although shipper of cattle selects the vehicle, with opportunity to know its defects, carrier is liable for injury by detention resulting from such defects. Contributory negligence. *Harris v. Northern Indiana R. Co.*, 20, 232.

Stipulation of exemption for negligence and delay does not excuse abandonment of

contract. *Keeney v. Grand Trunk R. Co.*, 47, 525.

Liability of. *Penn v. Buffalo & Erie R. Co.*, 49, 204; 10 Am. Rep. 355.

When shipper assumes risk of injuries from heat this includes such injuries through negligence. *Cragin v. New York Cent. R. Co.*, 51, 61; 10 Am. Rep. 559.

At shipper's risk—duty of—negligence. *Bills v. New York Cent. R. Co.*, 84, 5.

#### 7. Duty on arrival of goods at destination.

Retaining goods on vessel after arrival after refusal of consignee to receive, holds as bailee and bound only to ordinary care. *Hathorn v. Ely*, 28, 78.

Liability ceases when consignee, after notice of arrival, agrees that goods may be left over night in freight-house—lost by fire. *Fenner v. Buffalo, etc., R. Co.*, 44, 505; 4 Am. Rep. 709.

Express company cannot free itself from liability by notice of arrival. *Witbeck v. Holland*, 45, 13; 6 Am. Rep. 23.

When liable only as warehouseman after arrival. *Weed v. Barney*, 45, 344; 6 Am. Rep. 96; *Collins v. Burns*, 63, 1; *Pelton v. Rens. & Sar. R. Co.*, 54, 214; 13 Am. Rep. 568; *Matteson v. N. Y. Cent. R. Co.*, 76, 381; *Burneal v. N. Y. Cent. & H. R. R. Co.*, 45, 184; 6 Am. Rep. 61;  *Rogers v. Wheeler*, 52, 262.

Goods delivered, to await further orders from shipper while in custody of carrier, only liable as warehouseman. *O'Neill v. N. Y. Cent. & H. R. R. Co.*, 60, 138.

Duty as to imported goods on arrival. *Redmond v. Liverpool, etc., Steamboat Co.*, 46, 578; 7 Am. Rep. 390.

Duty to notify arrival—how modified by usage when received on holiday—negligence—burden of proof. *J. Russell Manufg. Co. v. New Haven Steamboat Co.*, 50, 121.

When notice of arrival to consignee may be dispensed with by usage—goods arriving on holiday. *Russell Manufg. Co. v. New Haven Steamboat Co.*, 52, 657.

Not bound to protect bulky freight landed and paid for and partly removed

by consignee. *Goodwin v. Baltimore & Ohio R. Co.*, 50, 154; 10 Am. Rep. 457.

By water—duty as to landing perishable goods—"fine day." *McAndrew v. Whitlock*, 52, 40; 11 Am. Rep. 657.

Excused from liability if consignee's residence is unknown and he does not give him notice of it. *Pelton v. Rensselaer & Saratoga R. Co.*, 54, 214; 13 Am. Rep. 568.

When notifying consignee of arrival waived by agreement—city baggage—express. *Henshaw v. Rowland*, 54, 242.

May store if consignee not found. *Northrop v. Syracuse, etc., R. Co.*, 2 Trans. App. 183.

#### 8. Delivery.

At wharf at place of destination does not discharge without notice to consignee and reasonable time to remove the goods. *Price v. Powell*, 3, 322.

Address of package to consignee in care of carrier's agent does not relieve carrier. *Russell v. Livingston*, 16, 515.

Of money from bank to bank, discharged by delivery according to consignee's direction. *Sweet v. Barney*, 23, 335.

Construction of statute making connecting road liable for delivery of freight—foreign road. *Burtis v. Buffalo & State Line R. Co.*, 24, 269.

To clerk of, outside the office, does not render carrier liable for loss before it came to carrier's hands. *Cronkite v. Wells*, 32, 247.

When can refuse to deliver goods in default of proof of authority to receive. *McEntee v. New Jersey Steamboat Co.*, 45, 34; 6 Am. Rep. 28.

Liable for delivery to fraudulent claimant. *Bassett v. Spofford*, 45, 387; 6 Am. Rep. 101.

Liable for delivery to fraudulent demandant without proof of identity. *Price v. Oswego & Syracuse R. Co.*, 50, 213; 10 Am. Rep. 475.

Where he receipts goods belonging to A., for delivery to B., and subsequently by shipper's direction delivers to another, he is liable to B. for conversion. *Bailey v. Hudson River R. Co.*, 49, 70.

Consignee must take away goods in reasonable time after notice—is a question of law. *Hedges v. Hudson R. R. Co.*, 49, 223.

What order from consignor justifies delivery—question of fact. *Viner v. New York, etc., Steamship Co.*, 50, 23.

When delivery as to carrier and not warehouseman implied. *Rogers v. Wheeler*, 52, 262.

When delivery may be justified by proof acquiescence of former similar deliveries. *Ontario Bank v. New Jersey Steamboat Co.*, 59, 510.

By water—mode of delivery, not specified, regulated by custom of port or course of trade—what justifies a substituted delivery—measure of damages. *Richmond v. Union Steamboat Co.*, 87, 240.

In action against, for non-delivery of goods, burden on plaintiff—must give some evidence of, before carrier to prove delivery. *Roberts v. Chittenden*, 88, 33.

When delivery to teller of money directed to "T., cashier," etc., is valid. *Hotchkiss v. Artisans' Bank*, 2 Abb. 403.

### 9. Freight charges and lien for.

Excessive freight paid to, under protest, may be recovered. *Harmony v. Bingham*, 12, 99.

Effect of owner's recovery of insurance on goods lost in transit on carrier's right to freight. *McKibbin v. Peck*, 39, 262.

When intermediate consignee not liable for freight—no promise implied from bill of lading. *Dart v. Ensign*, 47, 619.

When lien not discharged by warehousing goods. *Western Trans. Co. v. Barber*, 56, 544.

When consignee liable for freight—discharge of liability. *Davison v. City Bank*, 57, 81.

Whether carrier received compensation from others, immaterial. *Roberts v. Johnson*, 58, 613.

When cannot recover freight on goods destroyed by fire before delivery—back charges—usage. *New York Cent., etc., R. Co. v. Standard Oil Co.*, 87, 486.

Estoppel of owner of vessel in action for freight by bill of lading—counterclaim by assignee for non-delivery of part of cargo—acceptance of part does not bind to pay freight of whole. *Byrne v. Weeks*, 4 Abb. 657.

Has no lien on goods for neglect of consignee to take them away—is claim in nature of demurrage. *Crommelin v. New York & Harlem R. Co.*, 4 Keyes, 90.

### 10. Miscellaneous.

Consignor, if owner, may maintain action against, for loss of goods. *Thompson v. Fargo*, 49, 188; 10 Am. Rep. 342; *Price v. Powell*, 3, 322.

Prima facie consignee is owner. *Thompson v. Fargo*, 49, 188; 10 Am. Rep. 342.

Where goods are delivered to a carrier for delivery to a forwarder, who makes advances, the latter may maintain action against one to whom the carrier wrongfully delivered. *Fitzhugh v. Wiman*, 9, 559.

Who is also warehouseman, is liable as carrier from receipt of goods into his warehouse for carriage. *Blossom v. Griffin*, 13, 569.

His character not changed by his receipting the goods "to be forwarded." *Id.*

Collision with sunken vessel not "act of God." *Merritt v. Earle*, 29, 115.

Not liable for goods unless put under control of him or his servants with his assent. *Grosvenor v. New York Cent. R. Co.*, 39, 34.

By water, may choose either of customary routes, in absence of contract to contrary. *White v. Ashton*, 51, 280.

Definition of "article forwarded." *Wetzel v. Dinsmore*, 54, 496.

When cause of action in consignee. *O'Neill v. N. Y. Cent., etc., R. Co.*, 60, 138.

Receiving goods to await orders before shipment, liable only as warehouseman. *Id.*

Liability for negligent issue of bill of lading to one not entitled—evidence—record of verdict—custom. *Farmers and Mechanics' Bk. v. Erie Ry. Co.*, 72, 188.

Of goods "C. O. D."—taking check instead of money—consignee accepting it, carrier discharged. *Rathbun v. Citizens' Steamboat Co.*, 76, 376; 32 Am. Rep. 321.

When recovery for baggage not bar to action for loss of merchandise. *Millard v. Missouri, etc., R. Co.*, 86, 441.

## II. Carrier of passengers.

### 1. Who are passengers.

Is liable for gross negligence toward passengers carried gratuitously. *Nolton v. Western R. Co.*, 15, 444.

Railroad may contract with gratuitous passengers for exemption from liability for any negligence. *Wells v. N. Y. Cent. R. Co.*, 24, 181; *Perkins v. Same*, 24, 196.

But not for willful misconduct or equivalent recklessness. *Id.*

Railroad liable for gross negligence to one traveling on a drover's pass. *Smith v. N. Y. Cent. R. Co.*, 24, 222.

May exempt itself from liability for negligence under a drover's pass. *Bissell v. N. Y. Cent. R. Co.*, 25, 442.

Drover's pass. *Poucher v. N. Y. Cent. R. Co.*, 49, 263; 10 Am. Rep. 364.

Railroad admitting passengers to freight trains and taking fare liable as if on ordinary car. *Edgerton v. N. Y. & H. R. Co.*, 39, 227.

When one riding on freight train is not a passenger. *Eaton v. Delaware, etc., R. Co.*, 57, 382; 15 Am. Rep. 513.

When railroad company liable as to passenger to one riding in stage coach hired by it and run in connection with its trains. *Buffett v. Troy & Boston R. Co.*, 40, 168.

One who enters carriage for transportation is passenger before payment of fare. *Cleveland v. New Jersey Steamboat Co.*, 68, 306.

When railroad liable for negligent killing of express messenger—contract of exemption. *Blair v. Erie Ry. Co.*, 66, 313; 23 Am. Rep. 55.

Railroad employee traveling on its cars to and from his work is not a passenger, and the company is not liable for an injury

to him by negligence of a co-employee. *Vick v. N. Y. Cent., etc., R. Co.*, 95, 267.

Railroad liable for negligent killing of government mail agent in postal car. *Seybolt v. New York, etc., R. Co.*, 95,

### 2. Duties of carrier to passengers.

Burden of proof is on party alleging—fact of injury to passenger in railroad car does not shift—but circumstances may shift it. *Holbrook v. Utica & S. R. Co.*, 12, 236.

Liable for injury to passenger by breaking of axle if defect was discoverable in manufacture by any known test. *Hegeman v. Western R. Corporation*, 13, 9.

Bound to utmost care and prudence of very cautious persons. *Bowen v. N. Y. C. R. Co.*, 18, 408.

A passenger injured by negligence of two railroads may recover against either.

*Chapman v. New Haven R. Co.*, 19, 341.

Absolutely bound to provide road-worthy vehicles. *Alden v. New York Cent. R. Co.*, 26, 102.

Of ferry company letting down chains before landing. *Ferris v. Union Ferry Co.*, 36, 312.

When ferry company liable. *Hazman v. Hoboken Land and Improvement Co.*, 50, 53.

Negligence in taking passenger on street car. *Maverick v. Eighth Ave. R. Co.*, 36, 378.

Not insurer against inevitable accident—rail broken by extreme cold. *McPadden v. New York Cent. R. Co.*, 44, 478; 4 Am. Rep. 705.

Responsibility for injury from unsafe machinery. *Caldwell v. New Jersey Steamboat Co.*, 47, 282.

Passenger may get off train at accustomed place other than station. *Keating v. New York Cent. R. Co.*, 49, 673.

When ferry company not chargeable with negligence in construction of floating bridge in slip. *Loftus v. Union Ferry Co. of Brooklyn*, 84, 455; 38 Am. Rep. 533, note.

Street railway company bound to employ only such appliances as are safe and in

general use. *Unger v. Forty-second St., etc., R. Co.*, 51, 497.

Starting street car before passenger has time to alight is negligence. *Poulin v. Broadway, etc., R. Co.*, 61, 621.

Negligence of driver of horse car in not stopping car. *Drew v. Sixth Ave. R. Co.*, 1 Abb. 556.

Liability of owner of steamboat for injury by defective boiler—inspector's certificate—United States statute. *Carroll v. Staten Island R. Co.*, 58, 126; 17 Am. Rep. 221.

Backward jerking of railroad train is negligence. *Sauter v. N. Y. Cent., etc., R. Co.*, 66, 50; 23 Am. Rep. 18; *Milliman v. N. Y. Cent., etc., R. Co.*, 66, 642.

Duty to drunken man. *Milliman v. N. Y. Cent., etc., R. Co.*, 66, 642.

When steamboat owner not chargeable with negligence in fencing gangway. *Cleveland v. New Jersey Stmbt. Co.*, 68, 306.

Overshooting platform—questions of fact. *Taber v. Delaware, etc., R. Co.*, 71, 489.

Injury by fall of berth in vessel—remote cause. *Smith v. British, etc., Steam Packet Co.*, 86, 408.

Railroad company responsible for defective carriages borrowed. *Jettier v. New York & Harlem R. Co.*, 2 Keyes, 154.

Liable for negligence of servants in helping passengers off cars. *Drew v. Sixth Ave. R. Co.*, 3 Keyes, 429; 1 Abb. 566; 2 Trans. App. 246.

### 3. Rules as to tickets and ejection of passengers.

Passenger bound to exhibit ticket whenever requested. *Hibbard v. N. Y. & Erie R. Co.*, 15, 455.

The question of reasonableness of a regulation of a railroad company for surrender of tickets is one of law. *Vedder v. Fellows*, 20, 126.

May not eject passenger from car in motion. *Sanford v. Eighth Ave. R. Co.*, 23, 343.

Liable for servant's wrongful ejection of passenger. *Higgins v. Waterbollet Turnlike Co.*, 46, 23; 7 Am. Rep. 293.

May provide that ticket shall be used on day of issue. *Elmore v. Sands*, 54, 512; 13 Am. Rep. 617.

Not liable in exemplary damages for ejection of passenger for refusing to pay fare when his ticket has been wrongfully taken up by conductor of another train. *Townsend v. New York Cent., etc., R. Co.*, 56, 295; 15 Am. Rep. 419.

Rights of passenger on limited ticket—waiver—evidence. *Hill v. Syracuse, etc., R. Co.*, 63, 101.

Limited ticket used, when accepted for fare and traveler may continue on train to end of journey after limit expired. *Auerbach v. New York Cent. R. Co.*, 89, 281; 42 Am. Rep. 290.

Passenger may recover for injury incurred in resistance to unlawful ejection. *English v. Delaware & Hudson Canal Co.*, 66, 454; 23 Am. Rep. 69.

Where a company has a circuitous double road over part of its route, a passenger on a through ticket is only entitled to pursue the direct route—if takes other, and refuses to pay additional fare, may be ejected from train. *Bennett v. New York Cent., etc., R. Co.*, 69, 594; 25 Am. Rep. 250.

May set apart cars for women and exclude men therefrom. *Peck v. New York Cent., etc., R. Co.*, 70, 587.

Liability for ejection of passenger from drawing-room car—no seats in other cars. *Thorpe v. New York Cent., etc., R. Co.*, 76, 402; 32 Am. Rep. 325.

May not eject passenger at regular station for refusal to pay fare, if his fare is offered before ejection—otherwise where train stopped for sole purpose of putting off. *O'Brien v. New York Cent., etc., R. Co.*, 80, 236.

### 4. Liability for assault on passengers.

When not liable for assault by servant. *Isaacs v. Third Ave. R. Co.*, 47, 122; 7 Am. Rep. 418.

When liable for assault by servant. *Jackson v. Second Ave. R. Co.*, 47, 274; 7 Am. Rep. 448.



When not liable for assault by one passenger on another. *Putnam v. Broadway, etc., R. Co.*, 55, 108; 14 Am. Rep. 190.

Under no duty to protect passenger against robbery of extraordinary sum of money. *Weeks v. New York, etc., R. Co.*, 72, 50; 28 Am. Rep. 104, note.

Railroad company liable for willful act of conductor injuring passenger. *Schultz v. Third Ave. R. Co.*, 89, 242.

Detention of passenger who has lost ticket for failure to pay fare is false imprisonment. *Lynch v. Metropolitan, etc., R. Co.*, 90, 77; 43 Am. Rep. 141.

Liable for malicious injury to passenger by employee. *Stewart v. Brooklyn, etc., R. Co.*, 90, 588; 43 Am. Rep. 185.

### 5. Baggage.

Where several railroads run connecting trains over a continuous route an action will lie against one for baggage lost by another. *Hart v. Rensselaer & Saratoga R. Co.*, 8, 37.

Money—opinions of value—assignability of claim. *Merrill v. Grinnell*, 30, 594.

Not liable for baggage left over night at destination and burned. *Roth v. Buffalo and State Line R. Co.*, 34, 548.

Liable for clothes and dress materials for passenger and his family, but not for articles belonging to others. *Dexter v. Syracuse, etc., R. Co.*, 42, 326; 1 Am. Rep. 527.

After arrival. *Burnell v. New York Cent. R. Co.*, 45, 184; 6 Am. Rep. 61.

Notice of limitation of liability for baggage on face of ticket—effect of. *Rawson v. Pennsylvania R. Co.*, 48, 212; 8 Am. Rep. 543.

When not liable for conversion of baggage. *McCormick v. Pennsylvania Cent. R. Co.*, 49, 303.

Liability continues after arrival in absence of baggage master for a reasonable time to deliver. *Dinenny v. New York & New Haven R. Co.*, 49, 546.

Receiving pay for extra baggage, is liable for loss of merchandise as well as baggage in absence of fraud or concealment. *Stoneman v. Erie Ry. Co.*, 52, 429.

Charging for baggage knowing it contains merchandise, liable for the merchandise. *Perley v. New York Cent., etc., R. Co.*, 65, 374.

Is liable for merchandise not baggage when it receives it and charges for it as extra baggage. *Stoman v. Great Western Ry. Co.*, 67, 208.

When first of two connecting carriers not liable on separate tickets for through passage for loss of baggage by second. *Milnor v. New York & New Haven R. Co.*, 53, 363.

A stipulation in a passage ticket by ocean steamer limiting liability for baggage is binding. *Steers v. Liverpool, etc., Steamship Co.*, 57, 1; 15 Am. Rep. 453.

Not liable for wrong delivery of baggage left with agent after arrival, surrender of check, and notification that he will not be responsible. *Mattison v. New York Cent. R. Co.*, 57, 552.

Connecting railroads—last company cannot be held for loss of baggage without proof of possession. *Kessler v. New York Cent., etc., R. Co.*, 61, 538.

When responsible for baggage as warehouseman. *Fairfax v. New York Cent., etc., R. Co.*, 67, 11.

When liable as warehouseman for money in baggage—damages. *Fairfax v. New York Cent., etc., R. Co.*, 73, 167; 29 Am. Rep. 119.

Conflict of laws—paraphernalia. *Curtis v. Delaware, etc., R. Co.*, 74, 116; 30 Am. Rep. 271.

Burden of proof of delivery is on carrier—when delivery is question of fact. *Matteson v. New York Cent., etc., R. Co.*, 76, 381.

When liable for conversion of baggage—damages. *McCormick v. Penn. Cent. R. Co.*, 80, 353.

Liable for acts of servant in respect to baggage—duty of passenger as to care. *Isaacson v. New York Cent., etc., R. Co.*, 94, 278.

### 6. Miscellaneous.

Evidence in action for failure to carry passenger—damages—act of God. *Williams v. Vanderbilt*, 28, 217.

Contract of passage, how shown — damages for delay. *Van Buskirk v. Roberts*, 31, 661.

May confer license on one baggage expressman to exclusion of others. *Barney v. Oyster Bay, etc., Steamboat Co.*, 67, 301; 23 Am. Rep. 115.

See DAMAGES ; SHIP AND SHIPPING.

### CASE.

In case for injury to real estate plaintiff must show title or actual possession in himself at the time of the injury. *Gardner v. Heart*, 1, 528.

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Bradt *v.* Tousley, 13 Wend. 253. 17, 63.

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Brown *v.* Delafield, 1 Den. 445. 18, 567; 22, 472.

Brown *v.* Mott, 7 Johns. 361. 41, 287.

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Brownson *v.* Gifford, 8 How. Pr. 389. 28, 242.

Bush *v.* Lathrop, 22, 535. 55, 41.

Campbell *v.* Tate, 7 Lans. 370. 64, 457.

Carter *v.* People, 2 Hill, 317. 7, 378.

Chadwick *v.* Lamb, 29 Barb. 518. 35, 277; 42, 322.

Christopher *v.* New York, 13 Barb. 567. 18, 155.

City of Utica *v.* Churchill, 33, 161. 48, 524.

Clark *v.* Luce, 15 Wend. 480. 4, 254.

Cockey *v.* Hurd, 4 J. & S. 42. 58, 383.

Cooke *v.* Nat. State Bk., 52, 96. 74, 53.

Corbett *v.* Ward, 3 Bosw. 632. 56, 50.

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Crapo *v.* King, 45, 86. 77, 547.

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Cropsey *v.* Ogden, 11, 228. 27 Hun, 70.

Croton Turnpike Co. *v.* Ryder, 1 Johns. Ch. 611. 9, 444.

Cunningham *v.* Freeborn, 11 Wend. 240. 17, 9.

Danks *v.* Quackenbush, 3 Den. 594; 1, 129. 11, 281.

Darby *v.* Condit, 1 Duer, 599. 92, 358.

Dillon *v.* Horn, 5 How. Pr. 35. 13, 161.

Dohring *v.* People, 2 T. & C. 458. 59, 374.

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- Feeley v. Buckley, 28 Hun, 451. 92, 162.
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- First Nat. Bk. of Whitehall v. Lamb, 50, 95. 64, 212.
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- Fisher v. Marvin, 47 Barb. 159. 76, 521.
- Fisk v. Chicago & Pacific R. Co., 3 Abb. Pr. (N. S.) 430. 58, 383.
- Flanagan v. Irwin, 53 Barb. 587. 64, 188.
- Fleming v. Hollenback, 7 Barb. 271. 20, 134.
- Foy v. Troy & Boston R. Co., 24 Barb. 382. 45, 524.
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- Gardner, Matter of, 6 Hun, 67. 69, 452.
- Gates, Matter of, 2 Redf. 144. 70, 481.
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- Gile v. Libby, 36 Barb. 70. 54, 262.
- Gillet v. Moody, 3, 479. 17, 521.
- Gillet v. Phillips, 13, 114. 17, 521.
- Goodrich v. Downs, 6 Hill, 438. 15, 9.
- Gould v. Town of Venice, 29 Barb. 442. 23, 439.
- Gouverneur v. Lynch, 2 Paige, 300. 87, 457; 61, 88.
- Graham v. Stone, 6 How. Pr. 15. 11, 347.
- Grant v. Ellicott, 7 Wend. 227. 41, 287.
- Greenfield v. People, 13 Hun, 242. 74, 277.
- Greenleaf v. Mumford, 19 Abb. Pr. 469. 41, 210.
- Griffin v. Griffith, 6 How. Pr. 428. 17, 316.
- Hann v. Van Voorhis, 15 Abb. Pr. (N. S.) 79. 70, 270.
- Herrick v. Manly, 1 Caines, 253. 2, 517.
- Hews v. Hollister, 7 N. Y. Leg. Obs. 11. 20, 9.
- Hoagland v. Miller, 16 Abb. Pr. 103. 38, 182.
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- Hudson City Savings Institution, 5 Hun, 612. 77, 342.
- Huntingdon v. Mather, 2 Barb. 538. 2, 443.
- Jackson v. Phillips, 9 Cow. 94. 75, 288.
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- King v. Stow, 6 Johns. Ch. 323. 3, 396.
- King v. Whitely, 10 Paige, 465. 85, 39-40.
- Kniskern v. Luth. Church, 1 Sandf. Ch. 439. 11, 253.
- Kortz v. Carpenter, 5 Johns. 120. 65, 500.
- Lawrence v. Elliott, 3 Redf. 235. 92, 433.
- Markham v. Jaudon, 41, 235. 53, 211.
- Marshall v. Guion, 4 Den. 581. 11, 461.
- Marshall v. Marshall, 2 Hun, 238. 86, 18.
- Matteson v. Matteson, 51 How. Pr. 276. 63, 221.
- McCann v. Bradley, 15 How. Pr. 79. 27, 225.
- McDermott v. Palmer, 11 Barb. 9. 9, 435.
- McPherson v. Clark, 3 Bradf. 92. 88, 377.
- Mercer Street, Matter of, 4 Cow. 542. 23, 61.
- Meserole v. Meserole, 1 Hun, 66. 92, 508.
- Meyer v. Schultz, 4 Sandf. 664. 11, 347.
- Miller v. Gaston, 2 Hill, 188. 2, 225.
- Moore, Matter of, 8 Hun, 513. 85, 536.
- Morange v. Mudge, 6 Abb. Pr. 243. 63, 245.
- Morris v. Floyd, 5 Barb. 130. 6, 347.
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 Nat. Bank of Whitehall v. Lamb, 50, 95. 64, 213.  
 Newell v. Cutler, 19 Hun, 74. 93, 79.  
 Nitchie v. Townsend, 2 Sandf. 299. 44, 244.  
 Olmsted v. Elder, 5, 144 ; 1 Keyes, 316. 18, 139.  
 Patterson v. Choate, 7 Wend. 441. 2, 523.  
 Penfield v. Goodrich, 10 Hun, 41. 94, 611.  
 People v. Batchellor, 22, 138. 52, 374.  
 People v. Cline, 23 Barb. 197. 63, 391.  
 People v. Davis, 61 Barb. 456. 49, 132.  
 People v. Hovey, 5 Barb. 117. 92, 149.  
 People v. Jansen, 7 Johns. 332. 62, 88.  
 People v. Judges of Dutchess, 23 Wend. 360. 24, 399.  
 People v. Kennedy, 2 Park. 312. 13, 378.  
 People v. Mayor of Brooklyn, 6 Barb. 209. 4, 419.  
 People v. Quant, 2 Park. 410. 13, 378.  
 People v. Rector, 19 Wend. 569. 7, 378.  
 People v. Rando, 3 Park. 335. 84, 485.  
 People v. Spooner, 1 Den. 343. 75, 288.  
 People v. Tweed, 13 Abb. Pr. (N. S.) 25. 58, 1.  
 People v. White, 11 Barb. 26. 11, 308.  
 People, ex rel. Baldwin, v. Haws, 37 Barb. 440 ; 24 How. Pr. 148. 31, 203.  
 People, ex rel. Booth, v. Fisher, 2 Park. 402 ; 20 Barb. 652. 13, 378 ; 20, 363.  
 Phillips v. Peters, 21 Barb. 352. 9, 85.  
 Phoenix Fire Ins. Co. v. Phillips, 13 Wend. 81. 75, 288.  
 Pike v. Lent, 4 Sandf. 650. 70, 492.  
 Pitkin v. Cooley, 5 Hun, 48. 68, 221.  
 Plummer v. Murray, 51 Barb. 201. 40, 405.  
 Post v. Campbell, 18 Hun, 51. 83, 280.  
 Potter v. Kitchin, 5 Bosw. 566. 87, 605.  
 Public Adm'r v. Peters, 1 Bradf. 100. 24, 417.  
 Purchase v. Matteson, 25, 211. 38, 182.  
 Quinn v. Power, 17 Hun, 102. 87, 535.  
 Quinn v. Skinner, 49 Barb. 28. 43, 99 ; 41, 289.  
 Ramsdell v. Morgan, 16 Wend. 574. 36, 319.  
 Randall v. Smith, 1 Den. 214. 58, 89.  
 Reed, *Matter of*, 4 Hill, 572. 4, 173 ; 43, 514.  
 Reed v. N. Y. Cent. R., 56 Barb. 493, 45, 574.  
 Rich v. Milk, 20 Barb. 616. 35, 277.  
 Richardson v. Abendroth, 43 Barb. 162. 37, 640.  
 Roberts v. Randel, 3 Sandf. 707. 70, 492.  
 Rogers v. Smith, 5 Hun, 475. 71, 513.  
 Rose v. Bell, 38 Barb. 25. 27, 277.  
 Sanford v. Eighth Ave. R. Co., 23, 343. 3 Keyes, 271.  
 Saunders, *Matter of*, 10 W. Dig. 351. 85, 538.  
 Schlichting v. Wintgen, 25 Hun, 626. 89, 30.  
 Scofield v. Van Syckle, 23 How. Pr. 97. 13, 322.  
 Seixas v. Woods, 2 Caines, 48. 71, 129 ; 51, 203.  
 Shakespeare v. Markham, 10 Hun, 311. 67, 400.  
 Sherlock v. Sherlock, 7 Abb. Pr. (N. S.) 22. 70, 492.  
 Sherwood v. Vanderburgh, 2 Hill, 303. 1, 242.  
 Shotwell v. Mott, 2 Sandf. Ch. 46. 34, 584.  
 Smith v. Ludlow, 6 Johns. 267. 2, 523.  
 Starr v. Peck, 1 Hill, 270. 15, 345.  
 Stebbins v. E. Society Meth. Church, Roch., 12 How. Pr. 410. 1 Abb. 1.  
 Sterling v. Jaudon, 48 Barb. 459. 41, 235.  
 Stevens v. Rowe, 3 Den. 327. 7, 550.  
 Stevens v. Veriane, 2 Lans. 90. 63, 261.  
 Stewart v. Doughty, 9 Johns. 108. 39, 129.  
 Studwell v. Charter Oak Ins. Co., 19 Hun, 127. 88, 428.  
 Swett v. Colgate, 20 Johns. 196. 17, 129.  
 Talmage v. Pell, 7, 328. 17, 521.  
 Thorp v. Thorp, 23 Alb. L. J. 213. 86, 27.  
 Thurman v. Wells, 18 Barb. 500. 12, 622.  
 Tillou v. Kingston M. Ins. Co., 5, 406. 17, 391 ; id. 401.  
 Towner v. Church, 2 Abb. Pr. 299. 68, 370.  
 Tracy v. Rathbun, 3 Barb. 543. 2, 523.  
 Traders' Ins. Co. v. Robert, 9 Wend. 404. 17, 391.

Tucker v. Rankin, 15 Barb. 471. 36, 441.  
 Tylee v. Yates, 3 Barb. 222. 67, 162.  
 Van Bergen v. Bradley, 36, 316. 47, 244.  
 Van Rensselaer v. Platner, 1 Johns. 275. 2, 135.  
 Wait v. Day, 4 Den. 439. 15, 475.  
 Wait v. Wait, 4, 95. 27 Hun. 70.  
 Watson v. McGuire, 33 How. Pr. 87. 70, 492.  
 Wayne Co. Savings Bank v. Low, 6 Abb. N. C. 76. 77, 584.  
 West v. Mapes, 4 Redf. 496. 89, 403.  
 Wheeler v. Roch. & Syr. R. Co., 12 Barb. 227. 51, 568.  
 White v. Geraerd, 1 Edw. Ch. 336. 63, 253.  
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 Williams v. Weaver, 75, 30. 100 U. S. 539.  
 Williams v. Williams, 8, 525. 34, 584.  
 Wills v. People, 3 Park. 473. 84, 485.  
 Wilson v. Green, 20 Wend. 189. 6, 309.  
 Wohlfahrt v. Beckert, 27 Hun. 74. 92, 490.  
 Woodburn v. Mosier, 9 Barb. 255. 32, 219, 227.  
 Woodbury v. Sackrider, 2 Abb. Pr. 402. 88, 40.  
 Wright v. Equitable Life, 50 How. 367. 59, 557.  
 Wright v. Wright, 1 Cowen, 598. 3, 93.  
 Young v. Remer, 4 Barb. 442. 14, 16.  
 Zink v. Atterburg, 18 How. Pr. 108. 56, 50.

### Cause of Action.

See ACTION.

### CEMETERY ASSOCIATION.

May not condemn lands. *Matter of Petition of Deansville Cemetery Association*, 66, 569; 23 Am. Rep. 86.

When bonds of trustees invalid. *Campbell v. Cypress Hill Cemetery*, 41, 34.

Lands assessable for local improvements. *Buffalo City Cemetery v. City of Buffalo*, 46, 503.

Not exempt. *Id.*, 46, 506.

### CERTIFICATE.

Where legislature appropriate a sum to be paid upon the certificate of three designated persons, the certificate of two, showing that the third met but refused to coincide, is valid. *People v. Nichols*, 52, 478; 11 Am. Rep. 734.

See BANK; CONTRACT; EVIDENCE; DEED; NEGOTIABLE INSTRUMENT.

### CERTIORARI.

- I. *When a certiorari lies.*
- II. *When a certiorari does not lie.*
- III. *Practice.*
- IV. *Costs.*

#### I. *When a certiorari lies.*

Is proper remedy in case of illegal assessment. *Mut. Ben. Life Ins. Co. v. Supervisors of New York*, 3 Abb. 344.

In summary proceedings against tenant — office of. *People v. Hamilton*, 39, 107. Applicable to criminal cases. *Cancemi v. People*, 18, 128.

To review proceedings of highway commissioners — power of Supreme Court thereon. *People v. Ferris*, 36, 218.

Office of. *People v. Board of Assessors*, 39, 81.

Proper mode of reviewing decision of supervisors on reviewing assessment of United States securities. *People v. Supervisors of Madison Co.*, 51, 442.

Proper mode to review summary proceedings by grantee of tax title in Brooklyn — power of court on. *People v. Andrews*, 52, 445.

Is proper remedy to correct error of assessors in determining what property is benefited by improvement. *Kennedy v. City of Troy*, 77, 493.

Prosecution may remove indictment from Oyer and Terminer to Supreme Court. *Jones v. People*, 79, 45.

Proceedings to remove officers reviewable by. *People v. Nichols*, 79, 582.

## II. When a certiorari does not lie.

To correct wrong estimate by tax assessors after roll is delivered. *People v. Delaney*, 49, 655.

Barred by statute prescribing that determination of inferior tribunal shall be conclusive — second appraisal by highway commissioners. *People v. Betts*, 55, 600.

Where subject-matter is functus officii. *People v. Phillips*, 67, 582.

To town-bonding commissioners — nor to assessors after delivery of bonds for stock. *People v. Walter*, 68, 403.

Should be quashed where it appears by return that warrant of tax collector has been issued and a levy made. *People v. Supervisors of Queens Co.*, 82, 275.

When corporation not confined to, where personal property assessed in wrong county — may maintain action to recover. *Union Steamboat Co. v. Buffalo*, 82, 351.

To review decision of tribunal, which had jurisdiction, violated no rule of law, and the evidence tended to support. *People v. Board of Fire Comm'rs*, 82, 358.

## III. Practice.

Jurisdiction may be reviewed on, but decision of all other questions of fact below is conclusive. *People v. Goodwin*, 5, 568.

To drainage commissioners — brings up only question of regularity of assessment. *People v. Nearing*, 27, 306.

Proceedings on, to review order of commissioners of highways to remove obstruction. *People v. Commissioners of Highways*, 30, 72.

Court may examine evidence. *People v. Board of Police*, 39, 506.

To a justice's court to review summary proceedings to dispossess a tenant is ap-

pealable to this court. *People v. Boardman*, 3 Abb. 488.

On common-law certiorari court may look into the merits. *People v. Board of Police*, 72, 415.

When issued under 2 R. S. 49, § 47, court may examine and correct any erroneous legal decision of the officer. *Morewood v. Hollister*, 6, 309.

To review criminal conviction by justice of peace sitting as special sessions — court may review facts. *Barringer v. People*, 14, 593.

To review summary conviction under penal statute brings up question of sufficiency of evidence. *Mullins v. People*, 24, 399.

Court may review merits. *Freeman v. Ogden*, 40, 105.

To review proceedings of assessors brings up merits. *People v. Assessors*, 40, 154.

Questions of fact on conflicting evidence not reviewable. *People v. Board of Police and Excise*, 69, 408.

Requiring return of proceedings to tax to pay interest on bonds — regularity of bonds cannot come in question. *People v. Common Council of Long Island City*, 76, 20.

Quashing writ, or remanding case discretionary. *Jones v. People*, 79, 45.

Bringing on for hearing at Special Term where made returnable, proper. *People v. Nichols*, 79, 582.

## IV. Costs.

Referee may enforce collection of fees even during pendency of certiorari to review proceedings. *Disorway v. Winant*, 1 Abb. 508.

May be awarded on appeal from the decision of highway commissioners. *People v. Van Alstyne*, 3 Abb. 575.

When not awardable. *People v. Board of Police*, 39, 506.

## Challenge.

See CRIMINAL LAW; JURY; TRIAL.

**CHAMPERTY.**

Deed of land held adversely by bankrupt to assignee, valid. *Coleman v. Manhattan, etc., Co.*, 94, 229.

Where there is doubt as to possession, deed of land claimed adversely is not void. *Whiting v. Edmunds*, 94, 309.

Possession of grantee of tenant for life, claiming fee after grantor's death, is adverse to that of remainderman or reversioner, and the latter's conveyance is void. *Christie v. Gage*, 71, 189.

Contract to procure lands from State for part of lands, not void. *Sedgwick v. Stanton*, 14, 289.

See ADVERSE POSSESSION.

**Charitable Devises and Bequests.**

See WILL. *Chamberlain v. Chamberlain*, 43, 424; *Adams v. Perry*, 43, 487.

**CHARTER.**

By king in 1684 to Dutch Church. *Attorney-General v. Minister, etc.*, 36, 452.

See CONSTITUTIONAL LAW; MUNICIPAL CORPORATION.

**Chattel Mortgage.**

See EVIDENCE; MORTGAGE.

**Check.**

See BANK; NEGOTIABLE INSTRUMENT; PAYMENT.

**Child.**

See ADVANCEMENT; GUARDIAN AND WARD; INFANT; NEGLIGENCE; PARENT AND CHILD; WILL.

**Church.**

See RELIGIOUS SOCIETY.

**Citizen.**

See ALIENAGE; DOMICILE; CONFLICT OF LAWS; CONSTITUTIONAL LAW; REMOVAL OF CAUSE.

**City.**

See MUNICIPAL CORPORATION.

**CIVIL DAMAGE ACT.**

Is constitutional as to landlord letting premises for sale of liquors. *Bertholf v. O'Reilly*, 74, 509; 30 Am. Rep. 323.

Wife may maintain action for loss of means of support by intoxication of husband. *Hill v. Berry*, 75, 229.

Action lies for death — married woman liable as owner of building where liquors sold by her husband — proximate cause — possession before passage of act. *Mead v. Stratton*, 87, 493; 41 Am. Rep. 386.

Injury to plaintiff's minor son not presumed injury to "means of support." *Volans v. Owen*, 74, 526; 30 Am. Rep. 337.

Action lies by dependent child whose father killed his wife and himself — exemplary damages allowable. *New v. McKechnie*, 95.

**CLAIM AND DELIVERY.**

- I. *When action lies.*
- II. *Practice.*
- III. *Affidavit.*
- IV. *Bond.*
- V. *Judgment.*

**I. When action lies.**

Against one who has had and has parted with possession. *Latimer v. Wheeler*, 1 Keyes, 468.

Actual possession and equitable interest, when sufficient to maintain. *Johnson v. Carnley*, 10, 570.

In cepit only lies for injury to land. *Stockwell v. Phelps*, 34, 363.

Does not lie to recover property seized for tax. *Hudler v. Golden*, 36, 446.

When does not lie for money—bar.  
*Sager v. Blain*, 44, 445.

Does not lie for check, by maker, after payment. *Barnett v. Selling*, 70, 492.

In action by mortgagee against owner, judgment should be for return, or amount due on mortgage with damages for detention. *Allen v. Judson*, 71, 77.

Does not lie for property taken for tax, by warrant regular on its face, although tax is erroneous. *Troy & Lansingburgh R. Co. v. Kane*, 72, 614.

When defendant gives bond and retakes, he is estopped from denying that he had possession. *Diossy v. Morgan*, 74, 11.

Seizure of chattels of one on lands assessed to another, when not "taken for a tax." *Lake Shore, etc., Ry. Co. v. Roach*, 80, 339.

Claim of title is waiver of lien—action by tenant in common against vendee of co-tenant. *Hudson v. Swan*, 83, 552.

Will not lie for owner to recover stolen property detained by police authorities. *Simpson v. St. John*, 93, 363.

## II. Practice.

On death of plaintiff in replevin from sheriff, the sheriff may retake. *Burkle v. Luce*, 1, 163.

Demand of director of railroad, sufficient—detinue lies although possession has been parted with. *Dunham v. Troy Union R. Co.*, 3 Keyes, 543.

Offer to return—damages. *Brewster v. Silliman*, 38, 423.

When requisition protects officer—evidence of declarations. *Bullis v. Montgomery*, 50, 352.

Confusion of goods by defendant does not relieve him. *Samson v. Rose*, 65, 411.

Sheriff may not take goods of defendant's wife. *Otis v. Williams*, 70, 208.

Action against officer for conversion under—indemnity—demand—history of remedy in this State. *Manning v. Keenan*, 73, 45.

## III. Affidavit.

In justice's court—sufficiency. *Dennis v. Crittenden*, 42, 542.

## IV. Bond.

With one surety may be good. *Shaw v. Tobias*, 3, 188.

Delivery to sheriff may be waived by parties, and sureties are estopped. *Harrison v. Wilkin*, 69, 412.

Action on undertaking—irregularity in execution—estoppel—that property cannot be reached; no defense. *Harrison v. Wilkin*, 78, 390.

## V. Judgment.

Judgment must be in alternative. *Dwight v. Enos*, 9, 470; *Fitzhugh v. Wiman*, 9, 559.

Judgment limited to amount of lien held sufficient. *Fowler v. Haynes*, 91, 346.

## Clerk.

See COUNTY CLERK.

## Client.

See ATTORNEY AND CLIENT.

## CLOUD UPON TITLE.

Prima facie record title not essential to constitute. *Fonda v. Sage*, 48, 173.

Action not maintainable when title not legally affected. *Farnham v. Campbell*, 34, 480.

Action to remove, does not lie where defect necessarily appears in proceedings to enforce lien—assessment. *Marsh v. City of Brooklyn*, 59, 280.

Action does not lie to set aside receiver's deed not on its face conveying hostile title. *Bockes v. Lansing*, 74, 437.

Bill to remove, not entertained where it is apparent from inspection that no danger is to be apprehended—as a deed on sale under mortgage to the State, including land not included in advertisement. *Cox v. Clift*, 2, 118.

When action will not lie to set aside assessment sale. *Guest v. City of Brooklyn*, 69, 506.



Action lies to set aside invalid tax sale where certificate is a lien. *Crooke v. Andrews*, 40, 547.

When consummation of tax sale will not be enjoined. *Howell v. City of Buffalo*, 2 Abb. 412.

Apparent unconstitutionality of assessment, no ground for setting aside. *Wells v. City of Buffalo*, 80, 253; *Stuart v. Palmer*, 74, 183; 30 Am. Rep. 289.

Unconstitutionality of tax no ground for setting aside. *Townsend v. Mayor, etc.*, 77, 542.

Forged deed — paid judgment or mortgage — when execution purchaser may have it canceled. *Remington Paper Co. v. O'Dougherty*, 81, 474.

Mortgage by tenant in common of whole farm, and judgment of foreclosure, are not. *Ward v. Dewey*, 16, 519.

When suit of parties in possession of land under paper title to restrain sale under mechanic's lien against a third party is not maintainable. *Lehman v. Roberts*, 86, 232.

Merely speculative danger will not justify action to remove — irregular assessment. *Sanders v. Village of Yonkers*, 68, 489.

Owner of land may restrain a city from executing a deed on sale under an alleged assessment never made, the statute declaring such conveyances prima facie evidence of a valid assessment. *Scott v. Onderdonk*, 14, 9.

Action quia timet lies for irregular assessment when certificate of sale under it is prima facie evidence of title. *Allen v. City of Buffalo*, 39, 386.

Assessment under act of 1871, chapter 670, section 12, where not — allegations of fraud. *Dederer v. Voorhies*, 81, 153.

One in possession under void foreclosure may maintain action against stranger to equity with paper title apparently good but really bad. *Craft v. Merrill*, 14, 456.

Action to set aside United States internal revenue collector's deed on tax sale — *his pendens* — evidence. *Brown v. Goodwin*, 75, 409.

Sheriff's certificate of sale under judgment. *Lounsbury v. Purdy*, 18, 515.

Action does not lie to set aside sheriff's certificate of execution sale in favor of owner under unrecorded deed older than judgment. *Schroeder v. Gurney*, 73, 430.

Spurious certificates of railroad stock, when. *New York & N. H. R. Co. v. Schuyler*, 17, 592.

Recorded executory contract for sale of land executed by unauthorized agent is not. *Washburn v. Burnham*, 63, 132.

Assessment adjudged void by this court for want of power to make, is not. *Chase v. Chase*, 95, 373.

Comptroller's certificate of sale of land on tax illegally laid is not. *Clark v. Davenport*, 95, 477.

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### Code.

See ACTION; PLEADING; STATUTE, and various specific titles.

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### Codicil.

See WILL.

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## COLLECTORS.

Town — term of office of those to be elected may be extended by legislature — oath may be taken at any time before forfeiture — entitled to notice to file bond. *People v. McKinney*, 52, 374.

See OFFICE AND OFFICER; TAXATION.

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### Colleges.

See SUBSCRIPTION; TRUSTS; WILLS.

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### Collision.

See HIGHWAY; NEGLIGENCE; RAILROAD; SHIP AND SHIPPING.

**COMMISSION.**

To take testimony — cannot issue after judgment and appeal and pending appeal. *McColl v. Sun Mut. Ins. Co.*, 50, 332.

See EVIDENCE; TRIAL.

**Commission Merchant.**

See AGENCY.

**Commissions.**

See EXECUTOR AND ADMINISTRATOR; SUREGATE; TRUSTS.

**Communications.**

Privileged. See ATTORNEY AND CLIENT; EVIDENCE; LIBEL AND SLANDER.

**Complaint.**

See PLEADING.

**COMPOUNDING FELONY.**

What constitutes — mortgage. *Earl v. Clute*, 2 Abb. 1.

**COMPROMISE.**

If fairly entered into, is conclusive. *Wehrum v. Kuhn*, 61, 623.

When binding. *Baxter v. Bell*, 86, 195.

Ineffectual unless signed. *Bliss v. Shwartz*, 65, 444.

When note valid, although there was a good defense to original claim. *Feeter v. Weber*, 78, 334.

Of claim without consideration is not binding. *Bunge v. Koop*, 48, 225; 8 Am. Rep. 486.

Withdrawal of legal proceedings, sufficient consideration to support agreement

for division of property in suit. *Downer v. Church*, 44, 647.

When operates as satisfaction. *Babcock v. Bonnell*, 80, 244.

Of part of entire demand does not necessarily merge the whole. *O'Beirne v. Lloyd*, 43, 248.

May be made by parol with each creditor — tender need not be kept good. *Chemical Nat. Bank of New York v. Kohner*, 85, 189.

When transaction is purchase and sale and not compromise. *Goldenberg v. Hoffman*, 69, 322.

See DEBTOR AND CREDITOR.

**COMPTROLLER.**

May foreclose mortgage assigned by bank for redemption of its notes. *Flagg v. Munger*, 9, 483.

May not transfer a mortgage held by him as security for circulating bank notes, to a third person. *Mitchell v. Cook*, 7, 538.

Deed for taxes — presumptive evidence — notice to redeem. *Hand v. Ballou*, 12, 541.

Omission to publish notice for redemption invalidates — mistake in notice fatal. *Thompson v. Burhans*, 61, 52.

His deed may be shown void for insufficiency of affidavit to assessment-rolls. *Johnson v. Elwood*, 53, 431.

Void for reciting sale for non-resident taxes when taxes were against a former owner. *Ritter v. Worth*, 58, 627.

When presumption of regularity not overcome — publication — time of sale. *Colman v. Shattuck*, 62, 348.

Constructive possession under void comptroller's deed. *Thompson v. Burhans*, 61, 52.

Of New York city may vacate judgment against the city obtained by collusion or fraud. *Baldwin v. New York City*, 1 Abb. 75.

Effect of deed for taxes. *Tallman v. White*, 2, 66.

Deed of tide way in New York — requisites. *Mayor, etc., v. Hart*, 95, 442.

**Condonation.**

See MARRIAGE — *Divorce*.

**Confession.**

See CRIMINAL LAW — *Evidence*.

**Confession of Judgment.**

See JUDGMENT.

**CONFISCATION.**

When not valid to protect bank in refusing to pay check to payee. *Risley v. Phoenix Bank of City of New York*, 83, 318; 38 Am. Rep. 421, note; affirmed, 30 Alb. L. J. 30.

When proceedings void for not properly describing owner—denial of petition in Federal court to set aside, no bar. *Chapman v. Phoenix Nat. Bank of New York*, 85, 437.

**CONSANGUINITY.**

Judge disqualified by, cannot sit even by consent. *Oakley v. Aspinwall*, 3, 547.

Judge is disqualified by consanguinity to a party who is a mere surety or indemnified. *Id.*

**CONFLICT OF LAWS.**

Personal property in New Jersey does not pass under assignment here if it is invalid there. *Guillander v. Howell*, 35, 657.

Process of this State superior to assignment in another State. *Kelly v. Crapo*, 45, 86; 6 Am. Rep. 35; reversed, 16 Wall. 610.

Assignment for benefit of creditors by non-resident, conveys property here. *Ockerman v. Cross*, 54, 29.

Assignment to creditors—foreign attachment. *Van Buskirk v. Warren*, 2 Keyes, 119; reversed, 7 Wall. 139; 38 How. Pr. 52.

Assignment for creditors in another State—when creditors here may question validity—presumption as to creditor's knowledge of recording of assignment in Pennsylvania. *Stedman v. Davis*, 93, 32.

As to check—jurisdiction—attachment—foreign assignment. *Hibernia Nat. Bk. v. Lacombe*, 84, 367; 38 Am. Rep. 518.

Situs of debt created by arbitrators' award here, is here. *Williams v. Ingersoll*, 89, 508.

Payment of dividends by foreign bank, determined by law of place of bank. *Graham v. First Nat. Bk. of Norfolk*, 84, 393; 38 Am. Rep. 528.

Circulation here of bills of bank of another State under five dollars, when not unlawful. *Merchants' Bank v. Spalding*, 9, 53.

A foreign corporation may make and enforce in this State contracts legal here though not legal where it resides. *Bard v. Poole*, 12, 495.

Counter-claim litigated in action in another State cannot be set up in action here on judgment rendered there. *Patrick v. Shaffer*, 94, 423.

As to measure of damages—lex loci contractus. *Dike v. Erie Ry. Co.*, 45, 113; 6 Am. Rep. 43.

As to factors' act. *First Nat. Bk. of Toledo v. Shaw*, 61, 283.

Contract of indorsement—governed by lex loci. *Cook v. Litchfield*, 9, 279.

Contract between indorser and drawer of bill drawn and indorsed abroad but payable here, regulated by our law—otherwise as between indorser and indorsee. *Everett v. Vendryes*, 19, 436.

A citizen of one State suing in another State may still object to discharge of his debtor under insolvent law of the latter. *Donnelly v. Corbett*, 7, 500.

Assignment of insurance policy here to citizen of Maryland controlled by law of this State. *Barry v. Equitable Life Ass. Society*, 59, 587.

Interest governed by laws of State where action accrues. *Brown v. Knapp*, 79, 136.

Bonds—usury. *Curtis v. Leavitt*, 15, 9.

On note made, dated and payable here but negotiated in another State, our law of usury applies. *Jewell v. Wright*, 30, 259.

Note made and delivered in Ohio, but dated and payable at place in this State, draws interest at rate allowed here. *Croninger v. Crocker*, 62, 151.

Drafts drawn and discounted in Canada, naming no place of payment—Canada contract and usury no defense. *Merchants' Bk. v. Griswold*, 72, 472; 28 Am. Rep. 159.

Note made and payable here, void if negotiated in another State at rate of interest unlawful here. *Dickinson v. Edwards*, 77, 573; 33 Am. Rep. 671.

Loan negotiated in another State, at interest lawful there but usurious here, not void because obligation executed here and payable here. *Wayne Co. Sav. Bk. v. Low*, 81, 566; 37 Am. Rep. 533.

Decree of another State as to executor. *Rice v. Harbeson*, 63, 493.

Effect of judgment against one of several joint debtors. *Suydam v. Barber*, 18, 468.

Decisions of court of sister State on commercial law not obligatory here—when will not control though contract to be performed in another State. *Faulkner v. Hart*, 82, 413; 37 Am. Rep. 574.

Plea of statute of limitations of another State, where contract was made, no bar to action here. *Miller v. Brenham*, 68, 83.

Marriage in another State of party prohibited here by divorce decree from remarrying, valid. *Van Voorhis v. Brintnall*, 86, 18; 40 Am. Rep. 505.

Marriage in another State by divorced person valid. *Moore v. Hegeman*, 92, 521; 44 Am. Rep. 408.

Legitimacy of child dependent on law of domicile of parents when married. *Miller v. Miller*, 91, 315; 43 Am. Rep. 669.

Married woman living in another State, and owning separate property, may sue here in her own name for injury to it here. *Stoneman v. Erie Ry. Co.*, 52, 429.

Rights of wife, married in France, as creditor of husband under French law, continue here. *Bonati v. Welsek*, 24, 157.

When chattel mortgagee may maintain action of conversion against one who purchased the mortgaged property in Canada in good faith. *Edgerly v. Bush*, 81, 199.

Chattel mortgage on property and by parties in Pennsylvania, and void there, void here. *Wattson v. Campbell*, 38, 153.

Contract of partnership in Cuba governed by laws of Spain. *King v. Sarria*, 69, 24; 25 Am. Rep. 128.

In absence of proof, *lex loci* presumed to be same as *lex fori*. *Chapin v. Dobson*, 78, 74; 34 Am. Rep. 512.

Where no proof of Russian law our law made the test. *Savage v. O'Neil*, 44, 298.

Presumption that law of another State was complied with—validity of mortgage of chattels. *Nichols v. Mase*, 94, 160.

Presumption is that Court of Common Pleas of another State is of general jurisdiction—presumption in favor of judgment. *Pringle v. Woolworth*, 90, 503.

Construction of statute of another State by courts of that State generally conclusive here. *Jessup v. Carnegie*, 80, 441; 36 Am. Rep. 643; *Hunt v. Hunt*, 72, 217; 28 Am. Rep. 129.

Charitable trusts under will, when void. *Levy v. Levy*, 33, 97.

Will of personalty, made in California, valid there but void here—our courts will remit to California for distribution. *Despard v. Churchill*, 53, 192.

Double administration of estate—burden of proof—presumption. *Matter of Accounting of Hughes*, 95, 55.

See ASSIGNMENT FOR CREDITORS; CONTRACT; CORPORATION; EXECUTOR AND ADMINISTRATOR; MARRIAGE; USURY; WILL.

## CONSIDERATION.

Suspension of prosecution of suit valid to uphold note. *Meltzer v. Doll*, 91, 365.

New note in ignorance of payment of original debt is without consideration. *Pratt v. Foote*, 9, 463.

What is not valuable, as against creditors of an insolvent vendor. *Seymour v. Wilson*, 19, 417.

Release of claim under contract ultra vires held valid to sustain agreement to pay for benefit secured therefrom. *Wile v. Wilson*, 93, 255.

Finding of referee that party executed instrument reciting, conclusive in this court. *Cady v. Allen*, 18, 573.

See ASSIGNMENT; COMPROMISE; CONTRACT; DEED; EVIDENCE; FRAUD; NEGOTIABLE INSTRUMENT; MORTGAGE.

## CONSIGNOR AND CONSIGNEE.

Consignor may impose conditions, and consignee can acquire title only by performing. *Cayuga Co. Nat. Bk. v. Daniels*, 47, 631.

When intermediate consignee not liable for freight. *Dart v. Ensign*, 47, 619.

See AGENCY; BILL OF LADING; CARRIER; SHIP AND SHIPPING; WAREHOUSEMAN.

## CONSPIRACY.

When action for conspiracy to defraud is maintainable—evidence of declarations. *Place v. Minster*, 65, 89.

Action lies for, fraudulently to use legal proceedings to injure another. *Verplanck v. Van Buren*, 76, 247.

See CRIMINAL LAW.

## Constable.

See OFFICE AND OFFICER; SHERIFF.

## CONSTITUTIONAL LAW.

### I. In general.

1. What constitutional.
2. What unconstitutional.

### II. Municipal corporations.

### III. Legislative power.

1. Generally.
2. Excise statutes.
3. Jurisdiction of State statutes.
4. Public health.
5. Maritime laws.
6. Ex post facto laws.
7. Police regulations.
8. New counties.
9. Corporate franchises.
10. Local statutes.
11. Public education.
12. Agricultural leases.

### IV. Judicial department.

1. Courts.
2. Construction of statutes.
3. Due process of law.
4. Practice and evidence.
5. Jury.
6. Challenges.
7. Judiciary.
8. Reference and referees.

### V. Executive power.

### VI. Taxation and assessment.

### VII. Obligation of contracts.

### VIII. Eminent domain.

#### I. In general.

##### 1. What constitutional.

A law authorizing transfer of property by owner to another with owner's consent. *Embury v. Conner*, 3, 511.

Chapter 194, Laws of 1849, for protection of shell-fish. *State v. Levinus*, 8, 472.

Act of 1842, exempting certain property from execution. *Morse v. Gould*, 11, 281.

The enactment that claims for canal damages must be presented within a year. *Rexford v. Knight*, 11, 308.

Act concerning intrusion on Indian lands. *People v. Dibble*, 16, 203; affirmed, 21 How. (U. S.) 366.

Provisions of act of 1849 concerning insolvent banks. *U. S. Trust Co. v. U. S. Fire Ins. Co.*, 18, 199.

Statute authorizing release of escheated lands. *Englishbe v. Helmuth*, 3, 294.

Act of 1805 concerning grants in fee reserving rent. *Van Rensselaer v. Hays*, 19, 68; *Van Rensselaer v. Ball*, 19, 100.

Statute freeing slaves voluntarily brought to this State by master. *Lemmon v. People*, 20, 562.

Married women's acts of 1848 and 1849 not unconstitutional because they defeat curtesy in wife's subsequently acquired lands. *Thurber v. Townsend*, 22, 517.

Law repealing law imposing tolls on railroad freight. *People v. New York Cent. R. Co.*, 24, 485.

Act to secure payment of debts of manufacturing companies without preference. *Story v. Furman*, 25, 214.

Act authorizing electors of incorporated village to determine what sections of general village act shall apply to them; renewal of tax warrant. *Bank of Chenango v. Brown*, 26, 437.

Drainage law — how far constitutional. *People v. Nearing*, 27, 306.

Federal legal tender act; refusal of bank to redeem its bills in specie authorizes superintendent to sell its securities deposited with him. *Metropolitan Bank v. Van Dyck*, 27, 400.

Act to compensate sufferers from riots (April 13, 1855). *Darlington v. Mayor*, 31, 164.

Estray law (1862, chapter 459, as amended, 1867, chapter 814). *Campbell v. Evans*, 45, 356; *Cook v. Gregg*, 46, 439.

Act as to bounties valid. *Powers v. Shepard*, 48, 540.

Militia courts-martial — imprisonment to enforce judgment of. *People v. Daniell*, 50, 274.

Act of 1872, chapter 580, as to local improvements in New York city. *Matter of Delancey*, 52, 80.

Act of 1861, chapter 308, making board of revision of assessments. *Petition of Volkening*, 52, 650.

Act of 1869, chapter 272, as to improvement of highways in Yonkers and East Chester. *Odell v. De Witt*, 53, 643.

Act of 1861, chapter 333, section 3, as to forfeited recognizances. *People v. Quigg*, 59, 83.

Game law, act of 1871, chapter 721, sections 7, 8, 33. *Phelps v. Racey*, 60, 10; 19 Am. Rep. 140.

Drainage act of 1872, chapter 639. *People v. Willsea*, 60, 507.

Appointment of Central park commissioners. *Astor v. Mayor, etc.*, 62, 567.

Act of 1860, chapter 509. *Devlin v. Mayor, etc.*, 63, 8.

Act to perpetuate testimony respecting Pulteney estate valid. *Howard v. Moot*, 64, 262.

Act of 1873, chapter 531 — Greenwood and Coney Island R. Co. — act of 1874, chapter 448, Park Avenue R. Co. *Matter of Application of Prospect Park, etc., R. Co.*, 67, 371.

Act of 1876, chapter 439, relating to judicial sales in Kings county — title of act — increasing fees. *Kerrigan v. Force*, 68, 381.

Provision of act of 1873, chapter 335, section 114, as to city officers holding county office. *Billings v. Mayor, etc.*, 68, 413.

Drainage act, 1869, chapter 888; 1871 chapter 303. *Matter of Application of Ryers*, 72, 1; 28 Am. Rep. 88.

Act of 1877, chapter 165, concerning Brooklyn bridge. *Matter of Petition of Trustees of New York and Brooklyn Bridge*, 72, 527.

Act of 1874, chapter 209, authorizing supervisors to agree with county having penitentiary, for receiving prisoners, and authorizing sentence direct. *Brown v. People*, 75, 437.

Act of 1866, chapter 576, authorizing deposit of fund for security of registered policy-holders, not in conflict with article 8, section 1, of Constitution — does not create but regulates — such fund not a loan, but deposit — loaning credit of State constitutional, article 7, section 9. *Attorney-General v. North Amer. Life*, 82, 172.

Statutes (Laws 1866, chapter 633; 1867, chapter 962; 1870, chapter 297; 1877, chapter 64; 1879, chapter 89) requiring payment of percentage on insurance premiums in New York to exempt firemen's fund and not repealed by Laws 1880, chapter 542, etc. *Trustees of Exempt Firemen's Fund v. Roome*, 93, 313; 45 Am. Rep. 217.

Provision as to street railway legislation prospective — Laws 1876, chapter 187, as to Brooklyn railways. *People v. Brooklyn, etc., R. Co.*, 89, 75.

Statute allowing bondsmen to be substituted for sheriff in action for chattel levied on. *Hessberg v. Riley*, 91, 377.

Laws 1875, chapter 482, section 1, subdivision 9, amended by Laws 1880, chapter 365, and 1881, chapter 554, as to assessments by supervisors for improvements in counties containing city of 100,000 inhabitants — appropriation of property for improvement and compensation. *Matter of Church*, 92, 1.

State statute forbidding lottery. *People v. Noelke*, 94, 137.

Act of 1878, chapter 410, as to laying out highways. *Matter of Application of Woolsey*, 95, 135.

## 2. What unconstitutional.

Act of April 11, 1842, extending exemption of personal property. *Danks v. Quackenbush*, 1, 129.

Act for completion of Erie canal enlargement, July 10, 1851. *Newell v. People*, 7, 9.

A statute dependent on popular vote for adoption. *Barto v. Himrod*, 8, 483.

Act requiring oath of non-participation in rebellion as condition of voting. *Green v. Shumway*, 39, 418.

Laws of 1871, chapter 383, section 49, as to Court of Special Sessions in New York city. *Huber v. People*, 49, 132.

Acts of 1872, chapter 700, and 1872, chapter 734, for creation of debt. *People v. Board of Supervisors of Kings Co.*, 52, 556.

Act of 1868, chapter 776, as to vesting State lands in Marlborough, because it did not appear from statute book on original to have received two-third vote. *People v. Commrs. of Highways of Marlborough*, 54, 276; 13 Am. Rep. 581.

Act of 1871, chapter 385, section 1, extending term of office of Newtown collector under name of receiver of taxes. *People v. Brooks*, 53, 648.

Act providing that commissioners to appraise damages for land to be taken for

streets shall be drawn from a larger number of names. *Menges v. City of Albany*, 56, 374.

Lease of agricultural land for more than twelve years, although leased for other than agricultural purposes. *Odell v. Durant*, 62, 524.

Agricultural lease — two leases at same time for an aggregate of more than twelve years, void — when prior lease not reinstated. *Clark v. Barnes*, 76, 301; 32 Am. Rep. 306.

Act of 1844, chapter 86, as to appointment of commissioners to assess land damages. *Hilton v. Bender*, 69, 75.

Unconstitutionality of statute under which officer acts no defense for violation of duty. *Hall v. People*, 90, 498.

Election of justices of peace — act of 1881, chapter 564, sections 1, 2, unconstitutional. *People v. Schiellain*, 95, 124.

## II. Municipal corporations.

Laws 1880, chapter 59, section 4, discharging the city of Yonkers from liability on original negotiable bonds upon issuing duplicates unconstitutional. *People v. Otis*, 90, 48.

Legislative powers as to elections in cities — Laws 1881, chapter 76, as to charter of Troy valid. *People v. Crissey*, 91, 616.

Alteration of boundary of city involving alteration of assembly district — when cannot be made. *Kinne v. City of Syracuse*, 3 Keyes, 110.

Port warden act for New York city (1857) constitutional. *Tinkham v. Tapscott*, 17, 141.

An act confining powers on the authorities of a municipal corporation subject to the approval of the inhabitants by vote is constitutional. *Bank of Rome v. Village of Rome*, 18, 38.

Act of 1875, chapter 2, as to Hamburg turnpike in Buffalo valid — legalization of illegal acts of municipality. *Tift v. City of Buffalo*, 82, 204.

Creation of office of commissioner of records in New York city, act 1855, chapter 407, constitutional. *People v. Palmer*, 52, 83.

Act of 1859, providing for closing tunnel of Long Island railroad in Atlantic street, Brooklyn, and that of 1860, relative to assessments in Brooklyn, valid. *Litchfield v. Vernon*, 41, 123.

Act of 1872, chapter 771, amending acts in relation to city of Rochester, valid. *People v. Briggs*, 50, 553.

Act of 1860, chapter 501, to prohibit dramatic performances in city of New York on Sunday, is valid. *Neuendorff v. Duryea*, 69, 557; 25 Am. Rep. 235, note.

Rapid transit act. 1875, chapter 606, valid. *Matter of Petition of New York Elevated R. Co.*, 70, 327; *Matter of Petition of Gilbert Elevated Ry. Co.*, 70, 361.

Act of 1875, chapter 300, authorizing Brooklyn bridge, valid — "city purpose." *People v. Kelly*, 76, 475.

Act of 1876, chapter 445, as to Western avenue, Albany, valid. *People v. Banks*, 67, 568.

Act of 1873, chapter 335, vesting appointment of commissioner of juries in common council of New York, valid. *People v. Dunlap*, 66, 162.

Act of 1874, chapter 604, for laying out portions of New York city, valid. *Matter of Application of Dept. of Pub. Parks*, 86, 437.

Act of 1874, chapter 638, ratifying town bonding proceedings, valid. *Rogers v. Stephens*, 86, 623.

Act of 1869, chapter 876, section 11, prohibiting New York common council from creating new officers, valid. *Sullivan v. Mayor, etc.*, 53, 652.

Laws of 1872, chapter 872, relating to New York city, constitutional. *Matter of Upson*, 89, 67.

Charter of village of Corning, constitutional. *Sill v. Village of Corning*, 15, 297.

Charter of Watertown, 1871, chapter 810, section 38, invalid. *City of Watertown v. Fairbanks*, 65, 588.

Law compelling municipal corporation to become stockholder in railroad against its will is invalid. *People v. Batchellor*, 53, 128; 13 Am. Rep. 480.

Chapter 93, Laws of 1883, as to manufacture of tobacco in tenement-houses in New York city. *Matter of Paul*, 94, 497.

### III. Legislative power.

#### 1. Generally.

Legislature may enact that a city shall not be liable in damages for act or omission of officers. *Gray v. City of Brooklyn*, 2 Abb. 267.

Statute altering boundary of assembly district by altering boundary of city, unconstitutional. *Kinne v. City of Syracuse*, 2 Abb. 534.

When legislature may change salary of city officer. *Conner v. Mayor, etc.*, 5, 285.

The legislature has no power to order a sale of lands devised in trust and the investment of the proceeds, none of the beneficiaries being minors, insane or otherwise incompetent. *Powers v. Bergen*, 6, 358.

The legislature cannot deprive husband of his interest in a legacy to wife before 1848. *Westervelt v. Gregg*, 12, 202.

Grant of public lands contiguous to Salt Springs conveys no inheritable interest. *Newcomb v. Newcomb*, 12, 603.

Legislature may authorize joinder of legal and equitable causes of action. *Philips v. Gorham*, 17, 270.

The legislature may authorize a municipality to subscribe for railroad stock and levy tax therefor. *Bank of Rome v. Village of Rome*, 18, 38.

Legislature may provide for selling real estate of infants in esse or to be born. *Leggett v. Hunter*, 19, 445.

Legislature may authorize a special county judge to take bail. *People v. Main*, 20, 434.

Personal liability of stockholders of banks — legislative power to modify. *Matter of Oliver Lee & Co.'s Bank*, 21, 9.

The legislature may determine qualifications of attorneys. *Matter of Cooper*, 22, 67.

Legislature may extend term of officers of city by repeal or modification of act providing for election of successors. *People v. Batchelor*, 22, 128.

Legislature may fix time of payment of State loan. *People v. Denniston*, 23, 247.

Legislature may enact a law regulating the traffic in intoxicating liquors in certain



counties. *Metropolitan Board of Excise v. Barrie*, 34, 657.

Where legislature may direct whether office is to be filled by election or by appointment, it may in directing election declare one holding another office ineligible. *People v. Clute*, 50, 451; 10 Am. Rep. 508.

Legislature may extend term of town collector to be elected. *People v. McKinney*, 52, 374.

Legislature may make a reassessment for municipal improvement where first was irregular. *Matter of Van Antwerp*, 53, 261.

Legislature may appoint commissioners for widening a particular highway and cure defects in form of execution. *People v. McDonald*, 69, 362.

Legislature may require railroad to bridge over a turnpike. *People v. Boston & Albany R. Co.*, 70, 569.

Legislature may abolish board and office of assistant aldermen of city. *Demarest v. Mayor, etc.*, 74, 161.

Legislature may restrict power of courts to modify municipal assessment for local improvements. *Matter of Petition of Mead*, 74, 216.

Legislature cannot establish court in local district not bounded by town, county or city lines — Niagara police district act of 1881 unconstitutional. *People v. Porter*, 90, 68.

The legislature may authorize the removal of one holding an office created by it without notice. *People v. Whitlock*, 92, 191.

## 2. Excise statutes.

Prohibitory liquor law of 1855 is unconstitutional, because it destroys property in liquors possessed at time of enactment, and denies trial by jury. *Wynehamer v. People*, 13, 378.

Excise act of 1873, chapter 549, section 8, valid. *People v. Commissioner of Police*, 59, 92.

Excise law — title — local option. *Village of Gloversville v. Howell*, 70, 287.

Civil damage act valid as to landlord letting premises for sale of liquors. *Bert-*

*holf v. O'Reilly*, 74, 509; 30 Am. Rep. 323.

## 3. Jurisdiction of State statutes.

State insolvent law invalid as to citizens of other States. *Donnelly v. Corbett*, 7, 500.

Authorizing discharge from imprisonment and from debt, void only as to latter. *Id.*

Organization of one railroad company under statutes of several States. *Boardman v. Lake Shore, etc., R. Co.*, 84, 157.

## 4. Public health.

Metropolitan sanitary district act, 1866, chapter 74, constitutional. *Metropolitan Board of Health v. Heister*, 37, 661; 6 Trans. App. 170.

## 5. Maritime laws.

State law conferring jurisdiction on State court in proceedings in rem against vessel, unconstitutional. *In re Steamboat Josephine*, 39, 19.

Act of 1862, giving lien on ships and vessels, is constitutional. *Sheppard v. Steele*, 43, 52; 3 Am. Rep. 660.

State statute giving lien on sea-going vessel is void. *Brookman v. Hamill*, 43, 554; 3 Am. Rep. 731.

Act as to election of commissioners of pilots not unconstitutional. *Sturgis v. Spofford*, 45, 446.

Act of 1862, chapter 482, as to collecting demands against ships and vessels valid. *Happy v. Mosher*, 48, 313.

Act of 1862, chapter 482, giving lien for supplies to vessels engaged in foreign commerce, is invalid. *Poole v. Kermit*, 59, 554.

## 6. Ex post facto laws.

Statute taking away right of appeal in pending action not unconstitutional. *Grover v. Coon*, 1, 536.

Act adding preliminary imprisonment to capital sentence ex post facto as to persons under conviction at time of passage.

*Hartung v. People*, 22, 95; *Shepherd v. People*, 25, 406.

Laws of 1860, chapter 410, ex post facto as to subsequent convictions for previous crimes. *Hartung v. People*, 26, 167.

#### 7. Police regulations.

Capital police district act of 1865, valid. *McMullen v. Shepard*, 3 Trans. App. 354.

Erection of police district in New York city valid. *People v. Draper*, 15, 532.

Jurisdiction of police justice may be defined by reference to that of a justice of peace in same place. *Brandon v. Avery*, 22, 469.

Metropolitan fire district act valid. *People v. Pinckney*, 32, 377.

Capital police district may be established embracing portions of certain counties. *People v. Shepard*, 36, 285.

Metropolitan police board act — power to appoint police court clerks void. *Devoy v. Mayor, etc.*, 36, 449.

Act of 1873, chapter 638, constituting Rensselaer police district invalid. *People v. Albertson*, 55, 50.

Act of 1873, chapter 538, for appointment of police justices in New York city is valid. *Wenzler v. People*, 58, 516.

Act of 1881, chapter 415, establishing Niagara police district unconstitutional. *People v. Porter*, 90, 68.

#### 8. New counties.

Formation of new county — act to organize Schuyler county (chapter 386, Laws of 1854) unconstitutional. *Lanning v. Carpenter*, 20, 447. See *Rumsey v. People*, 19, 41.

#### 9. Corporate franchise.

Authority to a safe deposit company to issue certificates for money deposits is not a special charter for banking — act of 1868, chapter 816. *Pardee v. Fish*, 60, 265; 19 Am. Rep. 176.

Legislature may authorize one street railway company to use tracks of another

upon making compensation. *Sixth Ave. R. Co. v. Kerr*, 72, 330.

Act of 1878, chapter 206, invalid, as granting right to a corporation to lay down railroad track. *Matter of Application of Brooklyn, etc., R. Co.*, 75, 335.

#### 10. Local statutes.

Title of statute — private or local law. *Conner v. Mayor, etc.*, 5, 285.

Statute — double subject — (1855, chapter 337). *People v. McCann*, 16, 58.

Title of private act, what sufficient. *Brewster v. City of Syracuse*, 19, 116.

Special act of incorporation not void because of general act for same general purpose. *People v. Bowen*, 21, 517.

Amendment of New York city charter is local act — title not embracing purpose. *People v. O'Brien*, 38, 193.

Title of act, Laws of 1869, chapter 569, as to fees of sheriff of New York. *Gaskin v. Meek*, 42, 186.

Act for improving Boquet river is local and requires two-thirds vote. *People v. Allen*, 42, 378.

Act for bridge over Cattaraugus creek is local. *People v. Supervisors of Chautauqua*, 43, 10.

Local bill — act of 1872, chapter 580, valid. *Matter of Petition of Mayer*, 50, 504.

Act of 1872, chapter 219, sections 3, 4, valid — taking private property — local act. *People v. City of Rochester*, 50, 525.

Private or local bill — one subject expressed in title. *People v. Livingston*, 79, 279; *Sweet v. Buffalo, etc.*, 79, 293.

Exclusive right to bridge company. *Chenango Bridge Co. v. Paige*, 83, 178; 38 Am. Rep. 407.

#### 11. Public education.

Appropriation of common school fund to building of astronomical observatory is void. *People v. Allen*, 42, 404.

Taxation — acts in regard to normal schools, 1866, chapter 466; 1867, chapter 96, construed. *Gordon v. Cornes*, 47, 608.

The establishment of separate schools for colored children is not in violation of the Federal Constitution. *People v. Gallagher*, 93, 438; 45 Am. Rep. 232, note.

#### 12. Agricultural leases.

Lease for life of agricultural lands and personal property, with agreement to devise, in consideration of support for life, is not void as an agricultural lease for more than twelve years, reserving rent or service. *Stephens v. Reynolds*, 6, 454.

Lease not reserving rent, not within prohibition. *Parsell v. Stryker*, 41, 480.

Lease for other purposes, but without restriction, subject to prohibition. *Odell v. Durant*, 62, 524.

Two leases, one for eight, and other for twelve years, made at same time and for same consideration, both void. *Clark v. Barnes*, 76, 301; 32 Am. Rep. 306.

### IV. Judicial department.

#### 1. Courts.

Statute giving jurisdiction to County Courts in assault and battery is void. *Kundolf v. Thalheimer*, 12, 593.

Statute giving County Courts jurisdiction in partition is constitutional. *Double-day v. Heath*, 16, 80.

Act vesting recorder of Troy with powers of Supreme Court justice at chambers is constitutional. *Hayner v. James*, 17, 316.

Act conferring on County Courts jurisdiction in foreclosure is constitutional, if premises situated within county. *Arnold v. Rees*, 18, 57.

Act establishing Superior Court of Buffalo is constitutional. *International Bank v. Bradley*, 19, 245.

Legislature may provide for designation of justices of peace to sit in sessions. *Nelson v. People*, 23, 293.

Deed of land in this State not invalid for want of a stamp. *Moore v. Moore*, 47, 467; 7 Am. Rep. 466; *People v. Gates*, 43, 40.

City Court of Brooklyn can have no jurisdiction in action of negligence against

corporation situated outside the city. *Landers v. Staten Island R. Co.*, 53, 450.

Legislature may deprive courts of power to remove lien of void assessments. *Lennon v. Mayor, etc.*, 55, 361.

Act of 1870 to amend Code, not invalid because extending jurisdiction of justices of District Courts in New York city. *People v. Dudley*, 58, 323.

Legislature may limit jurisdiction of this court. *Butterfield v. Rudde*, 58, 489.

Act of 1874, chapter 545, section 4, authorizing any court to transfer actions to Marine Court, is unconstitutional. *Alexander v. Bennett*, 60, 204.

Legislature may invest Marine Court with jurisdiction of assault and battery, without limit as to amount of recovery. *Anderson v. Reilly*, 66, 189.

Court of Special Sessions in New York valid. *People v. Justices of Court of Special Sessions*, 74, 406.

Special Sessions may have exclusive jurisdiction of petit larceny. *People v. Dutcher*, 83, 240.

#### 2 Construction of statutes.

Vested right of landlord not taken away by statute abolishing distress for rent. *Conley v. Palmer*, 2, 182.

Act abolishing distress for rent is valid as to leases in force at the time of its passage. *Van Rensselaer v. Snyder*, 13, 299; *Conkey v. Hart*, 14, 22.

Construction of statute authorizing town railway aid bonds. *Starin v. Town of Genoa*, 23, 439; *Gould v. Town of Sterling*, 23, 456.

Action is "pending" so long as judgment is unsatisfied — Constitution of 1846, article 14, section 5. *Wegman v. Childs*, 41, 159.

When senate not deemed "in session." *People v. Fancher*, 50, 288.

Act of 1868, chapter 631, as to widening streets in Brooklyn, construction of. *Matter of Sackett, etc.*, *Streets*, 74, 95.

If part of act unconstitutional, that does not invalidate remainder. *Matter of Middleton*, 82, 196.

3. *Due process of law.*

Seizure and sale of estrays without judicial process is void. *Rockwell v. Nearing*, 35, 302.

Arresting business of corporation under act of 1869, chapter 902, not depriving of property without "due process of law." *Attorney-General v. North Amer. Life*, 82, 172.

See III, 2; VI.

4. *Practice and evidence.*

Witness not relieved from testifying against another in a criminal proceeding on the ground of self-implication if he is protected by statute against such use of his testimony. *People v. Hacklèy*, 24, 74.

State statute providing for surrender of foreign fugitives from justice is unconstitutional. *People v. Curtis*, 50, 321; 10 Am. Rep. 483.

Legislature may provide mode of commencing action against foreign corporation. *Hiller v. Burlington, etc., R. Co.*, 70, 223.

Act allowing husband and wife to testify applies to actions pending when it took effect. *Southwick v. Southwick*, 49, 510.

One prosecuted before court-martial is entitled to counsel. *People v. Van Allen*, 55, 31.

5. *Jury.*

Trial by jury in action of nuisance is a right. *Hudson v. Caryl*, 44, 553.

Defendants in quo warranto entitled to jury. *People v. Albany & Susquehanna R. Co.*, 57, 161.

Albany county jury law unconstitutional as to grand jurors, but indictment by jury valid to uphold conviction. *People v. Petrea*, 92, 128.

Defendant not entitled to jury in action for foreclosure of mortgage. *Carroll v. Deimel*, 95, 252.

See III, 2, CRIMINAL LAW.

6. *Challenges.*

Statute giving people peremptory challenges is valid. *Walter v. People*, 32, 147.

. Act of 1872, chapter 475, as to challenges in criminal cases, valid. *Stokes v. People*, 53, 164; 13 Am. Rep. 492.

See CRIMINAL LAW.

7. *Judiciary.*

Right of judge to sit on review of his own decision. *Pierce v. Delamater*, 1, 17.

Provision that a court shall consist of eight judges is subject to the contingency of disqualification of judges by consanguinity. *Oakley v. Aspinwall*, 3, 547.

Legislature may enact that less than eight shall constitute a quorum. *Id.*

Vacancy in office of Supreme Court justice must be supplied at next election, although vacancy occurs too late to give notice. *People v. Coules*, 13, 350.

Filling vacancy in office of judge caused by resignation, the day before November election, 1871. *People v. Potter*, 47, 375.

Court may appoint special surrogate where other officers disqualified: *Matter of Will of Hathaway*, 71, 238.

County judge cannot act after seventy years of age. *People v. Brundage*, 78, 403.

8. *Reference and referee.*

Reference of long accounts is valid. *Van Marter v. Hotchkiss*, 1 Keyes, 585.

Law providing for reference of controversy between receiver of insolvent mutual insurance company and the members is constitutional. *Sands v. Kimbark*, 27, 147; *Sands v. Harvey*, 4 Abb. 147.

Commissioner of appeals may act as referee. *Settle v. Van Esvrea*, 49, 280.

V. *Executive power.*

Governor may sign bill after adjournment of legislature, and within ten days after presentment to him. *People v. Bowen*, 21, 517.

VI. *Taxation and assessment.*

Assessment for street improvements in proportion to benefit is constitutional. *People v. Mayor, etc.*, 4, 419.

Taxation of sales of foreign merchandise by brokers—to what extent unconstitutional. *People v. Maring*, 3 Keyes, 374.

A commutation militia tax is not a tax within the article requiring passage by three-fifths of the legislature. *People v. Supervisors of Chenango*, 8, 317.

Requisites to passage of bill—certificate—yeas and nays. *Id.*

Legislature may enact that comptroller's deed for taxes shall be presumptive evidence of regularity of proceedings. *Hand v. Ballou*, 12, 541.

Legislature may levy a tax on town to pay a claim by an individual against the town, although the claim is not recoverable by action, and has been rejected by the electors under a legislative submission conditioned to be conclusive. *Town of Guilford v. Supervisors*, 13, 143.

Act (1855, chapter 327) for apportionment of taxes is constitutional. *Jackson v. Babcock*, 16, 246.

Requirement that taxing laws shall state object of application, how fulfilled. *People v. Supervisors*, 17, 235.

Congress may not exempt from State taxation Federal securities previously issued. *People v. Commissioners of Taxes*, 26, 163.

Legislature may enact to sell in fee for taxes—may apportion tax territorially—may tax lands devised in trust for charity school, vesting remainder. *Matter of Trustees of New York Protestant Episcopal Public School*, 31, 574.

State may repeal exemption from taxation, etc., for militia service. *People v. Roper*, 35, 629.

Lands benefited by street improvements may be assessed therefor. *Howell v. City of Buffalo*, 37, 267.

Act vesting appointment of tax commissioners in New York city in governor is unconstitutional. *People v. Raymond*, 37, 428.

Legislature may authorize town bonds and tax to pay them for construction of highways. *People v. Flagg*, 46, 401.

Exemption of New York hospital from taxation is valid. *People v. Commissioners of Taxes*, 47, 501.

Tax levy acts of 1863, 1867 and 1868, providing for designation of official newspapers in New York city, valid. *Petition of Astor*, 50, 363.

Legislature may not authorize sale of lands of competent adults except for taxes or assessments. *Brevoort v. Grace*, 53, 245.

Legislature may not authorize municipal corporation to lay tax to pay railroad aid bonds. *Weismer v. Village of Douglas*, 64, 91; 21 Am. Rep. 586.

Law imposing assessment without notice or hearing is unconstitutional—acts 1869, chapter 217, section 4; 1870, chapter 619—“due process of law.” *Stuart v. Palmer*, 74, 183; 30 Am. Rep. 289.

Act of 1867, chapter 360 (Rhinebeck charter), not in violation of article 8, section 9—legislature to restrict power of taxation and assessment—appointment of commissioners without notice, not deprivation of property without due process of law. *Matter of Livingston Street*, 82, 621.

Remitting owner of lands taken for city improvement to assessment fund illegal, and city liable for compensation. *Sage v. City of Brooklyn*, 89, 189.

Statutes of 1865 and 1875, imposing taxes upon insurance companies of other States to an amount equal to those imposed by such States on New York companies, constitutional. *People v. Fire Association, etc.*, 92, 311; 44 Am. Rep. 390, note.

Taxation of corporations, under Laws of 1880, chapter 542, valid, though Federal bonds not deducted. *People v. Home Ins. Co.*, 92, 328.

Laws 1865, chapter 453, for assessment of omitted property without notice, constitutional. *People v. Assessors of Brooklyn*, 92, 430.

## VII. Obligation of contracts.

Act authorizing addition to contract price for municipal improvement beyond what municipality authorized to pay, constitutional. *Brewster v. City of Syracuse*, 19, 116.

Alteration of bank charter. *Matter of Reciprocity Bank*, 22, 9.

Legislature may grant a bridge franchise impairing the value of a previous one, unless the former was expressly exclusive. *Fort Plain Bridge Co. v. Smith*, 30, 44.

Bonds having been issued for lands taken for a city park, an act of the legislature authorizing a sale of any part of the lands free from liens is void, as impairing their lien. *Brooklyn Park Co. v. Armstrong*, 45, 234; 6 Am. Rep. 70.

Act extending term of actual incumbents of office unconstitutional. *People v. Bull*, 46, 57; 7 Am. Rep. 302.

Legislature may increase price or make additional allowance under contracts for canal work. *People v. Dayton*, 55, 367.

Act of 1871, chapter 460, revising charter of Long Island City valid. *Harris v. People*, 59, 599.

State may discontinue work which it has contracted for. *Lord v. Thomas*, 64, 107.

Legislature may shorten term of aldermen in office. *Long v. Mayor, etc.*, 81, 425.

State may not impair obligation of contracts with it. *Danolds v. State*, 89, 36; 42 Am. Rep. 277.

Limitation of duration of term of office. *Berger v. Powell*, 94, 591.

#### VIII. *Eminent domain.*

Legislature cannot authorize railroad in highway without compensation to owners of fee. *Williams v. N. Y. Cent. R. Co.*, 16, 97.

Highways may cross railways without compensation. *Albany Northern R. Co. v. Brownell*, 24, 345.

Act of legislature authorizing appraisal of damages for lands taken for public use without authority is void. *Matter of Townsend*, 39, 171.

When act not void for authorizing commissioners to condemn lands to sell again. *Matter of Comm'rs of Washington Park*, 52, 132.

Legislature may provide for reassessment of damages for land condemned. *Clark v. Miller*, 54, 528

Legislature may close streets in New York city without compensating owners

for loss of right of way if another street be left giving access. *Fearing v. Irwin*, 55, 486.

Order of confirmation of report of commissioners directing payment of money awarded for lands acquired by railroad into bank subject to order of court instead of to owner is valid. *Matter of New York Cent., etc., R. Co.*, 60, 116.

Commissioners to assess damages for property taken for public use need not concur—provision that nothing but fraud shall suffice to vacate assessment is valid. *Astor v. Mayor*, 62, 580.

Taking lands for cemetery, invalid. *Matter of Petition of Deansville Cemetery Assoc.*, 66, 569; 23 Am. Rep. 86.

Acts of 1866, chapter 347; 1879, chapter 85—contemplate public use not private or local—additional powers of commission of appraisal—not prohibited—effort to agree on damages condition precedent, notice of appointment need not be given—only of hearing—legislature determines as to notice. *Matter of Middleton*, 82, 196.

Interest of abutting land-owner in street property, for taking of which compensation must be paid. *Story v. New York El. R. Co.*, 90, 122; 43 Am. Rep. 146.

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#### CONSUL.

Foreign, residing in United States, not liable to be sued in State court, although impeached with a citizen on a joint contract. *Valarnio v. Thompson*, 7, 576.

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#### CONTEMPT.

Supreme Court may punish for disobedience of order of county judge in supplementary proceedings on Supreme Court judgment. *Tremain v. Richardson*, 68, 617.

Surrogate's power to punish for. *Matter of Watson v. Nelson*, 69, 536.

A party may not be punished for, in not obeying order to repay moneys col-

lected on a judgment which has been reversed. *O'Gara v. Kearney*, 77, 423.

Party not punishable for disobeying order to pay referee's fees, unless other party injured thereby. *Fischer v. Raab*, 81, 235.

When party may be punished for disobedience of order to pay alimony. *Park v. Park*, 80, 156.

When attorney not guilty of, in abuse of confidence of court. *People v. Randall*, 73, 416.

Order punishing for, appealable — common council of city liable — practice in proceedings for. *People v. Dwyer*, 90, 402.

Proceedings for, against referee in foreclosure — appeal — suspension of order. *People v. Bergen*, 53, 404.

Drawing money from bank in disobedience of injunction is, although "in trust." *People v. Kingsland*, 1 Trans. App. 270; 3 Keyes, 325.

When railroad company liable for, in disobeying mandamus to fence. *People v. Rochester, etc., R. Co.*, 76, 294.

Refusal to leave books with referee or allow witness to examine — fine — amount how to be ascertained. *Sudlow v. Knox*, 4 Abb. 326.

Remedy for, in supplementary proceedings — fine — imprisonment — practice. *Brush v. Lee*, 1 Abb. 238; 2 Trans. App. 95.

Refusal of witness to answer before grand jury punishable. *People v. Kelly*, 24, 74.

When party in, court may refuse to hear him. *Walker v. Walker*, 82, 260.

Requisites of warrant after indictment for contempt issued previous to Code of Criminal Procedure. *People v. Mead*, 92, 415.

When party enjoined from prosecution not guilty of, for collecting costs. *German Savings Bank v. Habel*, 80, 273.

On vacating attachment for, court may not impose condition of not suing for false imprisonment — costs of appeal. *Matter of Bradner*, 87, 171.

Order to show cause, how served. *Pitt v. Davison*, 37, 235.

Attachment, how issued. *Kelly v. McCormick*, 28, 318.

## CONTRACT.

### I. What constitutes.

1. In general.
2. Particular subjects.
  - (a.) Sale.
  - (b.) Carrying on trade.
  - (c.) Lending money.
  - (d.) Miscellaneous.

### II. Consideration.

### III. Construction and effect.

1. General principles.
2. Particular subjects.

### IV. Validity.

1. As affected by public policy.
2. When in restraint of trade.
3. Special grounds.
4. Wagering contracts.
5. Effect of illegality.

### V. Performance and liability.

1. General matters.
2. Part performance.
3. Excuses for performance.
4. Condition precedent.
5. Actions for breach.

### VI. Rescission.

### VII. General matters.

#### I. What constitutes.

##### 1. In general.

On sale of newspaper route by one carrier to another, no contract is implied that the publisher shall continue to furnish him papers, although he has recognized him as carrier. *Hathaway v. Bennett*, 10, 108.

A broken contract is superseded by a new one covering the same matters, and left in escrow, to be delivered conditionally, and if the condition is not performed neither can be enforced. *Price v. McGown*, 10, 465.

Proposal by letter becomes binding upon deposit of acceptance in post-office. *Vassar v. Camp*, 11, 441.

Letter referring to oral proposition and accepting it, and requesting acknowledg-

ment, is not a contract. *Hough v. Brown*, 19, 111.

By letter and telegraph—what constitutes. *Trevor v. Wood*, 36, 307.

By letter—when not complete. *Brown v. New York Cent. R. Co.*, 44, 79.

—what is not acceptance of offer.

*White v. Corlies*, 46, 467.

—when parol evidence not competent to modify. *Van Keller v. Schulting*, 50, 108.

—repudiation—tender—remedy. *Howard v. Daly*, 61, 362; 19 Am. Rep. 285.

When superseded by and merged in subsequent. *Renard v. Sampson*, 12, 561.

Vendor of stocks to a banking corporation, taking notes therefor which the corporation was prohibited under penalty from making, may still recover the value of stocks on implied undertaking. *Tracy v. Talmage*, 14, 162.

Two instruments, to constitute one contract, must be between same parties and not merely to same party. *Draper v. Snow*, 20, 331.

Not executed by all named as parties, when binds others—execution when not to be deemed individual. *Chouteau v. Sugdam*, 21, 179.

When proposition equivalent to contract. *Pratt v. Hudson R. R. Co.*, 21, 305.

What is mere receipt. *Filkins v. Whyland*, 24, 338.

When implied to pay for use of property delivered in prospect of sale. *Rider v. Union India Rubber Co.*, 28, 379.

What is a deposit and not a loan. *Payne v. Gardiner*, 29, 146.

Modification as to time of payment by acceptance of note—offset of damages for breach, not allowed. *Walker v. Millard*, 29, 375.

What amounts to acceptance of order for delivery of goods. *Briggs v. Sizer*, 30, 647.

When note may be deemed mere receipt for money advanced. *Smith v. Rowley*, 34, 367.

Between A. and B. that A. should sell to B. for notes of C., does not bind C. even if he knew of agreement. *Fitch v. Dedrick*, 37, 225.

Particular, for purchase of land—when minds did not meet. *McCotter v. Mayor, etc.*, 37, 325.

Between debtor and creditor that former shall pay to a third is revocable until third knows and assents. *Kelly v. Roberts*, 40, 432.

Acceptance of offer—tender. *O'Neill v. James*, 43, 84.

Offer to transport merchandise and mere assent to proposal do not constitute—acceptance. *Chicago, etc., R. Co. v. Dane*, 43, 240.

To pay or reassign—option—time of exercise. *Manuel v. Holdredge*, 45, 151.

In two contemporaneous papers—must be read together. *Rogers v. Smith*, 47, 324.

Entire—delivery condition precedent—no demand or tender of payment necessary. *Mount v. Lyon*, 49, 552.

When not implied, by father of married child, to pay for services of physician to child. *Crane v. Bandouine*, 55, 257.

When party estopped from asserting that he did not understand it—question of performance. *Phillip v. Gallant*, 62, 256.

Want of privity—implied agreement to indemnify—release from liability. *Clark v. Dickinson*, 74, 47.

When no agreement implied to pay for mutual service. *Potter v. Carpenter*, 76, 157.

Agreement to pay for goods, where other party does not agree to sell, revocable before performance—revocation, question for jury—when seller delivers he may sue for price. *Quick v. Wheeler*, 78, 300.

When promise to pay what services worth does not apply. *Ross v. Hardin*, 79, 84.

Services rendered after employer's death—compensation presumed to be same as before. *Id.*

Papers to be submitted to counsel for approval—no contract till delivery—no delivery till approved. Not entitled to specific performance. *Diets v. Farish*, 79, 520.

Executory—assignment—when vesting no title—lien. *Hart v. Taylor*, 82, 373.



When grantor of deed remains principal debtor assumption clause is contract between parties to deed alone. *Pardee v. Treat*, 82, 385.

Offer of reward — acceptance of, creates valid — on compliance entitled to recover. *Pierson v. Morch*, 82, 503.

A mortgage to a trustee by a father for the benefit of a child is an executed contract. *Bucklin v. Bucklin*, 1 Abb. 242.

The acceptance of a cargo of goods by a consignee is an adoption of the contract of shipment. *Morse v. Pesant*, 3 Abb. 321.

Subscription to stock, signed as executor, is distinct from one signed individually. *Erie & N. Y. City R. Co. v. Patrick*, 2 Keyes, 256.

## 2. Particular subjects.

### (a.) Sale.

Sale of letters-patent — privilege of re-assignment after trial — waiver of trial — seller preventing performance of condition. *Young v. Hunter*, 6, 203.

Executory, for sale of stock, transfer and payment to be concurrent — tender requisite. *Lester v. Jewett*, 11, 453.

For sale of stock in manufacturing company partly executed — insolvency of company — rescission — statute of limitations. *Stover v. Flack*, 30, 64.

Sale of railroad bonds with guaranty and conditional agreement for return and refunding — when return may not be compelled. *Litchfield v. Irvin*, 51, 51.

To sell goods as low as to others — on breach of, action maintainable for difference. *Holtz v. Schmidt*, 59, 253.

To deliver coal — provision against damages for non-delivery occasioned by strikes. *Delaware, etc., R. Co. v. Bowns*, 58, 573.

Sale of coal to be taken away at a certain time — when time of essence. *Higgins v. Delaware, etc., R. Co.*, 60, 553.

Of purchase of bonds subject to right to return — waiver — laches. *Wooster v. Sage*, 67, 67.

To supply certain goods not exceeding a certain amount to a certain time if called for — binding to that amount if so called

for. *Highlands Chemical and Mining Co. v. Matthews*, 76, 145.

Of sale of goods partly on hand and partly to be manufactured — recovery for former in absence of compliance with condition for delivery of latter. *Patridge v. Gildermeister*, 1 Keyes, 93.

To deliver goods subject to government inspection — failure to pass inspection — when buyer deemed to have waived defense. *DeLafield v. DeGrauw*, 3 Keyes, 467.

To sell stock for half proceeds — keeping instead of selling, entitled to retain half. *Wright v. Wood*, 85, 402.

### (b.) Carrying on trade.

For public work — reservation of power to make alterations — measure of recovery. *Clark v. Mayor, etc.*, 4, 338.

For building — in accordance with specifications — subject to architect's approval — his acceptance of work or materials not so in accordance will not bind owner. *Glacius v. Black*, 50, 145; 10 Am. Rep. 449.

To carry on dairy farm and cheese factory — ownership of products. *Wilber v. Sisson*, 54, 121.

To manufacture and deliver goods like sample — vendee not bound to return defective goods. *Gurney v. Atlantic & Gt. West. Ry. Co.*, 58, 358.

For construction of railroad — assignment to president of company and completion by him by assent of company — equitable assignment. *Risley v. Indianapolis, etc., R. Co.*, 62, 240.

For work to be certified — refusal of certificate owing to interference of third party when not justified. *Bowery Nat. Bank v. Mayor, etc.*, 63, 336.

To allow cutting of bark — limitation of time is of essence. *Kellam v. McKinstry*, 69, 264.

For manufacture of articles — shipping C. O. D. at buyer's request — statute of frauds — loss on route — connecting carrier. *Higgins v. Murray*, 73, 252.

To pay for work certified by engineer — certificate a condition precedent to liability. *Wangler v. Swift*, 90, 38.

For cutting of timber — deviation from conditions — waiver by acceptance — no insurance against destruction by casualty. *Pike v. Nash*, 1 Keyes, 335.

To do work on house — building destroyed by fire before completion — recovery quantum meruit. *Niblo v. Binsse*, 1 Keyes, 476.

For building — owner does not necessarily waive defective performance by taking possession. *Reed v. Board of Education*, 3 Keyes, 105.

(c.) *Loaning money.*

To advance money on mortgage security — when mortgagor cannot insist on payment of money as condition precedent to delivering mortgage. *Rider v. Pond*, 19, 262.

To pay money on condition — dependent on promisor's will. *Lorillard v. Silver*, 36, 578.

To loan note on promise of a third to carry it — action against third. *Brisbane v. Beebe*, 48, 631.

To pay mortgage — not enforceable by subsequent grantee of promisor. *Miller v. Winchell*, 70, 437.

For reimbursement of money advanced for business — securities — interest. *Beach v. Colles*, 85, 511.

(d.) *Miscellaneous.*

Subscription to stock — contract to transfer — action for breach. *Orr v. Bigelow*, 14, 556.

For division of freights between carriers — when owner of goods cannot recoup damages to other goods against claim for entire freight. *Merrick v. Gordon*, 20, 93.

"Obey and perform the judgment of the court" — what is breach. *Claflin v. Ball*, 43, 481.

Parol agreement that lien of judgment shall extend to and cover personal property not enforceable. *Lanning v. Carpenter*, 48, 408.

Guaranty of sub-lease — when not affected by surrender. *Doscher v. Shaw*, 52, 602.

To compensate for services by will — compensation only in part — action lies against representative for balance. *Reynolds v. Robinson*, 64, 589.

For exchange of insurance policy — parol evidence — note of third person in payment — tender of performance. *Shaw v. Republic Ins. Co.*, 69, 286.

To convey land, vendee to erect building thereon, vendor to have privilege to mortgage and convey subject to, in lieu of purchase-money — conveyed subject to no incumbrances — vendee not liable in damages for failure to perform — not material that grantee reconveys. *James v. Burchell*, 82, 108.

Contract to convey real estate — incumbrances. *Mann v. Palmer*, 3 Abb. 162.

II. *Consideration.*

Subscription for religious society binds subscriber when expense has been incurred on the faith of it. *Barnes v. Perine*, 12, 18.

Subscription, when valid without expressing consideration. *Trustees of First Baptist Society v. Robinson*, 21, 234.

Creditor's promise to extend time of payment of overdue debt in consideration of future interest is not binding. *Kellogg v. Olmsted*, 25, 189.

Oral, for trading venture — consideration — mutuality — statute of frauds. *Coleman v. Eyre*, 45, 38.

To discontinue suit and extend time in consideration of payment of costs, not binding. *Parmelee v. Thompson*, 45, 58; 6 Am. Rep. 83.

Consideration — mutuality. *Sands v. Crooke*, 46, 564.

Compromise of doubtful claim is valid consideration. *White v. Hoyt*, 73, 505.

III. *Construction and effect.*

1. *General principles.*

Construction of two on same subject, on different days. *Coddington v. Davis*, 1, 186.

When papers must be construed together. *Flagg v. Munger*, 9, 483.

When provisions distributive and independent. *Tipton v. Feitner*, 20, 423.

Construction — evidence to vary. *Porter v. Spence*, 38, 119.

Time of payment — formation of corporation — when formed. *Childs v. Smith*, 46, 34.

Two instruments when construed together — when performance by one is to precede that of the other, action lies against him although the latter has done nothing. *Meriden Britannia Co. v. Zingsen*, 48, 247; 8 Am. Rep. 549.

Construed with reference to well-known state of the law — legal tender decisions in Federal Supreme Court. *Woodruff v. Woodruff*, 52, 53.

Rule of determination of ambiguous sense. *White v. Hoyt*, 73, 505.

Province of court to construe — when question for jury. *First Nat. Bank v. Dana*, 79, 108.

Construction where partly in writing and partly in print. *Miller v. Hannibal & St. Jo. R. Co.*, 90, 430; 43 Am. Rep. 179.

Written matter prevails over printed. *Hill v. Miller*, 76, 32.

## 2. Particular subjects.

For labor, price fixed by, controls. *Sherman v. Mayor*, 1, 316.

Towing as far as the ice would permit. *Vanderslice v. Newton*, 4, 130.

For purchase of cotton, deliverable in future, but not weighed nor ready for delivery, is executory, and title does not pass. *Joyce v. Adams*, 8, 291.

To keep twenty cows during dairy season and sell the butter to the other party, means so many cows producing milk through the season. *Oakley v. Morton*, 11, 25.

To build a vessel to be paid for at specified stages and subject to final approval — no property passes till completion. *Andrews v. Durant*, 11, 35.

Covenant to transport goods within a given time, and to deduct so much from freight for delay, not alternative. *Harmony v. Bingham*, 12, 99.

For sale of vessel — construction of — when executory. *Decker v. Furniss*, 14, 611.

To pay debt in merchandise out of debtor's store on demand. *Buck v. Burk*, 18, 337.

For construction of railroad — measurements to be made by engineer — provision for payment in stock — interest. *McMahon v. N. Y. & Erie R. Co.*, 20, 463.

Of consignment — when more than pledge. *Millicken v. Dehon*, 27, 364.

"Fixtures" in contract for sale of "fixtures belonging to fulling mill and carding machine." *Martin v. Cope*, 28, 180.

"General opposition" — subscription — implied condition. *Dodge v. Gardiner*, 31, 239.

Bond to administrator to pay all debts due or to grow due from A. B. (a deceased person), includes costs of settlement of estate. *Springsteen v. Samson*, 32, 703.

Architect — when not responsible for builder's faults. *Petersen v. Rawson*, 34, 370.

Mortgage made in 1851, payable in 1857, in gold or silver coin, may be paid in U. S. legal tender notes. *Rodes v. Bronson*, 24, 649; reversed, 7 Wall. 229.

Transfer of patent for cleaning coffee. *Newell v. Wheeler*, 36, 244.

Parol evidence admissible to show that an order on a third person for \$500 was to be paid in merchandise. *Finnemann v. Rosenback*, 39, 98.

To deliver merchandise for term of years, so much a year — evidence. *Curtiss v. Howell*, 39, 211.

For delivery of gold — how delivery made — gold check. *Kinne v. Ford*, 43, 587.

To deliver vouchers of a public officer, on purchase of goods, does not imply warranty of vouchers. *Wise v. Chase*, 44, 337.

For repairs — limitation of amount. *Carll v. Spofford*, 45, 61.

To allow one to dig sand at place to be designated — refusal to designate. *Hurd v. Gill*, 45, 341.

By several, to pay cost of counsel in proposed actions — does not authorize action by less than entire number. *Smith v. Duchardt*, 45, 597.

Addition of "per agreement" to bill of particulars for services, does not preclude showing value. *Robinson v. Weil*, 45, 810.

To grade and pave street—to provide and keep in order for a year—if street sinks, contractor bound to restore it without compensation. *Riley v. City of Brooklyn*, 46, 444.

To manufacture—condition that goods must suit purchaser's customers—evidence—term of credit. *Seltenreich v. Hiemenz*, 46, 677.

To deliver particular goods of different qualities, known in market and designated by numbers—quantity immaterial—ratification. *Beck v. Sheldon*, 48, 365.

Written instrument under seal, when ineffectual to pass legal title to lands—in duplicate—variance between—construed together. *Morss v. Salisbury*, 48, 636.

To farm on shares—when owner has exclusive title to crops. *Tanner v. Hills*, 48, 662.

For cutting timber—when title does not pass. *Stephens v. Sautee*, 49, 35.

Addition of "special committee" does not change individual agreement to one as agent. *Orchard v. Binninger*, 51, 652.

Money generally deemed payable in ordinary currency. *Fabri v. Kalbfleisch*, 52, 28.

When within act of congress of June 30, 1864, section 97, providing for adding duties—sale of iron ore payable in pig iron. *Hudson Iron Co. v. Alger*, 54, 173.

For street excavation—when collateral work not covered by. *Voorhis v. Mayor, etc.*, 62, 498.

Between judgment creditors for maintaining liens on land at joint expense—construction as to rents. *Belmont v. Ponvert*, 63, 547.

As to setting houses back from street. *Clark v. New York Life Ins. and Trust Co.*, 64, 33.

To deliver stone during season as fast as vessels could be obtained—breach. *Isaacs v. New York Plaster Works*, 67, 124.

As to counter-claim by action of third person. *Read v. Decker*, 67, 182.

Where sale of land deemed to be by acre and not by piece—evidence, contract and deed. *Wilson v. Randall*, 67, 338.

To elect between securities—waiver. *Wood v. Shehan*, 68, 365.

For purchase of bonds, with option to other bondholders to accept—option must be exercised through the party to the contract. *Johnson v. Morgan*, 68, 494.

"Full supply," "laid up," in ice contract—fraud or mistake—damages—forfeiture. *Kemp v. Knickerbocker Ice Co.*, 69, 45.

For towing—"at risk of master and owner"—liability of tow-boat owner for negligence of those in charge of tow. *Arctic Fire Ins. Co. v. Austin*, 69, 470; 25 Am. Rep. 221.

Ante-nuptial agreement of wife to release claims upon husband's estate, rigidly scrutinized in favor of the wife. *Pierce v. Pierce*, 71, 154; 27 Am. Rep. 22, note.

License to manufacture under patent—when provisions are covenants and not conditions—evidence—joint contractors—opinion—comparison of quality—statements of vice-president of company. *Booth v. Cleveland Rolling Mill Co.*, 74, 15.

When reference to prior inventory does not impliedly embrace all the property described therein. *Deering v. Metcalf*, 74, 501.

To receive goods on exhibition—right to reject goods—return of entrance fee. *Denneth v. American Institute*, 75, 502.

For freight—sufficiency of complaint. *Tugman v. National Steamship Co.*, 76, 207.

For commissions to agent effecting life insurances—when they adhere to renewals of policies after termination of contract. *Hercules Mut. Life Assur. Soc. v. Brinker*, 77, 435.

To pay for advertisement in book to be sold by subscription—condition precedent. *Burr v. American Spiral Spring Butt Co.*, 81, 175.

For furnishing materials—"more or less"—when no definite quantity called for. *Callmeyer v. Mayor, etc.*, 83, 116.

For publishing decisions of this court.  
*Little v. Banks*, 85, 258.

Lease with agreement to work mines for royalty — bond. *Gilmore v. Ontario Iron Co.*, 86, 455.

Shipping — memorandum receipts not to vary. *Fowler v. Liverpool & Great West. St. Co.*, 87, 190.

For extension of time of payment — when action deemed commenced — collateral security. *Foxell v. Fletcher*, 87, 476.

For sale and shipment of sugar. *Welsh v. Gossler*, 89, 540.

Building contract — as to damages for delay — contractor not liable for delay caused by owner. *Weeks v. Little*, 89, 566.

For cleaning all city paved streets at stipulated price held to apply to new streets. *Crocker v. City of Buffalo*, 90, 351.

Contract for services payable out of profits. *Jennery v. Olmstead*, 90, 363.

Where wages a share of profits, interest on capital not an expense. *Paine v. Howells*, 90, 660.

Between railroads as to fares, rates, etc. *B. & C. R. Co. v. Tioga R. Co.*, 1 Abb. 149.

Guaranty that land shall sell for a given price "within a year," and if not, to pay deficiency, does not bind the party guaranteed to wait a year. *Hakes v. Peck*, 2 Abb. 287; 1 Keyes, 505.

"Merchantable order" means "merchantable quality," in contract to deliver corn. *Hamilton v. Ganyard*, 2 Abb. 314; 3 Keyes, 45.

For sawing — "spoiled lumber" — evidence to explain — recoupment — payment — performance — condition precedent. *Harris v. Rathbun*, 2 Abb. 326; 2 Keyes, 312.

When authorizing alterations in "form, dimensions or materials" of work, the work may be discontinued at a certain point. *Clark v. Mayor, etc.*, 1 Keyes, 9.

For uniform rates of charges by railroads. *Blossburg, etc., R. Co. v. Tioga R. Co.*, 1 Keyes, 486.

For transportation of materials for building railroad — construction — damages. *Wilson v. New York Cent. R. Co.*, 3 Keyes, 381.

# IV. Validity.

## 1. As affected by public policy.

A sealed agreement between competitors for office that one shall withdraw and aid the other, in consideration of a division of the fees, is void, and so is every new agreement to effectuate it. *Gray v. Hook*, 4, 449.

That purchaser of damaged raisins shall have return duties, if any recovered by the seller is valid. *Allen v. Aguirre*, 7, 543.

To procure lands from the State for a portion of the lands not void. *Sedgwick v. Stanton*, 14, 289.

Conditional subscription to stock, when void. *Fort Edward, etc., Plankroad Co. v. Payne*, 15, 583.

Of members of voluntary association conferring judicial powers in respect to common property void. *Austin v. Searing*, 16, 112.

For waiver of exemption void. *Kneetle v. Newcomb*, 22, 249.

College may agree to give for a subscription a free scholarship in another college. *Genesee College v. Dodge*, 26, 213.

A note given for an extra amount to induce the payee to sign a composition with other creditors of the maker is void in his hands. *Lawrence v. Clark*, 36, 128.

In selecting an agent to sell property to government the principal may have reference to the fact that the agent is of the same political party as those administering the government. *Lyon v. Mitchell*, 36, 235.

Provision that questions arising under contract shall be adjusted by a certain person void. *Hurst v. Litchfield*, 39, 377.

To procure legislation is void. *Mills v. Mills*, 40, 543.

To devise land is valid and enforceable against heirs. *Parsell v. Stryker*, 41, 480.

To restrain competition in building for public work is void. *Atcheson v. Mallon*, 43, 147; 3 Am. Rep. 678.

With citizen of State in rebellion against government void, and partnership dissolved. *Woods v. Wilder*, 43, 164; 3 Am. Rep. 684.

When not void as preventing competition at public sale. *Bradley v. Kingsley*, 43, 534.

With director to influence others to prejudice of company is void. *Bliss v. Matteson*, 45, 22.

Of charter of vessel to government not avoided by employment of agent related to government agent to effect the charter. *Southard v. Boyd*, 51, 177.

Manufacturer may lawfully agree to pay a commission for introducing customers to him. *Richard v. Quintard*, 51, 636.

To deliver current funds of United States at certain valuation per dollar means legal tender notes for so much coin, and is valid. *Cooke v. Davis*, 53, 318.

To settle litigation, not avoided by stipulations to turn State's evidence, and recommend nolle prosequi. *Nickelson v. Wilson*, 60, 362.

In respect to furnishing recruits — when valid. *Marsh v. Russell*, 66, 288.

To indemnify another for refusing to put up margins or appear before arbitration committee of stock board, is valid. *White v. Baxter*, 71, 254.

For public work must be let in manner prescribed by statute — otherwise, no recovery quantum meruit. *Dickinson v. City of Poughkeepsie*, 75, 65.

Undertaking by father of bastard to pay mother for support, not unlawful. *Hook v. Pratt*, 78, 371; 34 Am. Rep. 539.

Public officers meeting and agreeing as to terms and details of letting — when let, one absent and one of others signed absentees' names — valid. *Boots v. Washburn*, 79, 207.

To deliver stock in consideration of resignation of directors of corporation — when valid. *Barnes v. Brown*, 80, 527.

Of sale, when void — buyer cannot maintain trover unless he has had actual possession. *Clements v. Yturria*, 81, 285.

Not presumed illegal — if capable of lawful construction — made in this State to advertise lottery in other States — in absence of proof of violation of their laws, not illegal. *Ormes v. Dauchy*, 82, 443; 37 Am. Rep. 583, note.

To convey railroad if contractor should buy in on foreclosure sale — validity — misjoinder of parties — collusion to prevent bidding. *Marie v. Garrison*, 83, 14.

To furnish papers and evidence to sustain defense — when not unlawful. *Wellington v. Kelly*, 84, 543.

To pay percentages upon payments under contract with county held not void on its face. *Wile v. Wilson*, 93, 255.

To share profits of government contract — when not presumed to be against public policy — defense must be pleaded. *Cummins v. Barkalow*, 4 Keyes, 514.

## 2. When in restraint of trade.

Construction of contract not to run steamboat — continuance — parties — damages. *Dunlop v. Gregory*, 10, 241.

Wholly void if illegal covenant enters into entire consideration. *Saratoga Co. Bank v. King*, 44, 87.

By retiring partner on dissolution. *Curtis v. Gokey*, 68, 300.

In restraint of trade. *Arnot v. Pitts-town & Elmira Coal Co.*, 68, 558; 23 Am. Rep. 190.

## 3. Special grounds.

Restricting liability of tow-boat owners valid. *Wells v. Steam Nav. Co.*, 2, 204.

For sale of land — when not void for uncertainty — parol evidence to identify. *Waring v. Ayres*, 40, 357.

Execution by promisee, of agreement void for want of mutuality binds promisor. *Willets v. Sun Mut. Ins. Co.*, 45, 45; 6 Am. Rep. 31.

Between two next of kin for settlement, when void for concealment from others. *Adams v. Outhouse*, 45, 318.

Between indorsers, for payment of note, when valid. *Sanders v. Gillespie*, 59, 250.

Void for uncertainty as to terms and parties. *Shakespeare v. Markham*, 72, 400.

For log-driving on river, when not unlawful. *Town of Pierrepont v. Loveless*, 72, 211.

To renew commercial paper at maturity, when invalid — not within powers con-

ferred by charter. *N. Y. State Loan and Trust Co. v. Helmer*, 77, 64.

For formation of corporation — when not deemed illegal — parties — value of capital — vesting of management. *Lorillard v. Clyde*, 86, 384.

#### 4. Wagering contracts.

Stock-jobbing illegal, and will not support action. *Staples v. Gould*, 9, 520. Statute repealed, act 1858, chapter 134.

To buy gold coin in future, not void as wager. *Bigelow v. Benedict*, 70, 202; 26 Am. Rep. 573.

Contract for sale of goods void as wager if property not to be delivered but only differences paid. *Kingsbury v. Kirwan*, 77, 612.

#### 5. Effect of illegality.

When rescinded for illegality, when partly performed, no recovery can be had for labor under it. *Peck v. Burr*, 10, 294.

Partly void — when recovery may be had — pledge of bonds. *Curtis v. Leavitt*, 15, 9.

Party in pari delicto cannot recover money paid on. *Knowlton v. Congress and Empire Spring Co.*, 57, 518.

When innocent, though void by statute, and fully performed, will not be undone. *Dunn v. Hornbeck*, 72, 80.

When stranger cannot set up illegality in defense of action for moneys received for use of another — if contract executed, court will refuse to aid either party. *Merritt v. Millard*, 4 Keyes, 208.

### V. Performance and liability.

#### 1. General matters.

Indemnity, broken on failure to do specific act, or when charge or liability is incurred. *Gilbert v. Wiman*, 1, 550.

But a contract of indemnity against damage or molestation by acts or omissions of another is not broken until actual damage is sustained. *Id.*

When administrator with will annexed must join with heir in executing testator's contract. *Roome v. Phillips*, 27, 357.

Entire — breach — rescission. *Husted v. Craig*, 36, 221.

When not rendered impossible by act of law — that law renders performance more burdensome and expensive no defense. *Baker v. Johnson*, 42, 126.

Architect's certificate, when conclusive — sufficiency of. *Wyckoff v. Meyers*, 44, 143.

Breach of, when tortious. *Rich v. New York Cent., etc., R. Co.*, 87, 392.

One party cannot charge the other with expense of removing obstacle to performance which latter was bound to remove — voluntary payment. *Thorp v. Ross*, 4 Keyes, 546.

#### 2. Part performance.

On contract for building in a good and workmanlike manner, for an entire price, there can be no recovery where the work was not well done, had not been accepted, and performance was not waived. *Pullman v. Corning*, 9, 93.

On contract for building house on land of another, when performance is to precede payment, there can be no recovery for part performance although owner occupies — waiver depends upon all the circumstances. *Smith v. Brady*, 17, 173.

No recovery on entire contract part performance of which is prevented by other party. *Butler v. Butler*, 77, 472, 33 Am. Rep. 648.

To publish advertisement — what not substantial performance — evidence. *Dauchoy v. Drake*, 85, 407.

Substantial performance all that is required in building contract — procuring architect's certificate — refusal to give may entitle to recovery. *Nolan v. Whitney*, 88, 648.

To transfer stock, not performed by transfer of half-paid stock — fraud — inquiry — merger. *Johnson v. Hathorn*, 3 Keyes, 126.

### 3. *Excuses for performance.*

On an entire contract for work, complete performance becoming impossible by act of law, the contractor may recover pro tanto the contract price. *Jones v. Judd*, 4, 411.

Action does not lie for labor and materials lost by fire while in plaintiff's possession—contract uncompleted by defendant's fault. *McConihe v. N. Y. & Erie R. Co.*, 20, 495.

Where an agent is prevented from completing his contract of service by sickness and death, recovery is to be measured by the contract. *Clark v. Gilbert*, 26, 279.

Hindrance by one, excuses delay by other—new contract. *Stewart v. Keteltas*, 36, 388.

What does not constitute prevention of performance. *Wallman v. Society of Concord*, 45, 485.

Extension of time waives forfeiture—party rendering performance impossible cannot insist on it—assignment. *Gallagher v. Nichols*, 60, 438.

One agreeing to deliver manufactures within a specified time may not postpone to last moment and then excuse non-performance on plea of accident. *Booth v. Spuyten Duyvil Mill Co.*, 60, 487.

For building—when performance prevented by order of public authorities recovery may be had pro tanto—evidence—counter-claim. *Heine v. Meyer*, 61, 171.

On conditional extension of time for performance, condition must be complied with, to render extension available. *Levy v. Burgess*, 64, 390.

To furnish opera troupe—compliance excused by sickness of principal singer. *Spalding v. Rosa*, 71, 40; 27 Am. Rep. 7.

Requirement of architect's certificate—when waived. *Haden v. Coleman*, 73, 567.

If condition cannot be performed, excused—insanity no excuse for non-payment of premium. *Wheeler v. Conn. Mut. Life*, 82, 543; 37 Am. Rep. 594, note.

When employer prevents performance, other party need not show readiness and ability. *Howell v. Gould*, 2 Abb. 418.

Party preventing performance cannot take advantage. *Niblo v. Binsse*, 3 Abb. 375.

Knowingly acquiescing in a deviation from a contract is a waiver—accepting timber of smaller size and poorer quality. *Pike v. Nash*, 3 Abb. 610.

### 4. *Conditions precedent.*

A note being payable in specific articles to be timely selected, but no selection being made for two years, the maker failing to comply on demand then, is liable in money. *Gilbert v. Danforth*, 6, 585.

When waived. *Viele v. Troy & Boston R. Co.*, 20, 184; *Crane v. Kimbel*, 61, 645.

Performance is condition precedent on contract in general terms to erect a house "by day's work." *Cunningham v. Jones*, 20, 486.

Where architect's certificate is required, and refused in bad faith, builder may recover on other proof of performance. *Thomas v. Fleury*, 26, 26.

Tender, when excused by request of party entitled—when conditions may accompany. *Wheelock v. Tanner*, 39, 481.

When seller of stock refuses to deliver from inability, buyer need not tender money before bringing suit. *Wheeler v. Garcia*, 40, 584.

On positive refusal to perform promise to marry, action for breach will lie, although time for performance not arrived. *Curtis v. Thompson*, 42, 246; 1 Am. Rep. 516.

When time is not of essence, notice requiring performance must be given to work forfeiture. *Myers v. DeMier*, 52, 647.

For breach of absolute contract to deliver merchandise, action lies although title may not have passed. *Bigler v. Hall*, 54, 167.

No action for breach without tender of performance or proof of willingness and ability. *Nelson v. Plimpton Fireproof Elevating Co.*, 55, 480.

Offer of performance and absolute refusal to accept excuses tender of performance of condition precedent. *Blewitt v. Baker*, 59, 611; 17 Am. Rep. 394.



**Building contract**—builder cannot recover on quantum meruit unless owner after notice fails to perform. *Lawson v. Hogan*, 93, 39.

Where defendants by insolvency were unable to perform and declined to do so, plaintiff entitled to damages without tender of performance on his part. *Woolner v. Hill*, 93, 576.

Tender excused when performance refused—cause of action assignable. *Sears v. Conover*, 3 Keyes, 113; 4 Abb. 179.

When a contract liquidating a debt and fixing time of payment may be enforced at once. *Lee v. Decker*, 3 Abb. 53.

For breach of, to let land on shares, action lies without awaiting expiration of term. *Taylor v. Bradley*, 4 Abb. 363.

### 5. Actions for breach.

On a contract to pay a sum in land there can be no recovery in money. *Cattle v. Rochester City Bank*, 3, 88.

When an indorser agrees for a certain sum to pay the notes, when due, and pays them, he may recover that sum. *L'Amoureux v. Gould*, 7, 349.

Recovery may be had for work and materials although more were done and furnished than called for by contract, unless excess detrimental. *Turner v. Haight*, 16, 465.

Action by C. lies on promise made by A. to B. upon valid consideration for benefit of C. without C.'s privity. *Lawrence v. Fox*, 20, 268.

Receipt for money to be indorsed on contract of sale by receiver to third party, upon assignment thereof to payor, does not prevent payor's recovery of the money from receiver. *Phelps v. Bostwick*, 22, 242.

Where one agrees to build house on another's land and it is destroyed by fire before completion, he is liable for money advanced and damages for non-completion. *Tompkins v. Dudley*, 25, 272.

Where A. transfers property to B., subject to certain claims of C., the latter may maintain action against B. therefor. *Dingeldein v. Third Ave. R. Co.*, 37, 575.

When entire, unimportant breach defeats right of recovery. *Brown v. Weber*, 38, 187.

When action lies for recovery of money in hands of mere depositary received under executed illegal contract. *Woodworth v. Bennett*, 43, 273; 3 Am. Rep. 706.

Of subscription—when not enforceable. *Van Rensselaer v. Aikin*, 44, 126.

No action lies against A. for inducing B. to break his contract to sell to C., and sell to A. instead, although A. had contracted to buy the property from C. *Ashley v. Dixon*, 48, 430; 8 Am. Rep. 559.

Damages for breach, not limited to penalty—word "forfeit" not conclusive on question. *Noyes v. Phillips*, 60, 408.

When contractor files certificate required by contract, that payment is in full, this estops him from claiming damages by delay. *Coulter v. Board of Education*, 63, 365.

To convey stock—action to recover money paid—demand. *Weller v. Tutthill*, 66, 347.

For exchange of goods—when action for excess does not lie. *Long Island R. Co. v. Verree*, 69, 486.

For sale of land—where voluntarily surrendered and canceled, no action lies for money paid on it. *Tice v. Zinsser*, 76, 549.

When one may recover of insane person for money loaned. *Mut. Life Ins. Co. v. Hunt*, 79, 541.

Agreement between individuals to subscribe for stock of railroad—when not enforceable by railroad. *Lake Ontario Shore R. Co. v. Curtiss*, 80, 219.

For building—when builder may recover price less damages for defects. *Woodward v. Fuller*, 80, 312.

By agent—descriptio personæ—when principal not entitled to recover under. *Buffalo Catholic Inst. v. Bitter*, 87, 250.

### VI. Rescission.

Fraud waived by acceptance of benefit after knowledge—ratification. *Cobb v. Hatfield*, 46, 533.

City not bound to pay contractor for materials left by him on abandonment of contract, and used by it to his knowledge without objection. *Hogan v. City of Brooklyn*, 52, 282.

In case of partial failure of title on sale of personal property, vendee need not rescind in toto—may recoup or sue—when not defeated by assignment—evidence. *McKnight v. Devlin*, 52, 399; 11 Am. Rep. 715.

Alteration of one of several instruments forming, avoids. *Meyer v. Huneke*, 55, 412.

When may not be rescinded without paying for service rendered under it. *Briggs v. Boyd*, 56, 289.

Rescission for fraud. *Hammond v. Pennock*, 61, 145.

With insane person, when may be rescinded. *Riggs v. American Tract Society*, 84, 330.

Mutually rescinded, cannot be invoked by either—exchange of lands—ejectment. *Graves v. White*, 87, 463.

Of corporation, not abrogated by insolvency or dissolution. *New Eng. Iron Co. v. Gilbert, etc., R. Co.*, 91, 153.

A fraudulent contract must be disaffirmed as soon as the fraud is discovered. *Bruce v. Davenport*, 1 Abb. 233.

Owner taking possession of building does not waive defect in construction. *Reed v. Board of Education of Brooklyn*, 4 Abb. 24. Nor does it waive strict performance. *Smith v. Brady*, 17, 173.

#### VII. General matters.

One under commission as an habitual drunkard may not waive protest. *Wadsworth v. Sharpsteen*, 8, 388.

Action for reformation not barred by delay short of statutory limit. *Bidwell v. Astor Mut. Ins. Co.*, 16, 263.

Parol evidence to show purpose—merger—guaranty—revocation of power of attorney—pledgee's interest—estoppel. *Hutchins v. Hebbard*, 34, 24.

Not reformable for misunderstanding of facts unless fraud or mutual mistake. *Story v. Conger*, 36, 673.

Entire, may be divided by consent. *Winne v. McDonald*, 39, 233.

Adding "trustee" to signature does not relieve contractor from individual liability. *Pumpelly v. Phelps*, 40, 59.

Naming third party not joining in execution—evidence of intention—rescission—notice to agent—damages. *Dillon v. Anderson*, 43, 231.

Lex loci contractus—comity of States—measure of damages. *Dike v. Erie Ry. Co.*, 45, 113; 6 Am. Rep. 43.

Insurance on life of one held by another for benefit of a third—power of insured over—third may enforce although he did not know of it originally. *Hutchings v. Miner*, 46, 456; 7 Am. Rep. 369.

United States statute as to adding duties. *Babbett v. Young*, 51, 238.

As to equities of mortgagees—rescission. *Kidd v. McCormick*, 83, 391.

When action to reform contract for fraud or mistake is assignable—rights of assignee. *Bentley v. Smith*, 1 Abb. 126.

Contractor cannot hold employer for expense of license from public authorities to allow work—parol evidence of consent not admissible to contradict. *Thorp v. Ross*, 4 Abb. 416.

Effect of stipulation pending suit to set aside—limitation. *Mann v. Palmer*, 2 Keyes, 177.

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#### Contractor.

See MASTER AND SERVANT; MECHANICS' LIEN; MUNICIPAL CORPORATION; NEGLIGENCE.

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#### Contribution.

See EXECUTOR AND ADMINISTRATOR; INSURANCE; NEGLIGENCE; SURETY; TENANTS IN COMMON.

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#### Contributory Negligence.

See NEGLIGENCE.

## CONVERSION.

Action for conversion may be maintained against wrong-doer by one having equitable interest. *Frost v. Mott*, 34, 253.

Accidental loss or destruction of article in lawful possession is not conversion. *Salt Springs Nat. Bank v. Wheeler*, 48, 492; 8 Am. Rep. 564.

Negligence as to security for money taken to invest does not constitute. *King v. Mackellar*, 94, 317.

Where action does not lie against assignees in trust for creditors of purchaser of goods sold on condition unfilled—demand. *Jessop v. Miller*, 1 Keyes, 321.

Assignees for creditors not liable without demand—demand of one—effect of refusal. *Id.*; 2 Abb. 449.

Shipping as his own property which he knows belongs to another, is. *Boyce v. Brockway*, 31, 490.

Maintainable against postmaster for wrongfully detaining newspaper. *Teal v. Felton*, 1, 537.

When lies for unauthorized use of hired property independent of negligence. *Beach v. Raritan, etc., R. Co.*, 37, 457.

One having delivered goods as security for a loan, and the receiver failing to advance the money or return the goods, the owner may sell them, and the purchaser may maintain trover after demand and refusal. *Hall v. Robinson*, 2, 293.

Lies against consignees to sell goods for owner, selling them as goods of another. *Covell v. Hill*, 6, 374.

Impossibility of compliance with demand excuses refusal. *Hill v. Covell*, 1, 522.

If at time of demand property not in existence demand and refusal do not establish. *Salt Springs Nat. Bk. v. Wheeler*, 48, 492; 8 Am. Rep. 564.

Demand and refusal merely evidence of. *Jessop v. Miller*, 1 Keyes, 321.

One who receives money in good faith, in usual course of business and for valuable consideration, not liable to one from whom money has been stolen. *Stephens v. Board*, 79, 183; 35 Am. Rep. 511.

When change in title not affected by wrongful taking. *Wright v. Ames*, 2 Keyes, 221.

Of drafts belonging to State wrongfully transferred by agent—agency—estoppel—damages. *People v. Bank of North America*, 75, 547.

By general owner as against special owner under bill of lading—estoppel—demand. *Marine Bank of Buffalo v. Fiske*, 71, 353.

Action for stolen goods lies, although defendant never was in possession and has sold to a third—evidence—negligence. *Pease v. Smith*, 61, 477.

Action against coroner for goods taken under claim and delivery proceedings—ratification—conditional sale—agency. *Manning v. Keenan*, 73, 45.

Bona fide purchaser not liable until demand, and a refusal indicating determination to withhold—when words constitute. *Gillett v. Roberts*, 57, 28.

Lies by maker of note wrongfully converted—negotiated before inception. *Decker v. Matthews*, 12, 313.

Of notes—when payee liable to indorser. *Develin v. Coleman*, 50, 531.

—when action will lie. *Powell v. Powell*, 71, 71.

—defendant may be permitted to cancel and return note in satisfaction of damages. *Thayer v. Manley*, 73, 305.

—evidence of alteration to reduce damages. *Booth v. Powers*, 56, 22.

—when action lies for—tender. *Hynes v. Patterson*, 95, 1.

Purchaser of collaterals by pledge at auction is not. *Bryan v. Baldwin*, 52, 232.

Owner of property wrongfully sold not required to make immediate effort to regain—silence—when will not bar claim—statute of limitations—does not confirm sale. *Hamlin v. Sears*, 82, 327.

Action against railroad company for converting ties—demand how made. *Dunham v. Troy Union R. R. Co.*, 1 Abb. 565.

Possession by agent is attributable to defendant—demand of agent is of principal. *Chambers v. Lewis*, 28, 454.

A purchaser at a wrongful sale on execution, sued for the conversion, when

estopped from saying that he acted as an agent. *Baltes v. Repp*, 1 Abb. 78.

When evidence of demand and refusal justifies submission to jury. *Tuttle v. Hazard*, 86, 628.

Complaint need not show how plaintiff's title was acquired. *Malcom v. O'Reilly*, 89, 156.

See BAILMENT; CARRIER; DAMAGES.

Equitable. See WILL.

### CONVICT.

May be sued in prison. *Davis v. Duffie*, 3 Keyes, 606.

Penitentiary contractor not liable for negligence of—prison authorities retaining control. *Cunningham v. Bay State Shoe and Leather Co.*, 93, 481.

### COPYRIGHT.

Remedy for infringement purely statutory when conferred by statute, but when not, any appropriate action may be maintained. *Dudley v. Mayhew*, 3, 9.

Of alien in unpublished dramatic composition—assignment—dedication to public—jurisdiction. *Palmer v. DeWitt*, 47, 532; 7 Am. Rep. 480.

### CORONER.

In action for conversion under proceedings for claim and delivery, like sheriff protected by process. *Manning v. Keenan*, 73, 45.

See SHERIFF.

### CORPORATION.

#### I. General matters.

#### II. Stockholders and stock.

##### 1. Stockholders' general rights and liabilities.

##### 2. Liability for debts.

##### 3. Subscriptions for and transfer of stock.

##### 4. Dividends.

#### III. Officers.

##### 1. Powers.

##### 2. Liabilities.

##### 3. Miscellaneous.

#### IV. Powers.

##### V. Liabilities.

#### VI. Insolvency.

#### VII. Dissolution.

#### VIII. Taxation.

#### I. General matters.

Duration of charter—power to make loans, express or by implication—usury. *Farmers' Loan and Trust Co. v. Clowes*, 3, 470.

Individual banker, under act of 1838, is not. *Codd v. Rathbone*, 19, 37.

Evidence of corporation de facto is available to a foreign corporation suing here. *Bank of Toledo v. International Bank*, 21, 542.

Incorporation of several corporations into one—member of old not constituted member of new until he assents. *Gardner v. Hamilton Ins. Co.*, 33, 421.

When bound by sale by officer. *Phillips v. Campbell*, 43, 271.

When creditor excluded from sharing in assets under 2 R. S. 466, although he has filed claim under 2 R. S. 471, § 71. *Matter of Harmony F. and M. Ins. Co.*, 45, 310.

Bound by satisfaction of judgment executed by president officially, although not in name or under seal of corporation—effect of giving satisfaction-piece. *Booth v. Farmers and Mechanics' Nat. Bank*, 50, 396.

Foreign, doing business here regarded as domiciled here. *Martine v. International Life Ins. Co.*, 53, 339; 13 Am. Rep. 529.

When persons assuming to act in corporate capacity not liable personally, but as partners, the corporation not legally existing. *Fuller v. Rowe*, 57, 23.

Seal on resolution not necessary to contract of—debt of, may be proved by dec-

larations of president. *Hoag v. Lamont*, 60, 96.

Joint-stock company suable in name of president — an associate may sue the company. *Wescott v. Fargo*, 61, 542; 19 Am. Rep. 300.

Easement in land liable to sale on execution. *Evangelical Lutheran St. John's Orphan Home v. Buffalo Hydraulic Ass'n*, 64, 561.

When judgment against, without consideration and collusive — may be set aside in suit by receiver. *Whittlesey v. Delaney*, 73, 571.

Action to charge — property in hands of directors and stockholders — judgment against corporation prima facie evidence — fictitious sale to another corporation — sale of stock subject to claims. *Hastings v. Drew*, 76, 9.

Devise to, subject to laws passed subsequently. *Kerr v. Dougherty*, 79, 327.

Under special act may be subject to general act of 1848, chapter 319; act 1870, chapter 51. *Id.*

Commercial paper discounted without lawful authority void — money may be recovered — without sanctioning illegality. *Pratt v. Short*, 79, 437; 35 Am. Rep. 531.

Sale of franchises — formation of new company — when old stockholder not entitled to new stock — foreclosure. *Thornton v. Wabash Ry. Co.*, 81, 462.

Assignment of patent to, before organization — bound by adoption after organization. *Bommer v. Am. Spiral Spring, etc., Co.*, 81, 468.

Foreign, when may invoke jurisdiction of State courts. *Direct U. S. Cable Co. v. Dominion Tel. Co.*, 84, 153.

When cannot show that money loaned was not used by — no resolution authorizing borrowing of money. *Kraft v. Freeman Printing, etc., Ass'n*, 87, 628.

Estopped to deny acts of agents where ratified. *Sheldon, etc., Co. v. Eickemeyer, etc., Co.*, 90, 607.

Action to restrain unlawful use of franchise not submissible. *People v. Mutual Endowment Association*, 92, 622.

In action by, existence averred and not denied need not be proved — building asso-

ciation membership not confined to original subscribers — premiums on loans on shares of such association not usurious — validity of mortgage to. *Concordia Savings Ass. v. Read*, 93, 474.

Irregularity in organization cured by act of legislature changing its name. *White v. Ross*, 4 Abb. 589.

Building association — articles of organization to be filed, need not name trustees. *Second Manhattan Building Assoc'n v. Hayes*, 2 Keyes, 192.

## II. Stockholders.

### 1. Stockholders' general rights and liabilities.

Right to inspect books and take memorandums (R. S., pt. 1, tit. 4, ch. 18). *Cothrel v. Brouwer*, 5, 562.

When estate of decedent not a stockholder. *Diven v. Lee*, 36, 302.

When stockholder does not acquire lien of building stock certificate holder. *Rutter v. Kilpatrick*, 63, 604.

When stockholder may sue officer for conversion of corporate stock — corporation must be made defendant if refuses to bring suit. *Greaves v. Gouge*, 69, 154.

Subscriber to stock deemed consenting to change in charter where right to change reserved by legislature. *Union, etc. v. Hersee*, 79, 454; 35 Am. Rep. 536.

Refusal to transfer stock on books does not defeat assignee's title — demand of payment or transfer not necessary — form of action. *Robinson v. Nat. Bk. of New Berne*, 95.

### 2. Liability for debts.

When stockholders individually liable for debts of, liability is original and primary. *Corning v. McCullough*, 1, 47.

Remedy for enforcement. *Bogardus v. Rosendale Manuf Co.*, 7, 147.

How stockholders may defeat action. *Garrison v. Howe*, 17, 458.

Not evaded by defect in organization. *Eaton v. Aspinwall*, 19, 119.

Stockholder holds subject to individual liability from extension or renewal of charter by legislature. *Bailey v. Hollister*, 26, 112.

Stockholders liable individually without reference to solvency of other stockholders. *Matter of Hollister Bank*, 27, 393.

Members of foreign, not individually liable elsewhere — comity. *Merrick v. Van Santvoord*, 34, 208.

Stockholder under ocean steamboat act of 1852, chapter 228, having been made liable for failure to record certificate of payment of capital, may compel contribution from other stockholders — defense. *Aspinwall v. Saccha*, 57, 331.

Creditors may pursue stockholders receiving assets before payment of debts. *Bartlett v. Drew*, 57, 587.

In action by creditor against stockholder who has paid for stock, stockholder may show a secured loan to the company to an equal amount. *Agate v. Sands*, 73, 620.

Action by creditor for himself and other creditors against stockholders — when proper — division of recovery. *Pfohl v. Simpson*, 74, 137.

Foreign — action against stockholder — when proceedings against corporation condition precedent. *Jessup v. Carnegie*, 80, 441; 36 Am. Rep. 643.

One apparently a stockholder liable to creditors as such. *Wakefield v. Fargo*, 90, 213.

In corporations formed under Laws 1863, chapter 63, stockholders are liable to laborers, servants, etc. — book-keeper and manager not laborer. *Wakefield v. Fargo*, 90, 213.

Evidence establishing liability as stockholder — disallowance of offset. *Wheeler v. Miller*, 90, 353.

Judgment against stockholders for debts — county clerk's commissions not chargeable as disbursements. *Veeder v. Judson*, 91, 374.

### 3. Subscriptions for and transfer of stock.

After a corporation has forfeited stock of a subscriber for non-payment, it cannot recover for any part of the subscrip-

tion. *Small v. Herkimer Mfg. Co.*, 2, 330.

And where the stock is of greater value than the amount due, the subscriber cannot recover the surplus. *Id.*

Subscription for stock — form of — allotment — remedy by forfeiture cumulative — subscriber not discharged by change of name and increase of capital, nor by unauthorized fraudulent representations by officer at public meeting. *Buffalo & N. Y. City R. Co. v. Dudley*, 14, 336.

Conditional subscription to stock, when void. *Fort Edward, etc., Plankroad Co. v. Payne*, 15, 583.

Signature to stock subscription reciting incorporation is conclusive evidence of incorporation against subscriber. *Black River & Utica R. Co. v. Clarke*, 25, 208.

Defectively organized may still on any proof of user recover against subscriber to stock. *Buffalo & Allegany R. Co. v. Cary*, 26, 75.

Construction of Laws of 1845, chapter 234, in respect to foreign corporations — effect of certificate of stock subject to further assessments. *Seymour v. Sturges*, 26, 134.

Liability of subscriber for stock may be enforced for creditors. *Dayton v. Borst*, 31, 435.

Stockholder not liable for unpaid calls, when he has transferred his stock, but the transfer was imperfectly made on the company's books. *Isham v. Buckingham*, 49, 216.

Effect of stock certificate — assignment — evidence — pendency of action in another State to determine title to stock. *Holbrook v. New Jersey Zinc Co.*, 57, 616.

Action for balance of capital subscription — validity — receiver — abandonment — agreement to accept notes of another. *Phoenix Warehousing Co. v. Badger*, 67, 294.

Blank transfer of certificate with irrevocable power of attorney does not confer authority to pledge as collateral. *Merchants' Bank of Canada v. Livingston*, 74, 223.

Action to compel delivery of stock — when complaint insufficient. *Burrall v. Bushwick R. Co.*, 75, 211.

Issue of preferred stock, when unlawful. *Kent v. Quicksilver Mining Co.*, 78, 159.

Liability of stockholder on subscription—signing firm name when none such, individually liable. *Union Hotel, etc. v. Hersee*, 79, 454; 35 Am. Rep. 536.

Owner sold stock—not transferred on books but dividends paid to assignee—receiver of the corporation sued original owner for unpaid stock—action not maintainable—stands in same position as corporation. *Cutting v. Damerel*, 88, 410.

Injunction to restrain voting on corporate shares refused. *McHenry v. Jewett*, 90, 58.

“Capital stock” under 1 R. S. 601, § 2, means all property of corporation required by charter. The excess is surplus and may be divided. Dividend in form of shares is valid. Purchase by directors of telegraph company of parallel line is valid. *Williams v. Western Union Tel. Co.*, 93, 162.

Reduction of stock under act of 1878, chapter 264. Distribution to stockholders to extent of surplus over reduced capital allowed. *Strong v. Brooklyn Cross Town R. Co.*, 93, 426.

Shares of non-resident in foreign, doing business here, not liable to attachment. *Plimpton v. Bigelow*, 93, 592.

What is not notice to corporation of ownership of stock. *Brisbane v. Delaware, etc., R. Co.*, 94, 204.

Transfer of stock in manufacturing company releases one transferring from unpaid assessments. *Billings v. Robinson*, 94, 415.

When right to stock not cut off by notice on provisional certificate—limitation of time for exchange after issue of certificate. *Van Alen v. Illinois Cent. R. Co.*, 2 Keyes, 673; 4 Abb. 443.

Assignee of stock from foreign executor may require transfer on books. *Midlebrook v. Merchants' Bank*, 3 Keyes, 135.

#### 4. Dividends.

Contract by stockholder for ownership of future dividends, ineffectual. *Hyatt v. Allen*, 56, 553; 15 Am. Rep. 449.

Directors may not limit dividend to a certain portion of prior stockholders. *Jones v. Terre Haute & Richmond R. Co.*, 57, 196.

Stockholder who has sued corporation for conversion of his shares, cannot claim dividends pending suit to establish right to shares. *Hughes v. Vermont Copper Mining Co.*, 72, 207.

Stockholder cannot, in first instance, recover from another stockholder a share in dividends paid him. *Peckham v. Van Wagenen*, 83, 40; 38 Am. Rep. 392.

When guaranteed stockholders preferred to common stockholders in dividends—when action maintainable to compel payment. *Boardman v. Lake Shore, etc., R. Co.*, 84, 157.

Dividend when declared belongs to stockholders—rights of holders of preferred stock. *Jermain v. Lake Shore, etc., R. Co.*, 91, 483.

Dividend of surplus not taxable under act of 1880, chapter 542. *People v. Albany Ins. Co.*, 92, 458.

Payment of dividends to one appearing on books as stockholder valid—transfer of stock without production of certificate—notice. *Brisbane v. Delaware, etc., R. Co.*, 94, 204.

### III. Officers.

#### 1. Powers.

Delegation of directors' authority—“ordinary business”—assignments of assets—ratification of agent's acts—conflict of laws. *Hoyt v. Thompson's Exr.*, 19, 207.

Powers of less than full board of directors at adjourned meeting. *Smith v. Law*, 21, 296.

President's authority to contract—ratification—evidence—ultra vires. *Olcott v. Tioga R. Co.*, 27, 546.

Director may not purchase its property on execution—but when trustees may not avoid. *Hoyle v. Plattsburgh, etc., R. Co.*, 54, 314; 13 Am. Rep. 595.

Authority of trustees of manufacturing company to purchase property and issue

stock — error of judgment not vital. *Schenck v. Andrews*, 57, 133.

Right of president to secure himself for advances — waiver — estoppel — dividends. *Duncomb v. New York, etc., R. Co.*, 88, 1.

President taking property from insolvent company for antecedent debt may confer good title on buyer in good faith. *Heroy v. Kerr*, 2 Abb. 359.

## 2. Liabilities.

When director not liable for misrepresentations of active managers. *Arthur v. Griswold*, 55, 400.

When directors not liable for fraudulent issue of stock under act of 1852, chapter 238, for formation of navigation companies. *Nelson v. Luling*, 62, 645.

Action against trustees for not filing report — when debt not established — evidence — admissions of treasurer. *Alexander v. Cauldwell*, 83, 480.

Officers executing contract for, not personally liable. *Whitford v. Laidler*, 94, 145.

## 3. Miscellaneous.

Not bound by notice to director while not engaged in its business. *President, etc. v. Cornen*, 37, 320.

Individual contract of officer when not void as against public policy. *Carnes v. Brown*, 80, 527.

Election of directors — one not a stockholder cannot compel new election. *Matter of Syracuse, etc., R. Co.*, 91, 1.

## IV. Powers.

When authorized to hold and convey land under some circumstances, conveyance deemed prima facie lawful. *Farmers' Loan and Trust Co. v. Curtis*, 7, 466.

Power to purchase property not needed for its business — evidence — liability of stockholders — estoppel. *Moss v. Averell*, 10, 449.

Incorporated for limited term may acquire a fee necessary for its use. Condition

subsequent — how title divested — rights of grantee under. *Nicoll v. N. Y. & Erie R. Co.*, 12, 121.

May purchase and reissue its own stock. *City Bank of Columbus v. Bruce*, 17, 507.

Power to take assignment of sheriff's certificate of sale of land under execution. *Chautauque Co. Bank v. Risley*, 19, 369.

Cannot defeat title of a mortgagee of its chattels by plea of ultra vires, and e converso. *Parish v. Wheeler*, 22, 494.

Ultra vires. *Ormsby v. Vermont Copper Mining Co.*, 56, 623.

Where not authorized to discount commercial paper. *New York State Loan and Trust Co. v. Helmer*, 77, 64.

Mortgage "securing indebtedness on commercial paper" — no power under charter to loan on personal security, act of 1868, chapter 816 — statute prohibiting discounting, 1 R. S. 712, §§ 3 and 6 — charter authorized to invest in bond and mortgages — may be enforced. *Pratt v. Eaton*, 79, 449.

May make necessary contracts unless forbidden. *Legrand v. Manhattan Mercantile Association*, 80, 638.

Contract to pay for building railroad in stock of company — paid-up stock — assignment to president. *Van Cott v. Van Brunt*, 82, 535.

Whether purchase of property and issue of stock therefor was in good faith, question for the jury. *Lake Superior Iron Co. v. Drexel*, 90, 87.

Mortgage by and execution of. *Trustees Can. Acad. v. McKechnie*, 90, 618.

Construction and validity of contract by — insolvency or dissolution does not abrogate contract. *New England Iron Co. v. Gilbert, etc., R. Co.*, 91, 153.

Purchase by directors of telegraph company of parallel line and issue of additional stock therefor held valid. *Williams v. Western Union Tel. Co.*, 93, 162.

Validity of lease by railroad company not questionable in action for rent by lessee. *Woodruff v. Erie R. Co.*, 93, 609.

Note of more than \$1,000, payable to corporation, transferred without authority of directors — transferee must show good faith and valuable consideration to recover



of maker. *Houghton v. McAuliff*, 2 Abb. 409.

A foreign corporation cannot avail itself of the statute of limitation in the courts of this State. *Mallory v. Tioga R. Co.*, 3 Abb. 139.

A foreign corporation may take personality in this State by will—but not an unincorporated association. *Sherwood v. American Bible Society*, 4 Abb. 227; 1 Keyes, 561.

Prohibition of transfer of property exceeding \$1,000 without resolution of directors does not apply to bona fide purchaser. *Ogden v. Raymond*, 1 Keyes, 42.

### V. Liabilities.

Not liable for willful trespass of servant although authorized and sanctioned by the president and general agent. *Vanderbilt v. Richmond Turnpike Co.*, 2, 479.

When not liable on fraudulent stock certificates issued by its agent—holder takes subject to equities. *Mechanics' Bank v. N. Y. & N. H. R. Co.*, 13, 599.

Two corporations, of different States, uniting in transporting passengers in a third State, jointly liable for negligence. *Bissell v. Michigan Southern & Northern Indiana R. Cos.*, 22, 258.

To charge a corporation for services it is not necessary to show a formal employment or ratification by directors—officers may employ. *Hooker v. Eagle Bank of Rochester*, 30, 83.

Liability for fraud of agent—spurious stock. *New York & N. H. R. Co. v. Schuyler*, 34, 30.

When liable to pledge of spurious stock pledged by its treasurer and purporting to be owned by him. *Titus v. Pres., etc., of Gr. Westn. Turnpike Co.*, 61, 237.

Bound by its accommodation indorsement. *Mechanics' Banking Assn. v. New York & Saugerties White Lead Co.*, 35, 505.

May be fined for violating injunction. *People v. Pendleton*, 64, 622.

When liable in action to set aside sale of stockholder's stock for non-payment

of assessment—tender. *Mitchell v. Vermont Copper Mining Co.*, 67, 280.

Liability of railroad corporations to laborers employed by contractors. *Atcherson v. Troy & Boston R. Co.*, 1 Abb. 13.

A corporation cannot evade liability on negotiable paper indorsed by its agent where his previous similar act had been ratified. *Bank of Auburn v. Putnam*, 1 Abb. 80.

Liable to firm for fraud although one of the firm was director of the corporation. *New York, etc., R. Co. v. Ketchum*, 3 Keyes, 863.

### VI. Insolvency.

Assignment by receiver of insolvent—effect and form—conflict of laws. *Hoyt v. Thompson*, 5, 320.

Payment by insolvent, with intent to prefer, is void although receiver is not cognizant of the insolvency. *Brouwer v. Harbeck*, 9, 589.

Where charter provides that an act of insolvency shall vest its property in receivers for specified distribution, this is not a voluntary conveyance. *Willits v. Waite*, 25, 577.

Receiver may include in assessment a reasonable sum for making and collecting. *Sands v. Boutwell*, 26, 233.

Requisites of assessment and notice. *Sands v. Sanders*, 26, 239.

When receiver properly appointed on pleadings. *People v. Northern R. Co.*, 42, 217.

Agreement of creditors to purchase its property and organize new—equities of other creditors. *Vose v. Cowdrey*, 49, 336.

Right of creditor to share in assets of insolvent corporation must be determined in court and district where receiver was appointed. *Rinn v. Astor Fire Ins. Co.*, 59, 143.

Receiver may be appointed in stockholders' action—notes made by a citizen of another State but payable here pass to receiver. *Osgood v. Maguire*, 61, 524.

May confer jurisdiction for appointment of receiver by appearing by attorney.

*Attorney General v. Guardian Mutual Life Ins. Co.*, 77, 272.

Chattel mortgage by insolvent corporation in pursuance of previous agreement for loan, not void under statute. *Paulding v. Chrome Steel Co.*, 94, 334.

Purchaser bona fide from president, of property of insolvent company, gets title, although the president's purchase was void as against creditors. *Heroy v. Kerr*, 2 Keyes, 582.

Rights of creditors subject to prior tax levy. *In Matter of Columbian Ins. Co.*, 3 Keyes, 123.

### VII. Dissolution.

Mere insolvency and suspension does not work dissolution. *Bradt v. Benedict*, 17, 93.

How forfeiture of charter enforced. *People v. Albany & Vermont R. Co.*, 24, 261.

Not dissolved until judgment of dissolution—until then, creditors may proceed against. *Kincaid v. Dwinelle*, 59, 548.

When dissolution abates action against unless continued by order of court under act 1832, chapter 295—requisites of order. *McCulloch v. Norwood*, 58, 562.

"Transfers" declared void when made by corporations seeking voluntary dissolution, means sales and not payments. *Sands v. Hill*, 55, 18.

Dissolution by expiration of term of charter—when not continued as cestui que trust under law of another State—director selling his stock and ceasing to take part in management need not formally resign—general creditor cannot reach funds paid to stockholders. *Sturges v. Vanderbilt*, 73, 384.

Lease to, not terminated by its dissolution—covenant to pay rent does not cease on—assets fund for payment of all debts—receiver of dissolved, may reserve sufficient to cancel and discharge them. *People v. Nat. Trust Co.*, 82, 283.

### VIII. Taxation.

Rule of taxation of. *People v. Board of Assessors*, 39, 81.

Taxation law of 1880 does not relieve from local taxation. *People v. Davenport*, 91, 574.

Taxable under Laws 1880, chapter 542, in January, 1881, though then not existing for a year. *People v. Spring Valley, etc., Co.*, 92, 383.

A foreign corporation is liable to taxation on securities deposited by it with State comptroller. *British Com. L. Ins. Co. v. Commrs of Taxes and Ass.*, 1 Abb. 199.

See various specific heads.

### COSTS.

#### I. When recoverable.

1. On certiorari.
2. On quo warranto.
3. Actions affecting real estate.
4. Generally.

#### II. Practice regarding.

#### III. For or against whom allowed.

1. Corporations.
2. Attorneys.
3. On reference.
4. Defendants.
5. Assignee of cause of action.
6. Generally.

#### IV. In equity cases.

#### V. When discretionary.

#### VI. For or against representative parties.

1. Executors, etc.
2. Trustees.
3. Generally.

#### VII. Extra allowance.

1. Basis of.
2. Where made.
3. Generally.

#### VIII. On appeal.

1. When not allowed.
2. When allowed as of course.
3. When discretionary.

#### IX. Double costs.

#### X. In probate practice

#### I. When costs are recoverable.

#### 1. On certiorari.

May be awarded to prevailing party on common-law certiorari. *People v. Van Alstyne*, 3 Keyes, 35.

Not awardable on common-law certiorari. *People v. Board of Police*, 39, 506; *People, ex rel. Smith, v. Nelleston*, 79, 638.

## 2. On quo warranto.

Recoverable on quo warranto. *People v. Olute*, 52, 576.

## 3. In actions affecting real estate.

When properly imposed on bill to redeem. *Calkins v. Isbell*, 20, 147.

When claim of title does not arise on pleadings so as to entitle to. *Rathbone v. McConnell*, 21, 466.

Charge for printing case on appeal prima facie correct. *Salter v. Utica, etc., R. Co.*, 86, 401.

When allowed in proceeding to vacate assessment in New York city—no presentment of claim to fiscal officer necessary. *Matter of Petition of Jetter*, 78, 601.

Not allowable against land-owners in eminent domain proceedings. *Matter of New York, etc., R. Co.*, 94, 287.

## 4. Generally.

In action for repeal of royal letters-patent. *People v. Clarke*, 9, 349.

In action to enjoin violation of trademark in discretion of court. *Low v. Hart*, 90, 457.

## II. Practice regarding.

Court may impose payment of counsel fees as condition of setting aside default. *Slade v. Warren*, 1, 431.

In pending action affected by enactment of Code of Procedure. *Lyme v. Ward*, 1, 531.

Imprisonment for. *Miller v. Scherder*, 2, 262.

Judge may instruct jury as to effect of verdict on. *Waffle v. Dillenback*, 38, 53.

Question under Code of Procedure, § 54, subd. 4, determined by facts found by referee. *Fuller v. Conde*, 47, 89.

Under Code of Procedure, § 61, plea of title—action begun in justice's court. *Morss v. Salisbury*, 48, 636.

Court may stay proceedings until costs of a former action for same cause are paid. *Barton v. Speis*, 73, 133.

When may be collected although prosecution enjoined. *German Savings Bank v. Habel*, 80, 273.

Sheriff's fees on execution how adjusted—not entitled to allowance for "auctioneer's fees, etc.," unless court so directs—Code, § 3307, subd. 7. *McKeon v. Horsfall*, 88, 429.

Attorney-general employing special counsel—allowance out of fund unauthorized. *Atty.-Gen. v. Cont. Life Ins. Co.*, 88, 571.

"To abide the event"—who entitled to. *Murtha v. Curley*, 92, 359.

## III. For or against whom allowed.

### 1. Corporations.

Court cannot allow to policy-holders intervening in suit to dissolve insurance company. *Matter of Atty.-Gen. v. North Am. Ins. Co.*, 91, 57; 43 Am. Rep. 648.

Disbursements in action against stockholders of corporation for debts—county treasurer's commissions, and printing. *Veeder v. Judson*, 91, 374.

### 2. Attorneys.

May be imposed on attorney for improperly instituting disbarment proceedings and he may be imprisoned for non-payment. *Matter of Kelly*, 62, 198.

When attorney liable for. *Voorlees v. McCartney*, 51, 387.

### 3. On reference.

Clerk has nothing to do with regularity of obtaining referee's report. *Ballou v. Parsons*, 55, 673.

On reference of question of fact on motion, disbursements cannot be allowed. *Concklin v. Taylor*, 68, 221.

Fees of sheriffs and referees on foreclosure sales in city of New York. *Schermerhorn v. Prouty*, 80, 317.

Fees of referee in proceedings to compel special guardian to account for sale of infant's land may be allowed. *Matter of Petition of Spelman v. Terry*, 74, 448.

Referee's fees—stipulation—sums paid for plans and measurements and for extra compensation to experts not taxable—agreement as to stenographer's fees. *Mark v. City of Buffalo*, 87, 184.

#### 4. Defendants.

One entitled to be substituted for or joined with defendant in ejectment, but not made a party, is liable for costs after execution against defendant unsatisfied. *Farmers' Loan and Trust Co. v. Kursch*, 5, 558.

When prevailing defendant, in action of tort against several, entitled to. *Daniels v. Lyon*, 9, 549.

In action in Supreme Court for conversion, where \$500 was demanded, and only \$35 recovered, defendants entitled to costs. *Powers v. Gross*, 66, 646.

Against municipal corporation—omission to present claim before suit—certificate of judge—when defendant not entitled. *Paine v. City of Rochester*, 85, 523.

#### 5. Assignee of cause of action.

One prosecuting suit in name of another, under agreement to do so at his own expense, and to have part of recovery, is liable for costs, although the agreement is void. *Giles v. Halbert*, 12, 32.

Assignee of demand in suit as collateral security not liable for. *Wolcott v. Holcomb*, 31, 125.

Assignee subsequent to suit not liable for, when assignment was collateral. *Matter of Lien of Dowling v. Premises of Bucking*, 52, 658.

Assignee of cause of action in suit liable for costs before as well as after. *Genet v. Davenport*, 58, 607.

Assignment of cause of action as mere security does not make assignee liable for costs. *Peck v. Yorks*, 75, 421.

#### 6. Generally.

Right of plaintiff to, when offer of judgment not accepted. *Tompkins v. Ives*, 36, 75.

When school officers not liable for. *Clarke v. Tunnickliff*, 38, 58.

When judgment creditor, instigating action of receiver through attorney, liable for. *Ward v. Roy*, 69, 96.

Allowed on application to enforce liability for costs of person beneficially interested in recovery. *Marvin v. Marvin*, 78, 541.

When action deemed brought in name of another by person beneficially interested—question not precluded by previous denial of motion for substitution. *Slauson v. Watkins*, 95, 369.

In trespass on lands, where title is alleged and denied, and less than \$50 recovered, no certificate that question of title arose on trial is necessary to entitle plaintiff to costs. *Kelly v. Manhattan Beach R. Co.*, 81, 233.

#### IV. In equity cases.

Defendants in equity action, not jointly interested, and separately answering, may each have costs. *Hauselt v. Vilmar*, 76, 630.

In equity cases discretionary in trial court. *Staiger v. Schultz*, 3 Trans. App. 4; 3 Keyes, 614; *Barker v. White*, 3 Trans. App. 86; 3 Keyes, 617.

#### V. When discretionary.

In action by assignor of collateral against assignee for surplus, and surrender of principal security, discretionary. *Cahoon v. Bank of Utica*, 7, 486.

In equity, even against executors, discretionary. *Riper v. Poppenhausen*, 43, 68.

When discretionary in action for damages and injunction. *Parker v. Laney*, 58, 469.

When discretionary, discretion may be exercised on appeal here. *Chipman v. Montgomery*, 63, 221.

On discontinuance of action by receiver. *Matter of Crosby v. Day*, 81, 242.

Of special proceeding, discretionary in Supreme Court. *Matter of Petition of Prot. Epis. Pub. School*, 86, 396.

Of appeal, discretionary on vacating attachment for contempt. *Matter of Bradner*, 87, 171.

## VI. For or against representative parties.

### 1. Executors, etc.

Statute prohibiting recovery of, against executors and administrators, does not apply to suits commenced against testator or intestate in his life. *Merritt v. Thompson*, 27, 225.

Against executor — claim may be presented before publication of notice to creditors — on question of offer to refer, finding below generally adopted here. *Field v. Field*, 77, 294.

Security for, may be required from executor. *Tolman v. Syracuse, etc., R. Co.*, 92, 353.

### 2. Trustees.

Not personally liable for, unless ordered. *Slocum v. Barry*, 38, 46 ; 5 Trans. App. 173.

### 3. Generally.

Defendant entitled to, on recovery against receiver of insurance company. *Columbia Ins. Co. v. Stevens*, 37, 536.

Assignee in bankruptcy not liable for, accruing before assignment, unless he has mismanaged. *Reade v. Waterhouse*, 52, 587.

## VII. Extra allowance.

### 1. Basis of extra allowance.

Extra allowance — basis for. *Atlantic Dock Co. v. Libby*, 45, 499.

Value of firm lease. *Struthers v. Pearce*, 51, 365.

Lease of railroad. *Ogdensburgh, etc., R. Co. v. Vermont, etc., R. Co.*, 63, 176.

In action for nuisance computed upon amount of damage and not upon value of land — disbursements for surveys not allowed. *Rothery v. New York Rubber Co.*, 90, 30.

Not permitted in litigation not involving money value. *Conaughty v. Saratoga Co. Bank*, 92, 401.

### 2. Where made.

Can only be made by court of original jurisdiction. *Wolfe v. Van Nostrand*, 2, 570.

Motion for extra allowance in case in first district must be made there. *Hun v. Salter*, 92, 651.

### 3. Generally.

Extra expenses and counsel fees may be allowed in action to declare marriage void. *Griffin v. Griffin*, 47, 134.

In proceedings under general railroad act for acquiring lands, costs when allowed should be as in actions, but not including extra allowances. *Rensselaer & Saratoga R. Co. v. Davis*, 55, 145.

When extra allowance to a several defendant proper. *Allis v. Wheeler*, 56, 50.

Extra allowance of five per cent not authorized in foreclosure, in 1870. *Hunt v. Chapman*, 62, 333.

When defendant gets judgment on counter-claim, extra allowance not limited to that, but based on plaintiff's claim. *Vilmar v. Schall*, 61, 564.

When extra allowance improper, in action for accounting of executors and trustees. *Weaver v. Ely*, 83, 89.

## VIII. On appeal.

### 1. When not allowed.

General Term reversing Special Term order punishing contempt has no authority to impose. *People v. Gilmore*, 88, 626.

Of appeal to Supreme Court cannot be added to remittitur from this court. *McGregor v. Buell*, 1 Keyes, 153.

This court may affirm and order absolute judgment in equity cases without costs to other party. *Patten v. Stitt*, 50, 591.

### 2. When allowed as of course.

Order of General Term regarding costs not appealable. *McClure v. Supervisors of Niagara*, 3 Abb. 83.

On reversal as to one and affirmance as to another, appellant has costs. *Montgomery County Bank v. Albany City Bank*, 7, 459.

On dismissal of any appeal to this court general costs follow. *White v. Anthony*, 23, 164.

Of appeal to this court from interlocutory order. *Brown v. Leigh*, 50, 427.

Judgment not set aside for error in — defense successful in part — referee's fees — motion. *Watson v. Gardiner*, 50, 671.

Full, on appeal. *Brown v. Leigh*, 52, 78.

When defendant entitled to, on appeal from justice's court. *Bigsby v. Warden*, 62, 27.

On one petition of railroad company to acquire lands of different owners, and one hearing, costs of only one appeal are proper. *Matter of Application of Prospect Park, etc., R. Co.*, 67, 371.

When this court reverses, with costs to abide the event, respondent if successful takes costs of appeal. *First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 84, 469.

On affirmance of order for new trial, sureties on appeal here only liable for costs to this court. *Burdett v. Lowe*, 85, 241.

### 3. When discretionary.

On appeal here discretionary. *Bouchaud v. Dias*, 1, 201.

Of appeal to County Court. *Younghanse v. Fingar*, 47, 99.

On appeal, discretionary only when reversed or affirmed in part or new trial granted. *Ayres v. Western R. Co.*, 49, 660.

Of appeal by trustee from order of accounting may be imposed on trustee personally. *Matter of McCarter*, 94, 558.

### IX. Double costs.

When allowed to public officer. *Burkle v. Luce*, 1, 239.

Not repealed by Code. *Bartle v. Gilman*, 18, 260.

### X. In probate practice.

Surrogate may award, but not counsel fees. *Devin v. Patchin*, 26, 441.

Defendants entitled only to taxable, in action by executor for construction of will. *Rose v. Rose Association*, 28, 184.

On contest of will — when costs of both parties charged upon estate. *Clapp v. Fullerton*, 34, 190.

In adjudication on will — extra allowances — power of review. *Downing v. Marshall*, 37, 380.

In action for construction of will Special Term may make allowance for counsel fees for executors. *Wetmore v. Parker*, 52, 450.

On appeal from decree of surrogate, discretionary. *Lawrence v. Lindsay*, 70, 566.

Court no right to be liberal to suitors in matter of, against estate. *McLean v. Freeman*, 70, 81.

Repeal of act of 1870, as to surrogate of New York, held not to affect pending proceedings — limit of, under Codes. *Matter of Weston*, 91, 502.

When not payable as claim against decedent's estate. *Matter of Fox*, 92, 93.

Upon executor for refusal to refer — absence of certificate under Code of Civil Procedure, § 1836. *Meltzer v. Doll*, 91, 365.

### COUNTER-CLAIM.

I. When allowable.

II. When not allowable.

III. In favor of whom.

IV. Matter arising subsequent to suit.

V. When need not be set up.

VI. Fraud.

I. *When allowable.*

In action for accounting, a judgment in tort. *Taylor v. Root*, 4 Keyes, 335; affirmed, 6 Alb. L. J. 99.

In action for injury to vessel by efforts of owner of cargo to preserve it, damages for injury to the cargo by delay. *Starbird v. Barrows*, 43, 200.

One indebted to estate in hands of receiver may counter-claim for services to estate. *Davis v. Stover*, 58, 473.

In trade-mark case. *Glenn & Hall Mfg. Co. v. Hall*, 61, 226; 19 Am. Rep. 278.

In action on contract, counter-claim on another contract may be set up. *Parsons v. Sutton*, 66, 92.

That wood was cut by plaintiff in possession on lands mortgaged to defendant, impairing the security, proper in action for conversion of wood, under Code of Civil Procedure, § 501, as connected with subject of action. *Carpenter v. Manhattan L. Ins. Co.*, 93, 552.

In action to foreclose mortgage given to secure bond with a surety, mortgagor may counter-claim a debt due him from obligee. *Bathgate v. Haskin*, 59, 533.

II. *When not allowable.*

In action of conversion of bonds by officer of bank. *Fishkill Sav. Inst. v. Nat. Bank of Fishkill*, 80, 162.

Without notice, defendant having expended money improving an elevator, cannot counter-claim such sums in action on another contract. *Mansfield v. Beard*, 82, 60.

Injury from nuisance permitted on premises, not causing eviction, not counter-claim in action for rent. *Boreel v. Lawton*, 90, 293; 43 Am. Rep. 170.

Vendee from factor may not set off claim against principal in action by factor. *Young v. Thurber*, 91, 388.

III. *In favor of whom.*

What proper, in action of accounting; by defendants against one of several plaintiffs—judgment is “contract,” al-

though on tort. *Taylor v. Root*, 4 Abb. 382.

When tenant is entitled to abatement of rent for partial eviction he may counter-claim it, and is not driven to cross action. *Blair v. Claxton*, 18, 529.

What is a payment by administrator of share of personalty, precluding setting it up as a counter-claim against claim for rents and profits. *Wright v. Wright*, 72, 149.

In favor of three jointly, not available to one alone—in action on note, cannot set up breach of warranty in sale. *Hopkins v. Lane*, 87, 501.

None affirmatively allowable in favor of personal representatives on reference of claim against decedent—reference is special proceeding. *Mowry v. Peet*, 88, 453.

When valid in favor of executor on reference of disputed claim. *Schmitz v. Langhaar*, 88, 503.

IV. *Matter arising subsequent to suit.*

Proper subject of—allowing amendment to answer—setting it up in effect supplemental answer. *Howard v. Johnston*, 82, 271.

V. *When need not be set up.*

Defendant not bound to set up, for independent cause of action—former action. *Brown v. Gallaudet*, 80, 413.

VI. *Fraud.*

When available in action to close partnership—fraud connected with contract. *More v. Rand*, 60, 208.

In action by State for fraud—when not proper against State. *People v. Dennison*, 84, 272.

See APPEAL; PLEADING; JUDGMENT; SET-OFF.

## Counterfeiting.

See CRIMINAL LAW; TRADE-MARK.

**COUNTY.**

Action does not lie against county after claim has been fixed and allowed by supervisors, on ground that their decision was erroneous. *Martin v. Supervisors of Greene Co.*, 29, 645.

Not liable for services of counsel assigned to defend prisoner. *People v. Board of Supervisors of Niagara Co.*, 78, 622.

When not liable for money wrongfully assessed and paid to drainage commissioners. *Dewey v. Supervisors of Niagara Co.*, 62, 294.

Court cannot, in absence of statute, order county treasurer to pay stenographer's fees. *Matter of Tinsley*, 90, 231.

See BRIDGE; HIGHWAY; MUNICIPAL CORPORATION; SUPERVISORS; TAXATION.

**COUNTY CLERK.**

Governor may supply vacancy on death, and deputy's right to act ceases on such appointment. *People v. Snedeker*, 14, 52.

Duty to index records cannot be transferred to another by supervisors. *People v. Nash*, 62, 484.

Not bound to note assignment in margin of record of mortgage. *Viele v. Judson*, 82, 32.

Not liable to owner of premises for omission to put in search a judgment on which premises were subsequently sold. *Kimball v. Connolly*, 2 Abb. 504.

Fees for searches for foreclosure. *Curtis v. McNair*, 68, 198.

See NEGLIGENCE.

**County Court.**

See COURTS.

**County Judge.**

See COURTS; CONSTITUTIONAL LAW; SUPPLEMENTARY PROCEEDINGS.

**COUNTY TREASURER.**

Increased duties imposed on, by supervisors, do not discharge bondsmen. *Supervisors of Monroe v. Clark*, 92, 391.

County not entitled to fees allowed him by comptroller for receiving and paying over State tax. *Board of Supervisors v. Otis*, 62, 88.

**Coupons.**

See BOND; NEGOTIABLE INSTRUMENT.

**COURTS.**

- I. *Supreme Court.*
- II. *Oyer and Terminer.*
- III. *City Courts.*
- IV. *County Court.*
- V. *Sessions.*

**I. Supreme Court.**

Decision of General Term must be concurred in by at least two justices personally present or in writing. *Matter of Kings Co. El. R. Co.*, 78, 383.

Its jurisdiction under the Constitution, article 6, section 6, cannot be limited by legislature. *People v. Nichols*, 79, 532.

Powers of General Term — may attach conditions to discretionary order. *Syracuse Savings Bank v. Syracuse, etc.*, 88, 110.

Clothed with powers of board of audit by act of 1881, chapter 211. *Danolds v. State*, 89, 36; 42 Am. Rep. 277.

When has no authority to fix unsettled damages on appeal. *Andrews v. Tyng*, 94, 16.

**II. Oyer and Terminer.**

Is permanent and continuous. *Quimbo Appo v. People*, 20, 531.

Cannot grant new trial on merits in felony after conviction. *Id.*

Place to which adjourned may not be changed. *Northrup v. People*, 37, 203.

Statute as to, in New York city, construed. *Smith v. People*, 47, 330.



Has jurisdiction of misdemeanors in New York city. *Gardner v. People*, 62, 299.

Must consist of same members throughout trial and they must be present throughout. *People v. Shaw*, 63, 36.

Power of sheriff to appoint attendants in county of New York. *Day v. Mayor*, etc., 66, 592.

### III. City Courts.

Appeal lies to New York Common Pleas from General Term of New York Marine Court. *People v. Clerk of Marine Court*, 3 Abb. 491.

Judges of Superior Court may issue attachments. *Renard v. Hargous*, 13, 259.

Superior Court of city of New York has jurisdiction of divorce suits. *Forrest v. Forrest*, 25, 501.

— has jurisdiction in divorce. *Forrest v. Havens*, 38, 469.

— justice may issue attachment on lien against a vessel. *Delaney v. Brett*, 51, 78.

Court of General Sessions in New York may grant new trials on merits. *Lanergan v. People*, 39, 39.

Court of Common Pleas in New York city — power to issue mandamus to comptroller of city. *People v. Green*, 58, 295.

— how may appoint attendants — evidence — pay-rolls. *Brennan v. Mayor*, etc., 62, 365.

City Court of Brooklyn cannot acquire jurisdiction of non-resident joint defendant. *Hoag v. Lamont*, 60, 96.

District Court in New York city — requisites of jurisdiction to issue attachment. *Van Loon v. Lyons*, 61, 22.

— power to appoint and remove clerks. *People v. Flynn*, 62, 375.

Marine Court — legislature may invest with jurisdiction of assault and battery, without limit as to amount of recovery. *Anderson v. Reilly*, 66, 189.

— can get no jurisdiction of action against city of New York. *Callahan v. Mayor*, etc., 66, 656.

— on death of defendant may substitute executor, and retain jurisdiction.

*People v. Justices of Marine Court*, 81, 500.

Marins Court — prior to Code of Civil Procedure had jurisdiction on attachment against non-resident of county with regular place of business therein. *Fielding v. Lucas*, 87, 197.

— appointment of attendants. *Holley v. Mayor*, etc., 59, 166.

### IV. County Court.

Has jurisdiction in partition. *Double-day v. Heath*, 16, 80.

Jurisdiction to sell infants' real estate and compel account from guardian. *Brown v. Snell*, 57, 286.

### V. Sessions.

Court of General Sessions of New York city — extension of term — irregularity in drawing jury of New York city. *Ferrie v. People*, 35, 125.

Bail to Special Sessions does not oust, nor transfer to General Sessions in New York city — voluntary appearance renders trial valid. *People v. Justices of Court of Special Sessions*, 74, 406.

Court of Special Sessions — act 1879, chapter 390, giving exclusive jurisdiction — pending indictments in Sessions — jurisdiction not ousted. *Ryan v. People*, 79, 593.

May have exclusive jurisdiction of petit larceny. *People v. Dutcher*, 83, 240.

See JUDGE ; JUDGMENT ; JURISDICTION.

### COURT-MARTIAL.

Defendant entitled to counsel. *People v. Van Allen*, 55, 31.

### COVENANT.

Acceptance of conveyance with right of entry for breach of condition binds to performance of condition. *Chamberlain v. Parker*. 45, 569.

When additional, implied from express one, and when not. *Bruce v. Nat. Bank*, 79, 154; 35 Am. Rep. 505.

To assign purchase-money mortgage by A. and wife satisfied by assignment by A. alone — when mortgage lost. *Clement v. Cash*, 21, 253.

Owners of adjoining lands in cities may agree upon mutual restrictions of use. *Trustees of Columbia College v. Lynch*, 70, 440; 26 Am. Rep. 615.

Not to engage in business — what is evasion of. *Sander v. Hoffman*, 64, 248.

One may recover on, running to himself although he did not sign and seal. *Smith v. Kerr*, 3, 144.

Not to permit grist-mill, does not run with land. *Harsha v. Reid*, 45, 415.

To repair gate across way is continuing. *Beach v. Crain*, 2, 86.

With penalty for non-performance — when may be enforced — running with land. *Phoenix Ins. Co. v. Continental Ins. Co.*, 87, 400.

Construction of guaranty of mortgage. *Mahaiwe Bank v. Culver*, 30, 313.

As to value of land covered by mortgage — acceptance of assignment containing no covenant as to value, not satisfaction of covenant — action for breach maintainable. *Smith v. Holbrook*, 82, 562.

"To assume, pay off and discharge" — right of action accrues when mortgage is due and payable. *Hume v. Hendrickson*, 79, 117.

To assume mortgage in deed poll enforceable against grantee. *Bowen v. Beck*, 94, 86.

By liquidating partner in firm name in assignment of judgment binds him alone in accordance with its terms — previous release of joint judgment debtor — damages. *Bennett v. Buchan*, 61, 222.

To pay taxes — when not merged in deed. *Sage v. Truslow*, 38, 240.

Charge of married woman's separate estate in her mortgage is not an express covenant to pay. *Mack v. Austin*, 95, 513.

See AGENCY; DEED; LANDLORD AND TENANT; MORTGAGE.

## Creditor.

See CREDITOR'S ACTION; DEBTOR AND CREDITOR.

## CREDITOR'S ACTION.

General creditor cannot sue to reach equitable assets. *Briggs v. Oliver*, 68, 336.

Sheriff cannot institute. *Lawrence v. Bank of Republic*, 35, 320.

Parol trust superior in equity to judgment lien — evidence. *Norton v. Mallory*, 63, 434.

Not maintainable until exhaustion of usual remedies at law. *Beardsley Scythe Co. v. Foster*, 36, 561.

Judgment in favor of receiver must be docketed. *Geery v. Geery*, 63, 252.

Not maintainable to reach assets of insolvent corporation until execution unsatisfied. *Ades v. Bigler*, 81, 349.

Against several joint debtors — legal remedy must first be exhausted against all, including estates of those deceased. *Voorhees v. Howard*, 4 Abb. 503; 4 Keyes, 371.

Action against three, service on two — execution sufficient to found suit to reach joint property. *Produce Bank v. Morton*, 67, 199.

Requisites of creditor's bill — justice's execution insufficient — execution must be returned against real estate — specific lien essential — insolvent copartnership. *Crippen v. Hudson*, 13, 161.

Complaint must allege return of execution unsatisfied. *Adsit v. Butler*, 87, 585.

Maintainable upon return of execution at plaintiff's request. *Forbes v. Waller*, 25, 430.

Outstanding execution need not be shown. *Haswell v. Lincks*, 87, 637.

Return of execution does not give lien on mere equities. *Dunlevy v. Tallmadge*, 32, 457.

May be maintained on return of execution, although within the sixty days. *Renaud v. O'Brien*, 35, 99.

When creditor's right of action on guaranty not extinguished. *Clafin v. Ostrom*, 54, 581.

When subsequent judgment creditor may set aside debtor's conveyance — when receiver may be appointed — when lien extinguished by receiver's sale. *Shand v. Hanley*, 71, 319.

Judgment creditor, when may maintain to cancel prior paid judgments — issuing execution. *Shaw v. Dwight*, 27, 244.

May be maintained to reach purchase-money due from purchaser to mortgage — creditor foreclosing a paid mortgage — may follow proceeds — may reach increased value. *Warner v. Blakeman*, 4 Abb. 530; 4 Keyes, 487.

Judgment creditor may maintain to reach excess of personalty held in trust for support over what is necessary for support. *Williams v. Thorn*, 70, 270.

Transfer without consideration in trust, when void as to creditors — contingent liability constituting creditor — death of transferor pending suit. *Young v. Heermans*, 66, 374.

To set aside conveyance by husband to wife — wife dying after suit — failing to show fraud, the plaintiff cannot reach husband's interest. *Curtis v. Fox*, 47, 299.

Attaching creditor cannot maintain to set aside debtor's fraudulent assignment of property attached in his behalf. *Thurber v. Planck*, 50, 80.

Establishes no preference over junior judgment as to personal property until receiver is appointed. *Davenport v. Kelly*, 42, 193.

Jurisdiction of Chancery — title of purchaser — effect of appointment of receiver — assignment — sale by receiver — his declarations — estoppel. *Chautauque County Bank v. White*, 6, 236.

Conveyance being shown to have been in good faith, grantee may still be compelled to pay his mortgage to receiver. *Durand v. Hankerson*, 39, 287.

In creditor's action to reach property fraudulently transferred, it is no defense that debtor has made general assignment. *Fort Stanwix v. Leggett*, 51, 552.

Lien does not relate back to supplementary proceedings, no receiver having been appointed — payment to judgment debtor's wife. *Edmondston v. McLoud*, 16, 543.

When defeated by laches and absence of evidence of fraud. *Trenton Banking Co. v. Duncan* 86, 221.

See ASSIGNMENT FOR CREDITORS; CONTRACT; CORPORATION; DEED; DAMAGES; LANDLORD AND TENANT; MORTGAGE; RECEIVER; SUPPLEMENTARY PROCEEDINGS; TRUSTS.

## CRIMINAL LAW.

- I. *Jurisdiction.*
- II. *Responsibility for crime.*
  1. *Insanity.*
  2. *Intoxication.*
- III. *Indictment.*
  1. *Particular averments.*
  2. *General requisites.*
  3. *Removal of.*
- IV. *Practice, arrest and bail.*
- V. *Trial.*
  1. *Generally.*
  2. *Challenges.*
  3. *Formation of jury.*
  4. *Charge of judge.*
- VI. *Evidence.*
  1. *Generally.*
  2. *Prisoner's testimony.*
  3. *Circumstantial evidence.*
  4. *Premeditation.*
  5. *Character.*
  6. *Motive.*
  7. *Cross-examination.*
  8. *Husband and wife.*
  9. *Confessions.*
  10. *Accomplice.*
- VII. *Courts.*
- VIII. *Ex post facto laws.*
- IX. *Appeal.*
- X. *Verdict.*
- XI. *Sentence.*
- XII. *Execution.*
- XIII. *Capital punishment.*
- XIV. *Abortion.*
- XV. *Arson.*
- XVI. *Assault.*
- XVII. *Bawdy-house.*
- XVIII. *Bigamy.*
- XIX. *Burglary.*
- XX. *Conspiracy.*
- XXI. *Counterfeiting.*

- XXII. *Election laws.*
- XXIII. *Embezzlement.*
- XXIV. *Excise.*
- XXV. *False pretenses.*
- XXVI. *Forgery.*
- XXVII. *Gambling.*
- XXVIII. *Homicide.*
- XXIX. *Kidnapping and seduction.*
- XXX. *Larceny.*
- XXXI. *Lottery.*
- XXXII. *Mayhem.*
- XXXIII. *Nuisance.*
- XXXIV. *Perjury.*
- XXXV. *Rape.*
- XXXVI. *Receiving stolen goods.*
- XXXVII. *Robbery.*
- XXXVIII. *Selling unwholesome provisions.*
- XXXIX. *Usury.*

### I. Jurisdiction.

Principal residing in another State and committing crime in this State by innocent agent. *Adams v. People*, 1, 173.

Indictment will not lie in county of New York for offense on vessel bound thence to Norwich, Conn., when close to Long Island, Suffolk county. *Manley v. People*, 7, 295.

Offense within five hundred yards of county boundary. *People v. Davis*, 36, 77; also, *People v. Davis*, 56, 95.

Property bought by superintendent of poor for their support, if stolen, may be laid as that of superintendent or of county. *People v. Bennett*, 37, 117.

On conviction of crime in one county, and carrying fruits of into another, may be indicted in latter. *Mack v. People*, 82, 235.

### II. Responsibility for crime.

#### 1. Insanity.

Burden of proof of sanity is on people. *People v. McCann*, 16, 58.

Test of sanity is knowledge of right and wrong. *Willis v. People*, 32, 715.

— at time of and with respect to act. *Flanagan v. People*, 52, 467; 11 Am. Rep. 731; *Wagner v. People*, 4 Abb. 509; *Brotherton v. People*, 75, 159.

Presumption of sanity — reasonable doubt of. *O'Connell v. People*, 87, 377; 41 Am. Rep. 379.

Test of sanity is knowledge of right and wrong — control of mental faculties sufficient to form criminal intent — burden of proof. *Walker v. People*, 88, 81.

On question of, doubt of expert not admissible. *Sanchez v. People*, 22, 147.

#### 2. Intoxication.

Evidence of the prisoner's intoxication is admissible to characterize the act. *People v. Rogers*, 18, 9.

Insanity produced by intoxication is a defense. *Id.*

One accused of being publicly intoxicated is entitled to jury trial and not triable before justice of peace. *Hill v. People*, 20, 363.

Voluntary intoxication no defense. *Kenny v. People*, 31, 330; *Flanigan v. People*, 86, 554; 40 Am. Rep. 556.

### III. Indictment.

#### 1. Particular averments.

Variance between indictment and verdict — larceny from person — evidence — of value of bank bill. *Fallon v. People*, 2 Keyes, 145.

Too late to object on appeal to omission to prove exact year and place of offense — caption no part of indictment. *Wagner v. People*, 2 Keyes, 684.

Caption no part of indictment. *People v. Bennett*, 37, 117.

Indictment for shooting A. — proof of shooting at B. and hitting A. by mistake — conviction right. *Hollywood v. People*, 3 Keyes, 55.

When clerical omission of "with" in indictment disregarded. *Shay v. People*, 22, 317.

Description in indictment of company defrauded by forgery. *Noakes v. People*, 25, 380.

Indictment for selling spirituous liquors — charging distinct offenses — naming

purchaser—election. *Osgood v. People*, 39, 449.

Corporate name of owner in arson must be exactly laid in indictment. *McGary v. People*, 45, 153.

## 2. General requisites.

Indictment defective for felony may be good for misdemeanor. *Lohman v. People*, 1, 379.

For murder—"upon the body," sufficient. *Sanchez v. People*, 22, 147.

On indictment for first degree of arson, there can be no conviction for third degree. *Dedieu v. People*, 22, 178.

Indictment for assault "with intent to do bodily harm" and with "intent to kill"—duplicitly—surplusage. *Dawson v. People*, 25, 399.

Caption not stating names or numbers of jurors good after judgment. *Id.*

Requirement to file is directory. *Id.*

On indictment of several for assault and battery some may be convicted of that, and some of simple assault—person unknown. *White v. People*, 32, 465.

Assault and battery—on woman, none, where she subsequently consents to connection. *People v. Bransby*, 32, 525.

One indicted as accessory before fact to several principals, only one of whom has been convicted, can be tried as accessory only to that one. *Starin v. People*, 45, 333.

Indictment for second offense of felony—discharge is material. *Wood v. People*, 53, 511.

Defective count—election—remedy—charging means. *People v. Davis*, 56, 95.

Duplicity—homicide in commission of felony. *Dolan v. People*, 64, 485.

Indictment on statute, charging same offense in different ways in separate counts, valid, although charging different grades differently punishable. *Hawker v. People*, 75, 487.

Husband and wife may be indicted if both guilty, and no coercion. *Goldstein v. People*, 82, 231.

Count in indictment for assault with intent to kill, alleging intent "to commit murder" good if it states substance

and informs defendant. *Pontius v. People*, 82, 339.

Surplusage—averment of corporation. Who is principal. Evidence—decoy letter—order of proof—objection to telegram not offered in evidence. *McCarney v. People*, 83, 408; 38 Am. Rep. 456.

Sufficiency of evidence before grand jury cannot be raised by plea—general verdict not vitiated because some counts bad. Robbery of bank keys—evidence. *Hope v. People*, 83, 418; 38 Am. Rep. 460.

Cruelty to children—care and custody—neglect of child in benevolent institution—lack of means—continuous offense—evidence—photographs—hypothetical questions. *Cowley v. People*, 83, 464; 38 Am. Rep. 464.

Duplicity in indictment—"to and for"—lottery ticket. *Read v. People*, 86, 381.

## 3. Removal of.

Indictment sent to Oyer need not be tried at first term. *Real v. People*, 42, 270.

Indictment may be removed from Oyer and Terminer to Supreme Court on application of prosecution—certiorari. *Jones v. People*, 79, 45.

Removing indictment from General Sessions to Oyer and Terminer—notice to accused unnecessary. *Leighton v. People*, 88, 117.

## IV. Practice, arrest and bail.

When deposition in criminal case competent. *Barron v. People*, 1, 386.

Harmless errors will be disregarded. *Shorter v. People*, 2, 193.

Warrant in proceedings to preserve peace need not be sealed—what is not discharge on examination. *Gano v. Hall*, 42, 67.

Settlement of bill of exceptions. *Wood v. People*, 59, 117.

Facts cannot be reviewed by this court in the absence of exceptions. *People v. Hovey*, 92, 554; also *People v. Boas*, 92, 560.

This court cannot review reversal of conviction on the facts. *People v. Boas*, 92, 560.

Practice upon motion for new trial—arrest of judgment. *People v. Kelly*, 94, 526.

When private person may arrest. *Burns v. Erben*, 40, 463.

Prisoner may waive examination, and recognizance without is valid, and need not show probable cause. *Champlain v. People*, 2, 82.

In debt on, no defense that no indictment was found. *Id.*

Justice of Supreme Court may not take bail during sitting of court having power to try. *People v. Mead*, 92, 415.

When court not sitting, justice of Supreme Court of county of arrest, though not of venue, may take bail. *People v. Clews*, 77, 39.

## V. Trial.

### 1. Generally.

Presence of prisoner—separation of jury—evidence of motive—testimony before coroner, when competent. *Stephens v. People*, 19, 549.

Prisoner stepping into ante-room—when immaterial. *People v. Bragle*, 88, 586; 42 Am. Rep. 269.

Prisoner must be present when jury come in for and receive further instruction. *Maurer v. People*, 43, 1.

Temporary absence of one judge, quorum being left, immaterial. *Tuttle v. People*, 36, 431.

Allocution essential. *Messner v. People*, 45, 1.

Corpus delicti must be proved in homicide—question of fact—motion to discharge equivalent to request to direct acquittal. *People v. Bennett*, 49, 137.

Talesmen, how summoned in Buffalo Superior Court. *Gaffney v. People*, 50, 416.

After summing up court may refuse to open case for prisoner. *Wilke v. People*, 53, 523.

Omission to instruct as to degree of murder not error, in absence of request—

new trial cannot be granted for error not excepted to—authority of Courts of Sessions in New York to grant new trials when verdict is against weight of evidence does not extend to other counties. *Buel v. People*, 78, 492; 34 Am. Rep. 555.

No exception lies to refusal to postpone for absence of witness—discretionary with court to compel district attorney to furnish evidence taken before grand jury. *Highmy v. People*, 79, 546.

Arson—trial of accessory before fact—conviction of principal—character—“dwelling-house”—evidence. *Levy v. People*, 80, 327.

Sufficiency and effect of objections and exceptions at. *People v. Dunn*, 90, 104.

### 2. Challenges.

Challenge to array—what is not cause for—peremptory challenge waives challenge for principal cause. *Friery v. People*, 2 Keyes, 424; 2 Abb. 215.

Challenge for conscientious scruples proper. *Walter v. People*, 32, 147.

Construction of act of 1855, chapter 337—juror—conscientious scruples—opinion from newspapers—court may act as triers of challenge to favor if not objected to—witnesses, professional and non-professional. *O'Brien v. People*, 36, 276.

Allowing special plea—motion to arrest—challenge to favor—opinion as to prisoner's character. *People v. Allen*, 43, 28.

Trial of challenges—appeal—opinions from newspapers. *Greenfield v. People*, 74, 277.

Challenge to array—withdrawn—jury impaneled—irregularity waived. *Pierson v. People*, 79, 424; 35 Am. Rep. 524.

Challenge of juror for opinion. *Thomas v. People*, 67, 218; *Balbo v. People*, 80, 484; *Cox v. People*, 80, 500.

Challenge to array, when deemed waived. *Cox v. People*, 80, 500.

### 3. Formation of jury.

Defendant in capital case not bound by consent to be tried by less than twelve jurors. *Cancemi v. People*, 18, 128.

Plea in abatement, as to formation of grand jury. *Dolan v. People*, 64, 485.

#### 4. Charge of judge.

Jury bound by instructions of court as in civil cases. *Duffy v. People*, 26, 588.

Error in charge, how cured. *Ruloff v. People*, 45, 213.

Hypothetical charge rightly refused—request without ruling on exception unavailing. *Slatterley v. People*, 58, 354.

Court questioning prisoner—charge. *Arnold v. People*, 75, 603.

Error to advise conviction if jury believe people's evidence. *McKenna v. People*, 81, 360.

Error cured by subsequent instruction. *Greenfield v. People*, 85, 75; 39 Am. Rep. 636, note.

"Falsus in uno"—test of mental capacity—evidence—respite—fresh sentence. *Moett v. People*, 85, 373

### VI. Evidence.

#### 1. Generally.

Certificate of conviction by Court of Special Sessions is conclusive of facts stated. *People v. Powers*, 6, 50.

Variance. *Noakes v. People*, 25, 380.

Statement in presence of prisoner presumed to have been in his hearing—act in presence of prisoner admissible as declaration—specific objection. *Hochreiter v. People*, 2 Abb. 363; 1 Keyes, 66.

Evidence—whether cries were of joy or grief, incompetent—so of declarations of deceased shortly before death. *Messner v. People*, 45, 1.

Dying declarations must be part of res gestæ—not admissible in abortion. *People v. Davis*, 56, 95.

Homicide—opinion of surgeon as to which wound fatal, competent—proof of particular instances of violent temper of deceased, incompetent. *Eggler v. People*, 56, 642.

Where intent is essential element to crime, defendant may testify as to his

intent. *Kerrains v. People*, 60, 221; 19 Am. Rep. 158.

Record of conviction of witness in another State may be rebutted. *Sims v. Sims*, 75, 466.

What deceased told physician not privileged within section 834 of Code of Civil Procedure. *Pierson v. People*, 79, 424; 35 Am. Rep. 524.

Prosecution may show improbabilities of prisoner's statements as to obtaining money. *Pontius v. People*, 82, 339.

Hearsay evidence part of conversation—objection. *People v. Beach*, 87, 508.

Evidence of prisoner's temper or that he was subject to fits of passion—when incompetent in murder case—declarations before homicide—comments of court immaterial if facts left to jury. *Sindram v. People*, 88, 196; *Thomas v. People*, 67, 218; *Abbott v. People*, 86, 460.

Upon trial of assault to kill—evidence of similar offense inadmissible. *People v. Gibbs*, 93, 470.

Photographs admissible as evidence. *Walsh v. People*, 88, 458.

Person convicted of crime competent witness, under Code of Civil Procedure, section 832. *People v. McGloin*, 91, 241.

#### 2. Prisoner's testimony.

Prisoner may show provocation. *People v. Lewis*, 3 Trans. App. 1.

On trial for murder, the prisoner's testimony at the coroner's inquest, before he was charged, is admissible against him. *Hendrickson v. People*, 10, 12; *Teachout v. People*, 41, 7.

Effect of prisoner's failure to account for his whereabouts. *Gordon v. People*, 33, 501.

Defendant in criminal trial testifying may be questioned as to other offenses. *People v. Noelke*, 94, 137.

Previous statements at coroner's inquest admissible against him. *Teachout v. People*, 41, 7.

Evidence of prisoner under arrest at coroner's inquest is not admissible on his trial. *People v. McMahon*, 15, 384.

Prisoner may testify to any material facts occurring after crime. *Donohue v. People*, 56, 208.

Presumption from failure to rebut a fact tending to show guilt. *Stover v. People*, 56, 315.

Person sentenced for felony incompetent as witness on criminal trial—objection must be taken when evidence is offered. *Perry v. People*, 86, 353.

Privilege to decline answering degrading questions. *People v. Brown*, 72, 571; 28 Am. Rep. 183.

Prisoner jointly indicted may be witness for co-defendant. *People v. Dowling*, 84, 478.

See *infra*, 6.

### 3. Circumstantial evidence.

When proper. *People v. Kennedy*, 32, 141.

Evidence of information to prisoner of wife's adultery, when admissible. *Sanchez v. People*, 22, 147.

Evidence as to blood stains on clothing. *People v. Gonzalez*, 35, 49.

All that happened in presence and hearing of prisoner at time of homicide is competent in evidence. *McKee v. People*, 36, 113.

Evidence of drunkenness—impeaching—opinions of non-experts. *Real v. People*, 42, 270.

That prisoner eluded officer competent on question of guilt—slight evidence. *Ryan v. People*, 79, 593.

Opinion as to blood stains—indifference of prisoner—letters and conversations of third persons admitting commission of crime. *Greenfield v. People*, 85, 75; 39 Am. Rep. 636.

That prisoner procured knife to be sharpened, asked where heart located, if pepper thrown in eyes would blind, justifies inference meditating injury. *Walsh v. People*, 88, 458.

### 4. Premeditation.

Premeditation of an instant constitutes murder. *People v. Clark*, 7, 385.

Passion does not excuse murder, when there has been cooling time. *People v. Sullivan*, 7, 396.

The right of self-defense does not arise until after every effort to avoid attack. *Id.*

Premeditation for appreciable time, though brief, makes crime murder in first degree. *People v. Majone*, 91, 211.

### 5. Character.

Evidence of good character is to be considered in any case. *Remsen v. People*, 43, 6.

Omission to prove good character cannot be considered against prisoner. *Ormsby v. People*, 53, 472.

Evidence of good character. *Stover v. People*, 56, 315.

A party may not show the good character of his witness, when evidence has been given of his committal for perjury. *People v. Gay*, 7, 378.

Evidence as to good character—weight of, in criminal case. *Cuncemi v. People*, 16, 501.

### 6. Motive.

Evidence tending to show motive admissible though tends to prove commission of another offense. *Pontius v. People*, 82, 339.

On trial for wife murder, the people may show that the wife's father had willed his estate in a way to disappoint the prisoner's expectations. *Hendrickson v. People*, 10, 12.

On question of motive, that prisoner married wife of deceased may be shown though it may tend to prove a crime not charged in the indictment. *Pierson v. People*, 79, 424; 35 Am. Rep. 524.

### 7. Cross-examination.

Evidence of threats—cross-examination. *LaBeau v. People*, 34, 223.

Error to admit evidence when prisoner had no opportunity to cross-examine. *People v. Cole*, 43, 508.



On cross-examination of prisoner—in trial for burglary he may not be asked if he had been arrested for bigamy—explanation of his statements. *People v. Crapo*, 76, 288; 32 Am. Rep. 302.

Prisoner testifying for himself on trial for assault, may be asked on cross-examination if he had not committed an assault on another, as bearing on his credibility. *People v. Irving*, 95, .

When may be asked if he has been indicted before. *Ryan v. People*, 79, 593.

### 8. Husband and wife.

Relations of husband and wife cannot be proved by reputation or declarations. *Walter v. People*, 32, 147.

Wife not competent witness against husband. *Wilke v. People*, 53, 525.

Woman indicted as single, and pleading, prima facie evidence that she is unmarried. *Seiler v. People*, 77, 411.

Coercion of wife is only presumed—husband must be present. *Id.*

Conversation between witness and prisoner's wife, when competent against him. *Lanergan v. People*, 39, 39.

### 9. Confessions.

A voluntary confession is admissible in evidence although the prisoner was under arrest. *People v. Rogers*, 18, 9.

Evidence is admissible of facts ascertained by means of an extorted confession. *Duffy v. People*, 26, 588.

Voluntary confession to policeman. *People v. Wentz*, 37, 303.

Confession under arrest and false hopes, incompetent—new trial or discharge. *People v. Phillips*, 42, 200.

Impeachment by writings—evidence that confession was free. *Gaffney v. People*, 50, 416.

Confession to officer while in custody. *Balbo v. People*, 80, 484; *Cox v. People*, 80, 500.

Confession held not made under influence of fear, and sustained by additional proof—not within provisions of Code of Civil Procedure as to statements by ac-

cused persons. *People v. McGloin*, 91, 241.

Silence of one charged with murder at coroner's inquest as to allegations made not admissible as admission. *People v. Willett*, 92, 29.

### 10. Accomplice.

Omission of prisoner to contradict testimony of accomplice when practicable may be considered. *People v. Dyle*, 21, 578.

Victim of abortion not accomplice. *Dunn v. People*, 29, 523.

Accomplice as witness—nol. pros.—corroboration—evidence—age of fracture—identity—blood stains—committing witness for perjury. *Lindsay v. People*, 63, 143.

Evidence—of accomplice—impeachment—declarations. *Stape v. People*, 85, 390.

Where accomplice and his wife are witnesses against prisoner, wife's testimony may be considered as corroborative. *Haskins v. People*, 16, 344.

### VII. Courts.

Session of New York city General Sessions—Laws of 1860, chapter 410, construed—opinion of juror—fixing day for execution—sentence partly void, how cured. *Lowenberg v. People*, 27, 336.

Act of 1855, chapter 337, amended in 1858, chapter 330, dispensing with exceptions, does not apply to Oyer and Terminer. *McKee v. People*, 36, 113.

Same justices of Court of Sessions must sit through trial. *Blend v. People*, 41, 604.

### VIII. Ex post facto laws.

Statute adding previous imprisonment to capital sentence ex post facto as to persons under conviction at time of passage. *Hartung v. People*, 22, 95.

Laws of 1860, chapter 410, ex post facto as to subsequent convictions for previous crimes. *Hartung v. People*, 26, 167.

IX. *Appeal.*

Writ of error does not lie in behalf of people. *People v. Corning*, 2, 1.

Writ of error to reverse conviction does not lie until after sentence, which must appear of record, but certiorari lies before. *Hill v. People*, 10, 463.

An escaped prisoner cannot maintain an appeal. *People v. Genet*, 59, 80 ; 17 Am. Rep. 315.

Writ of error does not lie here from reversal of General Term for irregularity and remission for re-sentence. *Pratt v. People*, 67, 606.

What writ of error brings up—indictment—charge—evidence—prisoner as witness. *People v. Casey*, 72, 393.

Dismissal of writ of error reviewable here—what is proper record of conviction—certiorari to bring up errors not shown. *Manke v. People*, 74, 415.

Writ of error does not bring up motion to arrest judgment on ground of disqualification of judge. *Hunt v. People*, 76, 89.

Writ of error does not lie to review order of General Term affirming judgment of conviction of Court of Sessions. *Eighmy v. People*, 78, 330.

Writ of error does not lie from order of General Term reversing conviction of Oyer and Terminer, and discharging prisoner before judgment. *People v. Bork*, 78, 346.

Writ of error only brings up exceptions taken on trial—motion in arrest not presented by. *Pontius v. People*, 82, 339.

Writ of error lies to review final judgment only. *Tabor v. People*, 90, 248.

Appeal does not lie here to review reversal of conviction on the facts. *People v. Boas*, 92, 560.

Power of Supreme Court by Code Crim. Proc., § 527, to grant new trial where judgment is against evidence or law, or where justice requires it, although no exceptions were taken in the court below, is discretionary, and where it does not appear that the discretion has been abused, it is not reviewable here. *People v. D'Argencour*, 95, 624.

X. *Verdict.*

Once in jeopardy—acquittal on invalid indictment no bar. *Canter v. People*, 2 Trans. App. 1.

Conviction in local court—proof of place and year waived by not objecting—caption unnecessary. *Wagner v. People*, 4 Abb. 509.

Judgment must be signed by judge—need not specify prison. *Weed v. People*, 31, 465.

Verdict of “guilty of embezzlement” on indictment for embezzlements and for larcenies is an acquittal of the larcenies. *Guenther v. People*, 24, 100.

Judgment not essential to plea of former conviction. *Shepherd v. People*, 25, 406.

Conviction for less degree than that charged—when proper. *Keefe v. People*, 40, 348.

Conviction may be had although it is not impossible that another may have committed the crime. *Poole v. People*, 80, 645.

General verdict sustained where some counts good and others bad. *Pontius v. People*, 82, 339.

Verdict of guilty on one count is acquittal on others—reversal does not disturb acquittal. *People v. Dowling*, 84, 478.

XI. *Sentence.*

Proper form under law of 1862 for murder in 1860—court will remit for proper sentence. *McKee v. People*, 32, 239.

When sentence not executed, Supreme Court may re-sentence. *Matter of Application of Ferris*, 35, 262.

This court may affirm and remand for proper sentence. *Harris v. People*, 59, 599.

Cumulative sentences under one indictment only valid to extent of legal punishment for one offense. *People v. Liscomb*, 60, 559 ; 19 Am. Rep. 211.

Imprisonment before sentence does not count on term of sentence. *People v. Warden of State Prison*, 66, 342.

On general verdict of guilty of several offenses differently punishable, sentence may be for highest charge. *Hawker v. People*, 75, 487.

Rights of prisoner confined on excessive sentence. *People v. Baker*, 89, 460.

## XII. Execution.

Escape of prisoner before expiration of term does not necessitate new award of execution. *Hagerty v. People*, 53, 476.

Convict committing murder may be hanged before expiration of sentence. *Thomas v. People*, 67, 218.

## XIII. Capital punishment.

Construction of law of 1860 in relation to capital punishment, and act of April 17, 1861. *Hartung v. People*, 28, 400.

Construction of Laws of 1861, chapter 303; 1862, chapter 197; and 1863, chapter 226, in regard to capital punishment. *Ratzky v. People*, 29, 124.

## XIV. Abortion.

Indictment — venue — variance — surplusage. *Crichton v. People*, 1 Keyes, 341.

— “Woman with child” equivalent to “pregnant woman.” *Eckhardt v. People*, 83, 462; 38 Am. Rep. 462.

Evidence — circulars — minutes of conviction of perjury. *Weed v. People*, 56, 628.

## XV. Arson.

Burning one's own dwelling-house — description — evidence. *Shepherd v. People*, 19, 537.

Ownership — indictment — duplicity — presence of human being — confession. *Woodford v. People*, 62, 117; 20 Am. Rep. 464.

## XVI. Assault.

Assault with intent to kill — shooting at one and wounding another. *Holly wood v. People*, 2 Abb. 376.

Assault with “sharp, dangerous weapon” — pitchfork not, when used as club — evidence of defense of property. *Filkins v. People*, 69, 101; 25 Am. Rep. 143.

Burden of proof on accused for assault with weapon. *Sawyer v. People*, 91, 667.

Evidence in trial for assault to kill — another similar offense not admissible. *People v. Gibbs*, 93, 470.

Evidence on trial for assault with intent to kill. *People v. Kelly*, 94, 526.

## XVII. Bawdy-house.

Evidence of arrest of prostitutes and harboring after conviction competent. *Harwood v. People*, 26, 190.

Disorderly house — need not be noisy — bawdy-house, what is — gambling-house. *King v. People*, 83, 587.

Taking woman to defile her — personal force not essential — act of 1848, chapter 105, not applicable — joint indictment of prisoner and keeper of house — proof of conspiracy not essential. *Beyer v. People*, 86, 369.

## XVIII. Bigamy.

Indictment lies although defendant procured ceremony by a pretended clergyman. *Hayes v. People*, 25, 390.

Proof of manner of subsequent intercourse is competent to corroborate prosecutrix. *Id.*

Indictment — unnecessary to negative the exceptions. *Fleming v. People*, 27, 329.

When assent to marriage ceremony implied. *Id.*

When divorce in another State no defense — charge as to intent. *People v. Baker*, 76, 78; 32 Am. Rep. 274.

One against whom divorce obtained here for adultery remarrying here guilty of bigamy. *People v. Faber*, 92, 146; 44 Am. Rep. 357.

## XIX. Burglary.

Tools used in burglary may be exhibited to jury. *People v. Larned*, 7, 445; *Foster v. People*, 63, 619.

Conviction of burglary or larceny may be had in any county where goods are carried. *Haskins v. People*, 16, 344.

Indictment — outer door of room in tenement-house. *Mason v. People*, 26, 200.

Outer door — breaking — intent to commit crime — mere trespass. *McCourt v. People*, 64, 583.

Evidence — of taking of articles not specified in indictment — calling for burglar's tools — breaking. *Foster v. People*, 63, 619.

Ownership — "dwelling-house" — authorities collated. *Quinn v. People*, 71, 561; 27 Am. Rep. 87.

Guest's room at inn must be charged as house of innkeeper. *Rodgers v. People*, 86, 360; 40 Am. Rep. 548.

## XX. Conspiracy.

When acts and declarations of part not admissible. *Ormsby v. People*, 53, 472.

Implied acquiescence in prosecutor's statements — conspiracy may be proved by circumstances, and declarations of conspirators are competent against one another. *Kelley v. People*, 55, 566; 14 Am. Rep. 342.

There must be criminal intent although act is prohibited by statute. *People v. Powell*, 63, 88.

## XXI. Counterfeiting.

Certification of check — indictment. *People v. Clements*, 26, 193.

## XXII. Election laws.

Sufficiency of indictment against election inspectors for violating law. *Hall v. People*, 90, 498.

Defense of unconstitutionality of law unavailable. *Id.*

## XXIII. Embezzlement.

Keeper of county poor house is not "agent or servant" within statute of embezzlement. *Coats v. People*, 22, 245.

By officer — evidence must show that money came to his hands by virtue of office. *Bartow v. People*, 78, 377.

Treasurer of city converting city bonds placed with him for sale, indictable under Laws 1875, chapter 19, for embezzlement. *Bork v. People*, 91, 5.

## XXIV. Excise.

Sale of intoxicants, when indictable. *Behan v. People*, 17, 516.

Offenses against act of 1857, chapter 628, sections 13, 29. *Foote v. People*, 56, 321.

Selling lager beer on Sunday — question whether it is intoxicating is one of fact. *Rau v. People*, 63, 277.

## XXV. False pretenses.

What is not false pretense — promise to give employment. *Ranney v. People*, 22, 413.

Sufficient to state, negative and prove one false pretense. *Thomas v. People*, 34, 351.

Object of statute against — whom protects — indictment not sustained. *McCord v. People*, 46, 470.

Indictment — evidence — request to charge as to sufficiency of indictment. *Smith v. People*, 47, 303.

Post-dated check as a false pretense. *Lesser v. People*, 73, 78.

Evidence — schedules in bankruptcy competent. Indictment in State court lies after bankruptcy proceedings instituted against prisoner. *Abbott v. People*, 75, 602.

Obtaining goods on credit — evidence of other frauds — cross-examination of prisoner. *Mayer v. People*, 80, 364.

Obtaining signature to written instrument — what evidence must show to justify conviction for false pretense — proof need not be direct — whether prosecutor influenced by representation, distinct from pretense of fraudulent intent of prisoner. *Therasson v. People*, 82, 238.

Obtaining signature to warrant on city chamberlain — indictment — evidence — challenge — cross-examination. *People v. Court of Oyer and Terminer*, 83, 436.

On sale of horse. *Watson v. People*, 87, 561; 41 Am. Rep. 397.

Procurement of property by post-dated check or false promise not false pretenses. *People v. Blanchard*, 90, 314.

Sufficiency of indictment—conviction as to one pretense sufficient—variance. *Webster v. People*, 92, 422.

Obtaining money by false pretense not larceny under statute previous to Penal Code. *Thorne v. Turck*, 94, 90.

### XXVI. Forgery.

Counterfeiting order for delivery of property. *Noakes v. People*, 25, 380.

Of check—indictment need not set forth indorsements or stamp. *Miller v. People*, 52, 304; 11 Am. Rep. 706.

Upon trial for forgery admissions of other forgeries inadmissible on question of intent. *People v. Corbin*, 56, 363; 15 Am. Rep. 427.

False entries in books of State treasurer—indictment—variance. *Phelps v. People*, 72, 365.

County treasurer executing in his own name, as treasurer, an unauthorized instrument purporting to be obligation of county, not forgery. *People v. Mann*, 75, 484; 31 Am. Rep. 482.

Of notes of bank of another country—evidence—of incorporation—making and engraving plate—indictment—"centaros"—intent to defraud. *People D'Argencour*, 95, .

### XXVII. Gambling.

Permitting gambling occasionally is sufficient under act 1851, chapter 504. *Hitchins v. People*, 39, 454.

### XXVIII. Homicide.

Threats. *Friery v. People*, 2 Abb. 215.

In self-defense cannot be justified where the combat could have been avoided or the assailed could have retreated. *Shorter v. People*, 2, 193.

Evidence of character of deceased and of accused. *People v. Lamb*, 2 Keyes, 360; *Abbott v. People*, 86, 460.

Without premeditation by dangerous act—construction of 2 R. S. 657, § 5. *Darry v. People*, 10, 120.

The body must be found or its disappearance accounted for. *Ruloff v. People*, 18, 179.

Corpus delicti must be proved beyond reasonable doubt. *People v. Schryver*, 42, 1; 1 Am. Rep. 480.

Of officer—knowledge of official character, how shown. *Yates v. People*, 32, 509.

Construction of law of 1862. *Fitzgerald v. People*, 37, 413.

Indictment—"alias"—declarations of deceased—opinion of experts as to probable position of body at time of killing. *Kennedy v. People*, 39, 245.

Under indictment for murder in first degree conviction of second degree may be upheld—there can be no reversal in absence of proper exceptions. *People v. Thompson*, 41, 1.

Justification for homicide not to be proved beyond reasonable doubt. *People v. Schryver*, 42, 1; 1 Am. Rep. 480.

Joint actors jointly guilty—rights of one opposing felony. *Ruloff v. People*, 45, 213.

Manslaughter, killing unborn child—child must be averred and proved to have been quick. *Evans v. People*, 49, 86. See *Eckhardt v. People*, 83, 462; 38 Am. Rep. 462.

Murder in second degree—what is. *Foster v. People*, 50, 598.

Evidence of uncommunicated threats by deceased competent—minutes of ground—burden of proof. *Stokes v. People*, 53, 164; 13 Am. Rep. 492.

Of wife taken in adultery, by husband—when murder. *Shufflin v. People*, 62, 229; 20 Am. Rep. 483.

Evidence—motive—footsteps—measurements—confessions. *Murphy v. People*, 63, 590.

Evidence—dying declarations—indictment—indorsement not essential. *Brotherton v. People*, 75, 159.

Unintentional killing in commission of rape is murder in first degree. *Buel v. People*, 78, 492; 34 Am. Rep. 555.

During commission of felony — indictment — death from fright. *Cox v. People*, 80, 502.

Character of weapon, question of fact. *Abbott v. People*, 86, 460.

Act of 1873, chapter 644 — deliberation and premeditation, what sufficient to characterize. *Leighton v. People*, 88, 117.

Facts constituting murder in first degree. *People v. Cornetti*, 92, 85.

Plea of manslaughter may be accepted upon indictment for murder. *People v. McDonnell*, 92, 657.

### XXIX. Kidnapping and seduction.

Kidnapping — getting sailor drunk to ship him — parol evidence of destination of ship. *Hadden v. People*, 25, 373.

Seduction — promise to marry — evidence of want of chastity — corroboration — evidence. *Kenyon v. People*, 26, 203.

— conditional promise to marry — evidence — corroboration. *Boyce v. People*, 55, 644.

— evidence of prosecutrix — corroboration — opportunities — privileged communication — promise may be sometime before intercourse. *Armstrong v. People*, 70, 38.

### XXX. Larceny.

From person — indictment need not aver that it was in night-time — verdict — variance. *Fallon v. People*, 2 Abb. 83.

Petit, second offense — indictment not showing jurisdiction on former trial, objection must be made in court below. *People v. Bowers*, 6, 50.

Evidence in grand larceny of taking of property insufficiently described, when competent. *Haskins v. People*, 16, 344.

Carrier's conversion of goods intrusted for carriage is larceny and not embezzlement. *Nichols v. People*, 17, 114.

On indictment for larceny of several sums amounting to more than \$25, prisoner entitled to finding as to amount. *Williams v. People*, 24, 405.

On joint indictment for larceny there may be convictions for larceny and for

attempt to commit. *Klein v. People*, 31, 229.

Felonious intent must exist at time of taking. *Wilson v. People*, 39, 459.

From agent — constructive possession. *People v. McDonald*, 43, 61.

Raising money from bottom of pocket constitutes larceny. *Harrison v. People*, 50, 518; 10 Am. Rep. 517.

Second offense — evidence — objection. *Johnson v. People*, 55, 512.

Effect of recent possession of stolen property. *Stover v. People*, 56, 315.

Of bill delivered to be changed. *Hildebrand v. People*, 56, 394; 15 Am. Rep. 435; *Justices of Sessions v. People*, 90, 12.

By conspiracy to convert. *Loomis v. People*, 67, 322; 23 Am. Rep. 123.

Of drafts, by employee of State treasurer — requisites of indictment — challenge. *Phelps v. People*, 72, 334.

Distinguished from false pretenses — no larceny where owner intended to part with title. *Zink v. People*, 77, 114; 33 Am. Rep. 589. See *Smith v. People*, 53, 111; 13 Am. Rep. 474.

Stealing dog is larceny — “personal property.” *Mullaly v. People*, 86, 365.

By trick — sending pretended expressman for goods C. O. D. — proof of similar transactions. *Shipply v. People*, 86, 375; 40 Am. Rep. 551, note.

Petit larceny not a felony — jurisdiction of Special Sessions. *People v. Finn*, 87, 533.

Police authorities may temporarily detain articles stolen. *Simpson v. St. John*, 93, 363.

### XXXI. Lottery.

Indictment for publishing lottery scheme, requisites of. *Charles v. People*, 1, 180.

Lottery to be drawn in another State where lawful unlawfully published in this State. *Id.*

### XXXII. Mayhem.

Premeditation essential to mayhem. *Godfrey v. People*, 63, 207.

Blow on head is not assault with intent to maim. *Foster v. People*, 50, 598.

Indictment need not state circumstances of premeditation — design must be averred — “destroy” answers for “disabled.” *Tully v. People*, 67, 15.

### XXXIII. Nuisance.

When railroad guilty of nuisance in bridging highway. *People v. New York Cent., etc., R. Co.*, 74, 302.

### XXXIV. Perjury.

Perjury committed although witness incompetent. *Chamberlain v. People*, 23, 85.

As to execution of will — advice of counsel. *Tuttle v. People*, 36, 431.

What constitutes perjury — indictment. *Wood v. People*, 59, 117.

On investigation before fire marshal of New York city — jurisdiction — variance — verdict. *Harris v. People*, 64, 148.

Indictment — when should negative information and belief — declarations of third person referred to by prisoner — false oath here before officer residing out of State, not perjury. *Lambert v. People*, 76, 220 ; 32 Am. Rep. 293.

Not predicable where affiant did not personally appear before officer certifying affidavit. *Case v. People*, 76, 242.

Sufficient to charge in indictment that court had authority to administer oath. *Elghmy v. People*, 79, 546.

Writ of error — brings up only question of law raised by exception. *Id.*

Offer of valuable consideration to procure — indictment. *Stratton v. People*, 81, 629.

Mere delivery of signed affidavit to officer is not taking oath. *O'Reiley v. People*, 86, 154 ; 40 Am. Rep. 525.

Subornation — oath on arrest for larceny — indictment. *Elkin v. People*, 28, 177.

Conviction cannot be had on uncorroborated evidence of perjurer. *People v. Evans*, 40, 1.

### XXXV. Rape.

Particulars of prosecutrix's complaints not admissible. *Baccio v. People*, 41, 265.

Evidence of unchastity of prosecutrix competent. *Woods v. People*, 55, 515 ; 14 Am. Rep. 309.

Evidence of chastity confined to those among whom she dwells. *Conkey v. People*, 1 Abb. 418.

Delay in making complaint, effect on credibility. *Higgins v. People*, 58, 377.

Prosecutrix must appear to have resisted to extent of her ability — female under ten years of age. *People v. Dohring*, 59, 374 ; 17 Am. Rep. 349.

Compelling woman to be defiled by force, menace or duress — going to house of prostitution as domestic not knowing its character — evidence justifying conviction — what said in room part of res gestæ. *Schnicker v. People*, 88, 192.

The conduct of the prisoner accused of rape when in the presence of the prosecutrix is competent evidence. *Conkey v. People*, 1 Abb. 418.

### XXXVI. Receiving stolen goods.

Evidence — possession of stolen property — effect of. *Knickerbocker v. People*, 43, 177.

Possession of stolen goods after larceny, unless explained, justifies conviction. *Goldstein v. People*, 82, 231.

On indictment for receiving stolen goods, prosecution to prove scienter may not show that prisoner has received other stolen property from others. *Coleman v. People*, 55, 81.

Evidence of other like acts, when competent. *Coleman v. People*, 58, 555.

Evidence of other purchases by pawnbroker — conversations. *Copperman v. People*, 56, 591.

Act of 1877, chapter 167, embraces receiving goods stolen from railroads. *People v. Dowling*, 84, 478.

### XXXVII. Robbery.

Circumstantial evidence — case for jury. *Bloomer v. People*, 3 Keyes, 9.

Custodian need not be actual owner of property. *Brooks v. People*, 49, 436; 10 Am. Rep. 398.

What evidence sufficient to establish the "corpus delicti" of a robbery — in toxication of person robbed — its effect. *Bloomer v. People*, 1 Abb. 146.

### XXXVIII. *Selling unwholesome provisions.*

Indictment — evidence — guilty knowledge may be inferred from circumstances. *Goodrich v. People*, 19, 574.

Selling unwholesome beef as merchandise generally is criminal. *People v. Parker*, 38, 85.

Selling adulterated milk — validity of ordinance — indictment — joinder — duplicity. *Polinsky v. People*, 73, 65.

### XXXIX. *Usury.*

When indictment will not lie. *Sumner v. People*, 29, 337.

### CROPS.

Carried by devise — go first to pay debts. *Bradner v. Faulkner*, 34, 347.

One in possession of land, claiming adversely, may sell the hay cut during the occupancy. *Stockwell v. Phelps*, 34, 363.

When sub-lessee not entitled to crops sowed pending action of ejectment. *Samson v. Rose*, 65, 411.

Mortgagor not entitled to ungathered crop sowed after default. *Sherman v. Willett*, 42, 146.

Owner of equity of redemption may sell crops as against purchaser on foreclosure. *Van Etten v. Currier*, 4 Abb. 475.

### Curtesy.

See MARRIAGE; WILL.

### CUSTOM.

When does not give cause of action. *Kelley v. Downing*, 42, 71.

See CONTRACT; EVIDENCE.

## D.

### DAMAGES.

#### I. *Mitigation of.*

#### II. *What recoverable as.*

#### III. *What not recoverable as.*

#### IV. *Measure of.*

1. *Actions ex contractu.*
2. *Actions against carriers.*
3. *Breach of warranty.*
4. *Contracts for sale of lands.*
5. *Breach of promise of marriage.*
6. *Quantum meruit.*
7. *Prospective damages.*
8. *Special damages.*
9. *Nominal damages.*
10. *Generally.*

#### V. *Liquidated damages.*

#### VI. *Actions ex delicto.*

1. *Negligence.*

#### 2. *Conversion.*

#### 3. *Exemplary damages.*

#### 4. *Fraud.*

#### 5. *Trespass.*

#### 6. *Actions against sheriff.*

#### VII. *Practice.*

#### 1. *What court to fix.*

#### 2. *Waiver of right of action for.*

#### 3. *Competent proof of.*

#### I. *Mitigation of.*

Where article sold is entirely worthless for purpose, vendor must still be allowed for intrinsic value. *Hoe v. Sanborn*, 36, 93.

Mortgage given to secure notes — maker becoming insolvent — value of note at time of trial allowed in diminution — offer to re-



turn note unnecessary. *Smith v. Holbrook*, 82, 562.

Where stored property stolen from warehouseman — recovery of part of property — expense of recovery and repair allowed. *Jones v. Morgan*, 90, 4; 43 Am. Rep. 131.

In action by receiver against officer of bank for illegal loans actual loss only recoverable — payments by joint tortfeasor to be credited. *Knapp v. Roehle*, 94, 329.

## II. What recoverable as.

Funeral expenses proper item in action causing death. Act of 1870, chapter 78. *Murphy v. New York Cent. R. Co.*, 88, 445.

In action for personal injury, bodily pain, as well as medical expenses and pecuniary loss, is a proper element of damage. *Ransom v. N. Y. & Erie R. Co.*, 15, 415.

May be awarded in action for reformation of contract. *Bidwell v. Astor Mut. Life Ins. Co.*, 16, 263.

Interest recoverable on penalty of bond. *Brainard v. Jones*, 18, 35.

On injunction bond counsel fees recoverable. *Corcoran v. Judson*, 24, 106.

When costs recoverable as damages. *Whitney v. Nat. Bk. of Potsdam*, 45, 303.

Interest recoverable on value of property destroyed by negligence. *Parrott v. Knickerbocker & N. Y. Ice Cos.*, 46, 361.

In trover interest is recoverable. *McCormick v. Pennsylvania Cent. R. Co.*, 49, 303.

Interest in action against railway commissioners. *Griggs v. Griggs*, 56, 504.

In action for collision of vessels, cost of repairs and rental value while repairing, and interest on both, proper. *Mailler v. Express Propeller Line*, 61, 312.

On breach of contract of employment on share of profits with certain weekly payments on account — no profits being shown, the weekly allowance may be recovered. *Gifford v. Waters*, 67, 80.

In action for injury by water from privy — loss of rents — injuries to premises. *Jutte v. Hughes*, 67, 267.

In action by dedicator of street for unauthorized use by railway depreciation of lots proper item. *Henderson v. New York Cent., etc., R. Co.*, 78, 423.

On breach of contract for board, interest is proper. *DeLavallette v. Wendt*, 75, 579; 31 Am. Rep. 494, note.

## III. What not recoverable as.

On covenant of indemnity against mortgage, bonus which the party was compelled to pay to raise amount. *Low v. Archer*, 12, 277.

In action by husband as administrator for death of wife, value of her services to him. *Dickins v. New York Cent. R. Co.*, 23, 158.

When damages too remote in action for removing bridge. *Coster v. Mayor, etc.*, 43, 399.

Damages for breach of contract void under statute of frauds but partly performed. *Harsha v. Reid*, 45, 415.

Damages not recoverable for non-delivery of goods sold but destroyed by accident without seller's fault. *Dexter v. Norton*, 47, 62; 7 Am. Rep. 415.

When costs and counsel fees not proper on injunction. *Disbrow v. Garcia*, 52, 654; *Hovey v. Rubber Tip Co.*, 50, 335; *Allen v. Glenville Woolen Co.*, id. 282; *Newton v. Russell*, 87, 527.

In action of damages for breach of contract the consideration paid is no part of damages — so in action ex delicto against an attorney the measure is not the fee received — onus is on plaintiff. *Quinn v. Van Pelt*, 56, 417.

Counsel fees not made necessary on temporary injunction cannot be assessed in action on undertaking — if no damages shown on reference — plaintiff not liable for expense of reference. *Randall v. Carpenter*, 88, 293.

Costs in another suit between plaintiff and third person as to subject-matter not allowable as damages. *Corn Exchange Bk. v. Nassau Bk.*, 91, 74; 43 Am. Rep. 655.

Actual loss only recoverable for breach of warranty of title to chattel. *O'Brien v. Jones*, 91, 193.

IV. *Measure of.*1. *Actions ex contractu.*

Where one refuses to accept or pay for goods, on ground that they are not of contracted quality, but is unable to restore the goods, he is liable for their market value at time of demand. *Shields v. Pettie*, 4, 122.

On breach of entire contract for work at uniform price by party for whom it was to be done, he may not show that part done was less expensive than part unperformed. *Jones v. Judd*, 4, 411.

On breach of contract to transport material to enable laying of parallel railway track. *Wilson v. New York Cent. R. Co.*, 4 Abb. 618.

Right of action for breach of contract of sale is not lost by a subsequent agreement including the part delivered on the former. *McKnight v. Dunlop*, 5, 537.

On breach of agreement to return a released note. *Barmon v. Lithauer*, 4 Keyes, 317.

In action for breach of contract to build a house in payment for a house, difference in value is the measure. *Laraway v. Perkins*, 10, 371.

On breach of contract to transfer stock. *Orr v. Bigelow*, 14, 556.

In action for surplus on sale of collateral. *Van Blarcom v. Broadway Bk.*, 37, 540.

In action against factor to charge him as purchaser because of neglect to sell, is market value at time of receipt of order to sell, or a reasonable time thereafter. *Wheeler v. Lynch*, 60, 469; 19 Am. Rep. 202.

Where purchaser refuses to perform contract to buy chattels, seller may retain them and recover difference between contract price and market price at time of delivery. *Bridgford v. Crocker*, 60, 627.

On breach of contract to pay at New York for goods to be shipped to Antwerp — evidence of market price. *Cahen v. Platt*, 69, 348; 25 Am. Rep. 203.

For breach of contract to build houses on lots conveyed. *Kidd v. McCormick*, 83, 391.

In action by vendor for breach of contract of sale of goods, measure is contract price less payments. *Hunter v. Wetsell*, 84, 549; 38 Am. Rep. 544.

Prospective profits from contract broken by State allowable. *Danolds v. State*, 89, 36; 42 Am. Rep. 277.

In action by employee for breach of contract of service. *Everson v. Powers*, 89, 527; 42 Am. Rep. 319.

2 *Actions against carriers.*

In action against carrier for failure to carry passenger, lost time is proper element, although value not proved. *Ward v. Vanderbilt*, 4 Abb. 521.

In action against a railroad company for breach of contract for construction of roadway, the difference between the principal and sub-contracts is not the measure. *Story v. N. Y. & H. R. Co.*, 6, 85.

On breach of contract to transport goods to a foreign port at a certain price, the measure is the difference between that price and what the shipper is compelled to pay. *Ogden v. Marshall*, 8, 540.

Measure of, for non-delivery of merchandise — interest — how market price fixed. *Dana v. Fiedler*, 12, 40.

Measure in action against carrier for not delivering property is not value of property. *Scovill v. Griffith*, 12, 509.

Carrier not liable for injury to goods by delay unless that was the direct cause. *Hamilton v. McPherson*, 28, 72.

Measure in action against carrier for delay in carriage of passenger. *Van Buskirk v. Roberts*, 31, 661.

Measure in action against common carrier for breach of contract to transport produce. *Starbird v. Barrons*, 38, 230.

Measure in action against telegraph company for mistake in message ordering merchandise to be shipped. *Leonard v. New York, etc., Tel. Co.*, 41, 544, 1 Am. Rep. 446.

Measure against common carrier. *Sturges v. Bissell*, 46, 462.

Measure as against common carrier for delay is difference in value at time when it ought to have been and time when it

was delivered. *Ward v. New York Cent. R. Co.*, 47, 29; 7 Am. Rep. 405.

Damages in action against carrier for loss of goods shipped on approval. *Magnin v. Dinsmore*, 62, 35; 20 Am. Rep. 442.

### 3 Breach of warranty.

Measure for breach of warranty of goods is difference between warranted value and real value. *Muller v. Eno*, 14, 597.

Measure on express warranty of seed, is value of the ordinary crop less expense of raising and value of crop raised. *Pas-singer v. Thorburn*, 34, 634.

Measure on implied warranty on sale of seed. *Van Wyck v. Allen*, 69, 61; 25 Am. Rep. 136.

— interest. *White v. Miller*, 71, 118; 27 Am. Rep. 13.

— interest not proper. *White v. Miller*, 78, 393; 34 Am. Rep. 544.

On breach of warranty that coal dust is free from soft coal dust, measure is injury to brick manufactured by its use. *Milburn v. Belloni*, 39, 53.

Measure in action by purchaser for breach of implied warranty, only nominal, recoverable before actual loss. *Burt v. Dewey*, 40, 283.

Measure on breach of warranty of goods sold for manufacture is difference in value of the manufacture from the goods sold and that from the goods as warranted. *Parks v. Morris Axe and Tool Co.*, 54, 586.

### 4. Contracts for sale of lands.

In action for breach of covenant to repair and replace a gate, the measure is not merely the cost of rebuilding, but the actual injury to the land by trespass of entering cattle. *Beach v. Crain*, 2, 86.

When grantee cannot resist action for purchase-money on ground of outstanding incumbrance. *Grant v. Tallman*, 20, 191.

Measure on breach of covenant against incumbrances. *Braman v. Bingham*, 26, 483.

Measure for delay in conveying premises according to agreement. *Worrall v. Munn*, 38, 187.

In action against vendor for breach of contract to convey land, vendee may recover for value of timber and materials removed. *Worrall v. Munn*, 53, 185.

Measure in action of specific performance of agreement to convey land is difference between contract price and value of land at time of breach. *Pumpelly v. Phelps*, 40, 59.

Measure on breach of covenant for quiet enjoyment in lease, by fault of lessor, is value of unexpired term less rent. *Mack v. Patchin*, 42, 167; 1 Am. Rep. 506.

Place of sale on breach of contract of sale. *Lewis v. Greider*, 51, 231.

Damages in action for dispossession from lands. *Eten v. Lyster*, 60, 252.

Measure for breach of covenant of landlord to make repairs — hotel. *Hexter v. Knox*, 63, 561.

Measure upon breach of contract to sell lands — defect in title unknown to vendor. *Cockcroft v. N. Y. & Harlem R. Co.*, 69, 201.

Measure in action on contract to indemnify against payments to be made to State on sale of lands, is value of land at eviction, with interest. *Taylor v. Carnes*, 69, 430.

On breach of contract to convey lands, expense of examining title is proper item. *Bigler v. Morgan*, 77, 312.

Damages for depreciation in value of land conveyed to secure loan pending action for reconveyance and expense of action not recoverable. *Marvin v. Prence*, 94, 295.

### 5. Breach of promise of marriage.

In action of breach of promise of marriage failure of defendant to prove unchastity of defendant which he has pleaded may be considered in aggravation. *Thorn v. Knapp*, 42, 474; 1 Am. Rep. 561.

### 6. Quantum meruit.

Where a party arrests the performance of work being done for him, the other

party may recover quantum meruit, or for the work done at the contract price with damages for breach. *Jones v. Judd*, 4, 411.

Where an agent is prevented from completing his contract of service by sickness and death recovery is to be measured by contract and not by quantum meruit. *Clark v. Gilbert*, 26, 279.

In action on quantum meruit, on proof of agreement to pay specific sum, that constitutes measure. *Ludlow v. Dole*, 62, 617.

In action on quantum meruit original complaint may be amended as to amounts. *Sherwood v. Hauser*, 94, 626.

### 7. Prospective damages.

Rule as to prospective damages for personal injury. *Filer v. N. Y. Cent. R. Co.*, 49, 42.

On breach of contract to support for life, prospective damages may be recovered. *Schell v. Plumb*, 55, 592.

On breach of contract to supply manufacture for known purpose, plaintiff may recover ordinary profits which he was prevented from making. *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60, 487.

On breach of contract, gains prevented as well as losses sustained recoverable. *Messmore v. New York Shot and Lead Co.*, 40, 422.

Damages extend to certain future personal suffering. *Curtis v. Rochester & Syracuse R. Co.*, 18, 534.

In action by husband for death of wife value of her probable earnings to children not proper item, but loss of maternal nurture and education is. *Tilley v. Hudson River R. Co.*, 24, 471; 29, 252.

In action by parent for injury to child prospective loss may be recovered. *Drew v. Sixth Ave. R. Co.*, 26, 49.

When profits are uncertain, proof of past profits is incompetent. *Masterton v. Village of Mount Vernon*, 58, 391.

### 8. Special damages.

General damages cannot be recovered without proof, where special damages are

alleged and proved. *Vanderslice v. Newton*, 4, 130.

Damages on breach of contract to sell goods—special damages. *Parsons v. Sutton*, 66, 92.

### 9. Nominal damages.

Only nominal damages recoverable on vendor's failure to perform contract to convey land by reason of inability to make title. *Conger v. Weaver*, 20, 140.

Measure in action for breach of covenant by lessee to sink a well, nominal. *Chamberlain v. Parker*, 45, 569.

Nominal damages only should be allowed for breach of an unconscionable contract induced by mistake. *Margraf v. Muir*, 57, 155.

Damages for loss of time from injury nominal in absence of proof of value. *Leeds v. Metropolitan Gas L. Co.*, 90, 26.

Nominal damages only recoverable for unauthorized sale by broker of stock that could be replaced. *Colt v. Owens*, 90, 368.

### 10. Generally.

When a contractor elects to consider contract as rescinded and sue for work, he can recover only actual value of work performed. *Clark v. Mayor, etc.*, 4, 338.

Damages against factor, for selling contrary to instructions—ascertained by net market price within reasonable time afterward to bring action. *Scott v. Rogers*, 4 Abb. 157.

Measure on breach of contract to let land on shares. *Taylor v. Bradley*, 39, 129; 4 Abb. 363.

Measure in action for compensation for services in negotiating sale of land. *Erben v. Lorillard*, 2 Keyes, 567.

Measure against charterer of vessel refusing to furnish cargo. *Ashburner v. Balchen*, 7, 262.

When an insurance policy agrees to pay the actual cash value of goods burned, that is the measure, although the duties have not been paid. *Wolfe v. Howard Ins. Co.*, 7, 583.

Damages in action for dissolving partnership are the profits lost, to be determined by the actual gains during continuance, and not to be diminished by the plaintiff's going into business on his own account. *Bagley v. Smith*, 10, 489.

Measure on breach of contract to deliver machinery is ordinary rent or hire. *Griffin v. Colver*, 16, 489.

Measure in action for mesne profits. *Holmes v. Davis*, 19, 488.

Measure in action by mortgagee of chattels, after forfeiture, against mortgagor or one under him, for the chattels, is the amount of the debt. *Parish v. Wheeler*, 22, 494.

Measure in action on injunction bond. *Barton v. Fisk*, 30, 166.

Measure on breach of contract of sale by buyer. *Pollen v. LeRoy*, 30, 549.

Measure in action to recover land and damages. *Vandervoort v. Gould*, 36, 639.

Measure in action by carrier on insurance policy is value of goods at time and place of loss. *Savage v. Corn Ex. Ins. Co.*, 36, 655.

Measure on breach of contract to sell goods to enable purchaser to fill contract of which seller is informed, is the difference between the price of the two contracts. *Messmore v. New York Shot and Lead Co.*, 40, 422.

Measure recoverable by purchaser from his assignees of his contract to buy personal property, on their breach and his fulfillment. *Dustan v. McAndrew*, 44, 72.

Measure on dissolution of injunction. *Andrews v. Glenville Woolen Co.*, 50, 282; *Roberts v. White*, 73, 375.

For breach of contract to sell sheep, highest market price of wool between demand and trial is proper. *Groat v. Gile*, 51, 431.

Measure on breach of municipal contract for street cleaning. *Deekin v. Mayor*, etc., 63, 8.

When property seized under void attachment, levy thereon without delivery to owner no defense — measure of damages. *Tiffany v. Lord*, 65, 310.

## V. Liquidated damages.

Whether damages liquidated or penalty — fixed sum as condition of penal bond. *Cotheal v. Talmage*, 9, 551.

When deemed a penalty and not liquidated. *Lampman v. Cochran*, 16, 275.

When deemed liquidated and not penalty. *Bagley v. Peddie*, 16, 469.

When deemed liquidated on contract to convey lands, etc. *Clement v. Cash*, 21, 253.

An excessive forfeiture will be deemed a penalty unless contrary intent is clear. *Colwell v. Lawrence*, 38, 71.

For breach of contract, not limited to penalty provided. *Noyes v. Phillips*, 60, 408.

Contract to deliver and take ice — intent to limit extent of damages. *Kemp v. Knick. Ice Co.*, 69, 45.

Rule as to gross sum in lieu of life estate. *Matter of Zahrt*, 94, 605.

## VI. Actions ex delictu.

### 1. Negligence.

In action for negligence, allowance for loss of time, when proper. *Ward v. Vanderbilt*, 1 Keyes, 70.

Life insurance does not reduce damages recoverable for death produced by negligence. *Althorff v. Wolfe*, 22, 355.

In action by father, as administrator of wife killed by negligence — nurture of children — capacity to carry on business — prospective loss. *Tilley v. Hudson River R. Co.*, 29, 252.

Negligent communication of fire — when too remote. *Ryan v. New York Cent. R. Co.*, 35, 210.

In case of death by negligence, damages may include loss of personal care, intellectual culture, etc. *McIntyre v. New York Cent. R. Co.*, 37, 287.

What not excessive for death of infant. *O'Mara v. Hudson R. R. Co.*, 38, 445.

Measure in action for injury by boiler explosion. *Cassidy v. Le Fevre*, 45, 562.

Value of use of vessel while undergoing repairs and interest on cost of repairs

proper in action for negligent injury. *Whitehall Trans. Co. v. New Jersey Steamboat Co.*, 51, 369.

In action by physician for personal injury by negligence, money paid for prescribed medicine is recoverable—so loss in his practice. *Metcalf v. Baker*, 57, 662.

When negligence of telegraph company not cause of embezzlement. *Lowery v. Western Union Tel. Co.*, 60, 198; 19 Am. Rep. 154.

In action for personal injury by negligence, loss of wages being claimed, defendant may show that plaintiff's employer paid him his wages during his sickness. *Drinkwater v. Dinsmore*, 80, 390; 36 Am. Rep. 624.

In action against bank for negligence in collecting draft. *First Nat. Bk. v. Fourth Nat. Bk.*, 89, 412.

For death from negligence, present and prospective loss allowable. *Houghkirk v. Delaware, etc., Can. Co.*, 92, 219; 44 Am. Rep. 370.

## 2. Conversion.

When pledgor may recover enhanced value of stock wrongfully sold. *Wilson v. Little*, 2, 443.

In trover for conversion by factor of goods shipped, damages is value of goods at time and place of conversion, with interest, less amount advanced for freight. *Covell v. Hill*, 6, 374.

In action by maker of a note for its wrongful conversion, he may recover the amount without proof of payment. *Decker v. Mathews*, 12, 313; *Potter v. Merchants' Bank*, 28, 641.

—cancellation in satisfaction. *Thayer v. Manley* 73, 305.

—evidence. *Booth v. Powers*, 56, 22.

In action for conversion of corporate stock, measure is highest price between conversion and end of trial. *Romaine v. Van Allen*, 26, 309.

In action by mortgagee against receivers in supplementary proceedings for converting mortgaged chattels. *Manning v. Monaghan*, 28, 585.

Measure, in action by principal against factor for conversion. *Scott v. Rogers*, 31, 676.

Measure, for conversion of goods, is the highest market price at place of taking between taking and trial. *Burt v. Dutcher*, 34, 493.

Measure in action for conversion of stocks is highest market price between conversion and trial. *Markham v. Jaudon*, 41, 235.

When highest price not measure of, in conversion. *Matthews v. Coe*, 49, 57.

Measure, in action against stock broker for conversion. *Taussig v. Hart*, 49, 301.

For conversion of carpets—includes value of labor in cutting, making and laying. *Starkey v. Kelly*, 50, 676.

In action to recover personal property, value of use during detention is proper item. *Allen v. Fox*, 51, 562; 10 Am. Rep. 641.

Measure in action for conversion of grain, where trial was had in justice's court and new trial in County Court, is highest price up to last trial. *Lobdell v. Stowell*, 51, 70.

Measure in action for conversion of stock is advance in market price from sale up to reasonable time to replace stock. *Baker v. Drake*, 53, 211; 13 Am. Rep. 507.

Measure for unauthorized sale of stocks. *White v. Smith*, 54, 522.

—difference between price realized and market price after reasonable notice of sale. *Gruman v. Smith*, 81, 25.

In action for conversion of bonds the difference in value between gold and currency may be taken in account, where the bonds were uniformly paid in gold. *Simpkins v. Low*, 54, 179.

For conversion of stock—cost of replacing within reasonable time after sale, deducting defendant's debt. *Baker v. Drake*, 66, 518; 23 Am. Rep. 80.

Measure in action to recover personal property, when return cannot be made, is value at time of trial, adding amount of impairment during detention. *New York Guaranty and Indemnity Co. v. Flynn*, 55, 653.

When goods of retail dealer are wrongfully taken, he may recover fair retail value. *Wehle v. Butler*, 61, 245.

Measure in conversion, without malice, is market value at time of taking, with interest — market value is not retail price. *Wehle v. Haviland*, 69, 448.

Measure in conversion is value at time of, with interest. *Prince v. Conner*, 69, 608.

In action for conversion — land conveyed in compromise — counsel fees. *Hynes v. Patterson*, 95, 1.

### 3. Exemplary damages.

Proper in seduction. *Life v. Eisenlord*, 32, 229.

Allowed for gross negligence — corporations liable to. *Caldwell v. New Jersey Steamboat Co.*, 47, 282.

When not proper. *Hamilton v. Third Ave. R. Co.*, 53, 25.

When master liable in, for negligence of servant. *Cleghorn v. New York Cent., etc., R. Co.*, 56, 44; 15 Am. Rep. 375.

When master not liable in, for unlawful act of servant. *Townsend v. New York Cent., etc., R. Co.*, 56, 295; 15 Am. Rep. 419.

Not proper for assault on trespasser. *Kiff v. Youmans*, 86, 324; 40 Am. Rep. 543.

Special and exemplary damages in action for libel. *Bergmann v. Jones*, 94, 51.

Exemplary proper for malicious slander. *Brooks v. Harrison*, 91, 83.

### 4. Fraud.

Measure in action for fraudulent representation as to territorial extent of right granted or leased. *Whitney v. Allaire*, 1, 305.

### 5. Trespass.

In action by remainderman for injury to inheritance. *VanDeusen v. Young*, 29, 9.

In trespass in cutting and removing timber — measure is difference between

value of farm before and after cut — when special need not be alleged. *Argotsinger v. Vines*, 82, 308.

Measure for tearing down party-wall. *Schiele v. Brokhahus*, 80, 614.

### 6. Actions against sheriff.

In action for false return of execution the measure is amount directed to be collected, where there was sufficient property. *Bacon v. Cropsey*, 7, 195.

In action against sheriff for neglect to return execution, measure, prima facie, is amount of execution. *Ledyard v. Jones*, 7, 550.

Sheriff may show that there was no property, but not that the judgment is still collectible. *Id.*

In action against sheriff for failure to return execution — limited to actual injury — pre-existing attachment lien. *Wehle v. Connor*, 69, 546.

On recovery in replevin against sheriff, measure is value of property. *Buck v. Remsen*, 34, 383.

## VII. Practice.

### 1. What court to fix.

General Term may not fix amount of damages. *Andrews v. Tyng*, 94, 16.

### 2. Waiver of right of action for.

When right of action for injury by explosion of boiler not waived by acceptance of repairs. *Cassidy v. LeFevre*, 45, 562.

Permitting completion after time does not bar damages for delay — measure of, in case of building, is value of use during delay. *Ruff v. Rinaldo*, 55, 664.

### 3. Competent proof of.

What competent evidence in an action for overflowing plaintiff's land. Value of growing crop — evidence of experts. *Phillips v. Terry*, 3 Abb. 607.

In action to recover personal property by one having special interest he cannot

recover more than his interest. *Townsend v. Bargo*, 57, 665.

In action for sinking of vessel—proof that she could not be raised—comparison in value of other vessels. *Blanchard v. New Jersey Steamboat Co.*, 59, 292.

When proof of market price at place other than contract place of delivery, and cost of transportation is competent. *Rice v. Manley*, 66, 82; 23 Am. Rep. 30.

### Death.

See EVIDENCE; NEGLIGENCE.

## DEBTOR AND CREDITOR.

Creditor having double security—compelling resort to one only. *Ingalls v. Morgan*, 10, 178.

Creditor of corporation organized to defraud creditors of its president has no priority over such latter creditors. *Booth v. Bunce*, 24, 592.

What is authority to draw draft. *Barney v. Worthington*, 37, 112.

Where creditor releases debtor from demand which he has transferred, the debtor may recover the amount from him after having been compelled to pay it. *Harloe v. Foster*, 53, 385.

Taking continuing mortgage for amount less than debt—when subsequent advances on faith of it. *Fassett v. Smith*, 23, 252.

Collaterals—presumption as to payment—creditor's rights and liabilities. *Youngs v. Stahelin*, 34, 258.

Debtor bound by agent's representations in, effecting release—compromise of doubtful claim as consideration. *Crane v. Hunter*, 28, 389.

Creditor not entitled to subrogation in respect to securities taken by surety. *Seward v. Huntington*, 94, 104.

See COMPROMISE; CREDITOR'S ACTION.

### Deceit.

See FRAUD; CRIMINAL LAW—*Falsæ Pretenses*.

## DEDICATION.

How established. *Cady v. Conger*, 19, 256; *Cook v. Harris*, 61, 448; *Strong v. City of Brooklyn*, 68, 1.

When grantor presumed to have dedicated street to grantee. *Bissell v. New York Cent. R. Co.*, 23, 62.

Of street or highway must be accepted by public, formally or by use, to render effectual. *Fonda v. Borst*, 2 Keyes, 48; *Holdane v. Trustees of Village of Cold Spring*, 21, 474; *Lee v. Village of Sandy Hill*, 40, 442; *Wohler v. Buffalo & State Line R. Co.*, 46, 686; *Niagara, etc., Bridge Co. v. Bachman*, 66, 261; *Cook v. Harris*, 61, 448.

Bounding on lands of railroad company does not affect owner's title thereto on abandonment of railroad. *Heard v. City of Brooklyn*, 60, 242.

How evidenced—revocation—evidence of declarations. *Niagara Falls Susp. Bridge Co. v. Bachman*, 66, 261.

Need not be in writing—irrevocable. *Cook v. Harris*, 61, 448.

See DEED; EASEMENT; HIGHWAY; WAY.

## DEED.

### I. Execution and validity.

1. General matters.
2. Validity.
3. Proof.
4. Delivery.
  - (a.) Absolute.
  - (b.) In escrow.
5. Covenant.

### II. Construction.

1. General matters.
2. Boundaries.
3. Description.
4. Recitals.
5. Covenants.
6. Restrictions.



7. *Reservations.*
8. *Appurtenances.*
9. *Easement.*
10. *As mortgage.*

### I. *Execution and validity.*

#### 1. *General matters.*

In performance of contract — when does not extinguish stipulation in contract. *Morris v. Whitchee*, 20, 41

In this State need not be stamped. *Moore v. Moore*, 47, 467; 7 Am. Rep. 466; *People v. Gates*, 43, 40.

Presumption as to non-payment of rent reserved. *Central Bank of Troy v. Heydorn*, 48, 260.

Voluntary and fair, from father to child — consideration of love and affection may be assumed. *Loeschigk v. Hatfield*, 51, 660.

To avoid, for champerty, actual adverse possession necessary. *Dawley v. Brown*, 79, 390.

Acknowledging payment of purchase-price prima facie evidence of grantee's good faith. *Lacustrine, etc., Co. v. Lake Guano, etc., Co.*, 82, 476.

#### 2. *Validity.*

To son-in-law in consideration of love and affection is invalid. *Corwin v. Corwin*, 6, 342.

Set aside for undue influence. *Voorhees v. Voorhees*, 39, 463.

Returned for mistake and destroyed, does not pass title. *Fonda v. Sage*, 48, 173.

Actual possession of part, under void, claiming whole, is constructive possession of residue — but residue must have necessary connection with or be subservient to part possessed. *Thompson v. Burhans*, 79, 93.

By executor of one residuary legatee to another conveys no title. *Prentice v. Janssen*, 79, 478.

Executed by husband and wife, vitiated by alteration by husband without wife's consent. *Stone v. Lord*, 80, 60.

By habitual drunkard — not necessarily void. *Van Wyck v. Brasher*, 81, 260.

In fictitious name, binds grantor and vests title. *David v. Williamsburgh City Fire Ins. Co.*, 83, 265; 38 Am. Rep. 418.

#### 3. *Proof.*

Although acknowledged, may be proved by proof of handwriting and death of subscribing witness. *Borst v. Empie*, 5, 33.

Acknowledgment may be taken by one so related to parties as to be disqualified as judge or juror. *Lynch v. Livingston*, 6, 422.

Clerk's certificate of commissioner's signature, etc., may be made by deputy. *Id.*

Unacknowledged and unattested is valid except as to subsequent purchasers and incumbrancers. *Wood v. Chapin*, 18, 509.

Bona fide purchaser from grantor with notice of prior deed is protected. *Id.*

Creditor purchasing land at judicial sale, to enforce his debt is purchaser for valuable consideration. *Id.*

Proof and acknowledgment. *Hunt v. Johnson*, 19, 279.

When defectively acknowledged — may still pass title — estoppel. *Fryer v. Rockefeller*, 63, 268.

Unwitnessed and unacknowledged, does not divest fee nor operate as estoppel. *Chamberlain v. Spargur*, 86, 603.

#### 4. *Delivery.*

##### (a.) *Absolute.*

Presumption of delivery at date, not affected by 1 R. S. 738, § 137.

Delivered to the grantee cannot be an escrow. *Braman v. Bingham*, 26, 483.

Conditional delivery to grantee — usury. *Brackett v. Barney*, 28, 333.

Inoperative without delivery. *Fisher v. Hall*, 41, 416.

Referee's, on foreclosure, vests title only on delivery, and owner of equity of redemption is entitled to possession and rents up to that time. *Mitchell v. Bartlett*, 51, 447.

Delivery obtained by fraud ineffectual—acknowledgment. *Ritter v. Worth*, 58, 627.

Delivery presumed from recording. *Fryer v. Rockefeller*, 63, 268.

Presumption of delivery from recording, how repelled—hostile title not available to one not connecting himself with it. *Knolls v. Barnhart*, 71, 474.

(b.) *In escrow.*

Can be made only to stranger. *Worrall v. Munn*, 5, 229.

Delivery to agent as such is delivery to party *Id.*

When escrow. *Hathaway v. Payne*, 34, 92.

When revocable. *Stanton v. Miller*, 58, 192.

Delivering to grantee's agent to be held while grantee considers whether he shall accept, not binding. *Ford v. James*, 2 Abb. 159; 4 Keyes, 800.

5. *Covenant.*

Covenant of seizin, if grantor has no title, is broken upon execution of deed. *Bingham v. Weidewax*, 1, 509; *Mott v. Palmer*, 1, 564.

Naked condition does not create agreement on part of grantee to perform it. *Palmer v. Fort Plain, etc., Plankroad Co.*, 11, 376.

Covenant against incumbrances—loan office mortgage without eviction, no breach. *York v. Allen*, 30, 104.

Tenant's unauthorized removal of fixtures not breach of covenant of seizin, etc. *Loughran v. Ross*, 45, 792; 6 Am. Rep. 173.

Subject to mortgage which the grantee assumes—mortgagee may sue on implied covenant without foreclosing. *Thorp v. Keokuk Coal Co.*, 48, 253.

Acceptance binds grantee to covenants—one seal may bind both, if the deeds recite sealing by both—action of covenant. *Atlantic Dock Co. v. Leavitt*, 54, 35; 18 Am. Rep. 556.

Assessment or levy of tax is not breach of covenant against incumbrances made

between assessment and levy. *Barlow v. St. Nicholas' Nat. Bk.*, 63, 399; 20 Am. Rep. 547.

Where grantee is prevented from getting possession by paramount title, this is breach of covenant of quiet enjoyment. *Shattuck v. Lamb*, 65, 499; 22 Am. Rep. 656.

Grantee's name in blank with authority to fill—grantee accepting bound by covenant to assume mortgagee. *Campbell v. Smith*, 71, 26; 27 Am. Rep. 5.

Grantee assumes payment of liens—when grantor principal debtor—lienor may proceed against grantee when debt becomes his. *Pardee v. Treat*, 82, 385.

Subject to a mortgage but without stipulating that grantees shall pay it, leaves the grantor primarily liable for deficiency. *Binsee v. Paige*, 1 Abb. 138.

Grantee has no remedy for eviction from part of house projecting on adjoining lot not conveyed. *Burke v. Nichols*, 2 Keyes, 670.

II. *Construction.*

1. *General matters.*

Construction of attorney-general's, on sale under mortgage to State. *Cox v. Clift*, 2, 118.

Words "remise, release and quit-claim" effectual as bargain and sale. *Lynch v. Livingston*, 6, 422.

To uses—where part of use fails on account of the uncertainty of the cestui que use, the consideration paid is equivalent for whole use, and the part failing does not result but vests in grantee. *Van der Volgen v. Yates*, 9, 219.

Sheriff's—when void for uncertainty. *Peck v. Mallams*, 10, 509.

Conditional limitation—dedication—assignment or delegation of power. *Mayor, etc., v. Stuyvesant*, 17, 34.

Construction as to grant of "additional land" to railroad company. *Long Island R. Co. v. Conklin*, 29, 572.

Of life estate with remainder to heirs and assigns gives vested interest to remainderman. *Moore v. Littel*, 41, 66.

What words constitute grant. *Hunt v. Johnson*, 44, 27; 4 Am. Rep. 631.

When in fee, notwithstanding lack of words of inheritance in habendum. *Saunders v. Hanes*, 44, 353.

Construction of, between tenants in common — repugnancy — in trust. *Mott v. Richtmyer*, 57, 49.

Consideration clause not conclusive. *Bingham v. Weiderwax*, 1, 509; *Hebbard v. Haughian*, 70, 54.

Of water lots to adjoining owners, with condition for re-entry in case of failure of grantees' title to uplands — adverse possession. *Towle v. Remsen*, 70, 303.

Vested future estate in remainder. *Sheridan v. House*, 4 Abb. 218.

To one for life and after his death to his heirs forever vests an immediate estate in the children. *Sheridan v. House*, 4 Keyes, 569.

## 2. Boundaries.

Described monuments conclusive. *Clark v. Baird*, 9, 183.

Occupation, by consent of grantor, of land pointed out as within boundaries, but really outside the described boundaries, will not ripen into title within the statutory period. *Id.*

Bounding on and excluding an alley, carries easement in the alley, on partition between owners. *Huttemeier v. Albro*, 18, 48.

Parol evidence inadmissible to fix division line when it is ascertainable from the deed or the language is unambiguous. *Waugh v. Waugh*, 28, 94.

Where town lots are sold by numbers on recorded map, and bounded by a "park," the only means of access, they go to the center. *Perrin v. New York Cent. R. Co.*, 36, 120.

Bed of road belonging to State does not pass by deed bounded thereon. *Dunham v. Williams*, 37, 251.

Bounding on alley laid down on map give right of way in alley. *Cox v. James*, 45, 557.

Bounded on bank of creek — courses and distances yield. *Yates v. Van DeBogert*, 56, 526.

Monument will be disregarded in favor of courses and distances if the intention is clear. *Buffalo, etc., R. Co. v. Stigeler*, 61, 348.

On street along river — when fee of street not conveyed. *People v. Colgate*, 67, 512.

"Side of lane" — "right, title and interest" being sold, question of validity of title immaterial. *Mott v. Mott*, 68, 246.

"At" a tree — evidence competent to show whether boundary was at center or one side — practical location. *Stewart v. Patrick*, 68, 450.

Monuments prevail over courses and distances — parol evidence competent to locate destroyed monuments. *Robinson v. Kine*, 70, 147.

When courses and distances prevail over monuments. *Higinbotham v. Stoddard*, 72, 94.

Course and distance do not control where land may be plotted from deed. *Ratchliffe v. Cary*, 4 Abb. 4.

"Side of road" does not carry to center. *Kings Co. F. Ins. Co. v. Stevens*, 87, 287; 41 Am. Rep. 361.

"The said stream" in a deed means to the bank of the stream and not to its center. *Babcock v. Utter*, 1 Abb. 27.

Question of boundary — when for jury — evidence. *Ratchliffe v. Cary*, 4 Abb. 4.

Practical location of uncertain boundaries — question of fact — evidence. *Ratchliffe v. Gray*, 3 Keyes, 510.

See BOUNDARY.

## 3. Description.

Defective, when operative. *Laub v. Buckmiller*, 17, 620.

Uncertain, may be aided by parol. *Pettit v. Shepard*, 32, 97.

When evidence to vary incompetent. *Drew v. Swift*, 46, 204.

Map may control — practical location of boundary and acquiescence in wrong line for less than twenty years not conclusive where land was wild. *Townsend v. Hayt*, 51, 656.

On sale of estimated quantity of land, "more or less," by the acre, recovery may

be had for excess of payment. *Murdock v. Gilchrist*, 52, 242.

Mistake in one part may be corrected by reference to another. *Donahue v. Case*, 61, 631.

General words will not control particular description—construction of particular grant—adverse claim—practical location. *Jones v. Smith*, 73, 205.

When last clause of description controls prior clauses. *Ousby v. Jones*, 73, 621.

Construction of—description cannot be changed by admissions in pleadings or declarations of grantor. *Armstrong v. Du Bois*, 90, 95.

Construction of description that will correct mistake will be adopted. *Brookman v. Kurzman*, 94, 272.

#### 4. Recitals.

Effect of. *Reed v. McCourt*, 41, 435.

Effect of, as constructive notice. *Acer v. Westcott*, 46, 384; 7 Am. Rep. 655.

#### 5. Covenants.

Covenant of warranty in deed of several lots mortgaged separately for purchase-money is distributed. *Johnson v. Blydenburgh*, 31, 427.

Covenant cannot be implied. *Sandford v. Travers*, 40, 140.

With covenant of warranty or quiet enjoyment is operative as an estoppel although entire title is subsequently acquired. *House v. McCormick*, 57, 310.

Covenant against incumbrances—when construed not to include mortgage executed to grantor as security—estoppel. *Judd v. Seekins*, 62, 266.

Covenant against charges and assessments—when includes assessments not entered in title book in New York city. *DePeyster v. Murphy*, 66, 622.

Reciting that it was made in insolvency proceedings gives prima facie title. *Rockwell v. Brown*, 54, 210.

Distinction between easement and right to profit a prendre—right to mow on right of way. *Pierce v. Keator*, 70, 419; 26 Am. Rep. 612.

#### 6. Restrictions.

To railroad company on condition that road shall be constructed within certain time, condition subsequent, and vests title. Re-entry necessary to divest, and right does not pass by conveyance. *Nicoll v. New York & Erie R. Co.*, 12, 121.

Condition against manufacture or sale of intoxicating liquors—when not repugnant to grant—what is not forfeiture. *Plumb v. Tubbs*, 41, 442.

Restrictive covenants strictly construed. *Duryea v. Mayor*, 62, 592.

Restrictive covenant for benefit of other grantees—injunction—violation by others—extinguishment of easement. *Lattimer v. Livermore*, 72, 174.

For “church purposes” and to revert if pews should be “rented or sold,” not forfeited by sale of church for debts. *Woodworth v. Payne*, 74, 196; 30 Am. Rep. 298.

Restricting character of buildings on lands conveyed—validity—when released by change in character of general occupation of neighborhood. *Trustees of Columbia College v. Thacher*, 87, 311; 41 Am. Rep. 365.

#### 7. Reservations.

Construction. *French v. Carhart*, 1, 96.

Deed subject to reservation in another, construed with reference to that. *Id.*

Of sufficient water to propel specified machinery authorizes use of the same quantity for any other purpose. *Cromwell v. Selden*, 3, 253.

Deed “to their use” of well and water-works “for the purpose of supplying the tannery aforesaid with water” does not restrict the use of the water to that specific purpose. *Borst v. Empie*, 5, 33.

Deed of water privilege—construction. *Olmsted v. Loomis*, 9, 423.

Distinction between reservation and exception—prohibitory condition void—when papers to be construed together. *Craig v. Wells*, 11, 315.

Exception of land “conveyed by A. B.” construed to embrace mesne conveyances

by his grantees. *Bartlett v. Judd*, 21, 200.

Exception of grass, herbage feeding and pasturage—effect of. When duty of fencing is on grantee. *Rose v. Bunn*, 21, 275.

Of rent on fee valid before 1846. *Van Rensselaer v. Dennison*, 35, 393.

When not exception of dower interest. *Clark v. Cottrel*, 42, 527.

When so-called reservation will be construed an exception—parol evidence to construe. *Bridger v. Pierson*, 45, 601.

When operates as exception—acknowledgment in 1828. *West Point Iron Co. v. Reymert*, 45, 703.

Exception of public road covers fee. *Munn v. Worrall*, 53, 44; 13 Am. Rep. 470.

Reservation—lateral support. *Ryckman v. Gillis*, 57, 68; 15 Am. Rep. 464.

What is not reservation of private way. *Wheeler v. Clark*, 58, 267.

Construction of reservation of water-power in. *Groat v. Moak*, 94, 115.

### 8. Appurtenances.

When easement in way and yard passes on grant of mill as appurtenant—estoppel. *Voorhees v. Burchard*, 55, 98.

“Appurtenances” does not carry other land. *Woodhull v. Rosenthal*, 61, 382; *Ogden v. Jennings*, 62, 526; *Armstrong v. DuBois*, 90, 95.

When right of way does not pass as appurtenance. *Parsons v. Johnson*, 68, 62; 23 Am. Rep. 149.

When water-power passes as appurtenant to deed. *Simmons v. Cloonan*, 81, 557.

When right to maintain dam and flow land passes as appurtenant. *Adams v. Conover*, 87, 422; 41 Am. Rep. 381.

When right to use sewer on adjoining lands of another is not appurtenance. *Green v. Collins*, 86, 246; 40 Am. Rep. 531, note.

Whole title passes without use of “appurtenances”—boundary—bank of river. *Babcock v. Utter*, 1 Keyes, 397.

### 9. Easement.

See EASEMENT.

Construction of water privilege. *Torrence v. Conger*, 46, 340.

Of use of water for carding mills does not authorize a buzz saw on land in front of the mills—forfeiture. *Comstock v. Johnson*, 46, 615.

Where easement in reservoir and flume does not pass. *Simmons v. Cloonan*, 47, 3.

Right to draw water from pond for “carrying away the spent bark” does not justify discharging the bark into the stream so as to obstruct the grantor’s water power. *Winchester v. Osborne*, 61, 555.

When deed not construed to convey exclusive right to stream—evidence—improvements—compensation for taking for highway. *Partridge v. Eaton*, 63, 482.

When soil of street not included—easement—change in street lines. *White’s Bank of Buffalo v. Nichols*, 64, 65.

Grant of use of spring water—grantor’s injury to, by percolation. *Johnstown Cheese Manuf. Co. v. Veghte*, 69, 16; 25 Am. Rep. 125.

“Privilege of raising water at the spring” does not warrant erection of a dam twenty-five feet below and flooding land. *Merrill v. Calkins*, 74, 1.

### 10. As mortgage.

See MORTGAGE.

When deed simply given as security construed a mortgage. *Odell v. Montross*, 68, 499.

When not intended as mortgage. *Randall v. Sanders*, 87, 578.

May be shown by parol to be intended as a mortgage. *Van Dusen v. Worrell*, 3 Keyes, 311.

See COMPTROLLER; COVENANT; EXECUTOR AND ADMINISTRATOR; MORTGAGE—Foreclosure; RECORDING ACT; SHERIFF.

**DEFAULT.**

Defendant by not answering admits only such relief as the facts properly alleged authorize. *Argall v. Pitts*, 78, 239.

See APPEAL ; JUDGMENT ; TRIAL.

**Defendant.**

See PARTIES.

**DEFINITIONS.**

Accidentally begun. 49, 373.  
 Act in official capacity. 43, 514.  
 Act of God. 29, 115 ; 30, 571.  
 Actual occupancy. 4, 577.  
 Actual possession. 59, 134.  
 Actual total loss. 78, 400.  
 Adjoining. 31, 289 ; 52, 395.  
 Adjournment. 5, 22.  
 Alien. 3 Abb. 92.  
 Alienation, 1, 290.  
 All liability. 18, 502.  
 All rail. 45, 514.  
 Ancestor. 5, 263 ; 52, 67.  
 And, and or. 24, 463.  
 Apply. 2, 297.  
 Appointment. 3, 119.  
 Article forwarded. 54, 496.  
 Assignee. 90, 238.  
 Assignment. 34, 447 ; 79, 230.  
 At anchor. 90, 382.  
 Attending physician. 37, 580.  
 Audit. 82, 80.  
 Available means. 13, 215.  
 Banker. 15, 167.  
 Beach. 68, 459.  
 Bet. 81, 532.  
 Blood. 14, 235.  
 Body. 22, 147.  
 Bonds. 24, 114.  
 Book-keeper. 88, 334.  
 Borrower. 1, 274 ; 2, 131 ; 14, 93 ; 49, 373 ; 65, 432.  
 Brother or sister. 52, 67.  
 Building, fixture or erection. 24, 559.  
 Business of a court. 37, 155.  
 Carriage. 47, 122.  
 Cash. 27, 378.

Cause. 72, 445.  
 Change in the risk. 59, 1.  
 Children. 37, 42 ; 72, 408 ; 78, 275 ; 79, 246 ; 84, 516.  
 Citizen. 79, 454.  
 City purposes. 76, 475.  
 Claim. 43, 413.  
 Clerk. 88, 334.  
 Common schools. 33, 333.  
 Completed. 68, 321.  
 Conduct unbecoming an officer. 72, 415.  
 Constructive possession. 79, 99.  
 Contemplation of insolvency. 21, 406.  
 Contiguous. 69, 191.  
 Contract or obligation. 95, 728.  
 Contract, obligation or liability, express or implied. 74, 387.  
 Conveyance. 79, 23 ; 87, 446.  
 Creditor. 77, 628 ; 6, 567.  
 Cruel and inhuman treatment. 73, 369.  
 Cut off. 9, 575.  
 Deed. 73, 452.  
 Defendants severally liable. 21, 300.  
 Demand or claim. 15, 512.  
 Depot. 45, 514.  
 Descendant. 30, 393.  
 Destroy. 67, 15.  
 Disable. 67, 15.  
 Disease. 63, 404 ; 70, 72.  
 Disposal of property. 42, 79.  
 Distillery. 45, 499.  
 Due. 7, 476 ; 24, 283.  
 Due process of law. 74, 183.  
 Dwelling-house. 20, 52 ; 71, 508 ; 80, 327 ; 83, 133.  
 Earth. 75, 65.  
 Employee. 58, 358.  
 Encumbrance. 45, 379.  
 Equity case. 4, 600.  
 Erected. 45, 153.  
 Erection, construction or finishing. 8, 388.  
 Fall supply. 69, 45.  
 False. 61, 571.  
 False swearing. 67, 283.  
 Family. 6, 597.  
 Fast estate. 9, 502.  
 Fine day. 52, 40.  
 Flow. 19, 523.  
 For. 31, 103.  
 For the bursting. 31, 103.  
 Forthwith. 67, 274 ; 76, 459.

- Future editions. 6, 390.  
 Good and sufficient deed. 36, 673.  
 Good health, 20, 293.  
 Head of bureau. 86, 149.  
 Heirs. 95, 17.  
 Held by contract. 58, 562.  
 Improvidence. 6, 433; 14, 449.  
 Incidental repairs. 59, 387.  
 Incompetency. 78, 248.  
 Incumbrance. 80, 21.  
 Indebtedness. 73, 480.  
 Individual banker. 80, 225.  
 Inferior. 1, 505.  
 In office. 83, 372.  
 In session. 50, 288.  
 Insolvency. 43, 68.  
 Jewel or ornament. 43, 539.  
 Labor. 76, 50.  
 Laborer. 12, 628; 24, 482; 46, 521; 58, 358.  
 Laborer or servant. 37, 640; 90, 213.  
 Laid up. 69, 45.  
 Lands and real estate. 39, 81; 46, 46; 68, 552; 74, 365; 82, 459.  
 Legacy. 3 Keyes, 486; 3 Abb. 411.  
 Living person. 22, 352.  
 Loan. 45, 655.  
 Loss. 17, 486.  
 Loss by explosion. 11, 516.  
 Lottery. 7, 228.  
 Lying at anchor. 77, 448; 90, 382.  
 Machinery. 61, 26.  
 Main sea. 73, 393.  
 Managers; trustees. 10, 84.  
 Mandate. 83, 174.  
 Manufacturing corporation. 92, 87.  
 Mariners. 80, 71.  
 Means of support. 74, 526.  
 Merchantable order. 3 Keyes, 45.  
 Misconduct. 78, 248.  
 Money. 92, 228.  
 Mortgagee in good faith. 77, 628.  
 Mutual accounts. 79, 1.  
 Necessary repairs. 38, 80.  
 Next of kin. 52, 389; 67, 387; 69, 36; 72, 312; 88, 487; 95, 17.  
 Occupied as dwelling. 66, 464.  
 Occupying. 18, 168.  
 Opened and worked. 70, 430.  
 Or order or bearer. 3 Abb. 269.  
 Out west. 30, 309.  
 Owner. 20, 181; 47, 157.  
 Owner of the building. 9, 435.  
 Party aggrieved. 60, 16; 62, 224; 75, 354; 85, 536.  
 Party to action. 78, 220.  
 Pending. 41, 159.  
 Person. 22, 44; 1 Abb. 199.  
 Personal property. 86, 365.  
 Personal transaction. 81, 625; 85, 639.  
 Place. 69, 396.  
 Place of business. 69, 396.  
 Poor person. 88, 513.  
 Port risk. 71, 453.  
 Pregnant woman. 83, 462.  
 Prevented or detained by ice. 61, 332.  
 Prior paving. 85, 268.  
 Proceeding for recovery of dower. 43 424.  
 Progress. 83, 543.  
 Proof by affidavit. 75, 179.  
 Property. 47, 368.  
 Public office. 77, 503.  
 Public stages. 51, 295.  
 Public use. 9, 100.  
 Purchaser. 66, 77.  
 Quick child. 49, 86.  
 Receipt. 56, 544.  
 Reciprocal demands. 79, 1.  
 Refined coal or earth oil. 81, 273.  
 Regular clerk. 73, 437; 86, 149.  
 Repaving street. 76, 174; 81, 139.  
 Repavement. 81, 139.  
 Risk of master and owners. 8, 375.  
 Risk of navigation. 48, 415.  
 Rock and earth oil. 61, 26.  
 School-house. 13, 220.  
 Sea. 7, 555.  
 Securely sealed. 79, 279.  
 Seizure. 83, 174.  
 Servant. 24, 483; 61, 274.  
 Settled limits of the United States. 22, 427.  
 Sharp, dangerous weapon. 69, 101.  
 Ship on stocks. 11, 532.  
 Standing or riding on platform. 31, 314.  
 Stone dwelling-house. 20, 52.  
 Storing or keeping. 54, 569.  
 Stranding. 31, 106.  
 Street. 76, 174.  
 Strong and spirituous liquors. 21, 173.  
 Structures connected therewith. 67, 149.  
 Subscribed. 6, 9.

Subsequent purchaser. 1 Abb. 295.  
 Successor in office. 70, 5.  
 Taxation. 84, 108.  
 Term of insurance. 21, 136.  
 Theft. 80, 71.  
 Tolls. 1 Keyes, 72.  
 Track. 52, 510.  
 Traveled public street or road. 64, 535.  
 Traveling by public or private conveyance. 43, 516.  
 Unsold commentaries. 6, 390.  
 Until. 17, 502.  
 Usual medical attendant. 70, 72.  
 Vacant and unoccupied. 72, 117; 85, 162; 90, 382.  
 Vessel. 7, 508.  
 Voluntary. 15, 384.  
 Warrant. 71, 371.  
 Work or supplies. 83, 207.  
 Wrecks. 7, 555.

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### DELIVERY.

Effect of conditional delivery of instrument. *Whitford v. Laidler*, 94, 145.

See CARRIER; CONTRACT; DEED; NEGOTIABLE INSTRUMENT; SALE; TENDER.

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### DEMAND.

Of payment on contract need not be made at specified time and place as against original debtor. *Locklin v. Moore*, 57, 360.

Not necessary to maintain action for money had and received for remittance. *Stacy v. Graham*, 14, 492.

See CLAIM AND DELIVERY; CONTRACT; CONVERSION; LANDLORD AND TENANT; SHIP AND SHIPPING; VENDOR AND PURCHASER.

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### Demurrage.

See SHIP AND SHIPPING.

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### Demurrer.

See PLEADING.

### Deposit.

See BANK; PLEDGE.

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### Deposition.

See EVIDENCE; TRIAL.

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### DESCENT.

"The blood" of the ancestor (1 R. S. 753) includes his relations of the half blood. *Beebe v. Griffing*, 14, 235.

"Ancestor"—"brother or sister"—half blood. *Wheeler v. Clutterbuck*, 52, 67.

When estate deemed to come on part of mother. *Morris v. Ward*, 36, 587.

See WILL.

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### Determination of Claims to Real Property.

See PROPERTY.

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### Deviation.

See INSURANCE; SHIP AND SHIPPING; WAY.

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### Devise.

See WILL.

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### DISCONTINUANCE.

Action cannot be discontinued by mere notice. *Averill v. Patterson*, 10, 500.

In justice's court—jurisdiction—estoppel—docket. *Bradner v. Howard*, 75, 417.

Of special proceeding—court may impose payment of sum beyond costs as condition. *Matter of Waverly Water-Works Co.*, 85, 478.

Attorney-general may waive appeal and discontinue action to annul contract for



canal repairs — when oral agreement binding. *People v. Stephens*, 52, 306.

Submission of cause of action to arbitration works discontinuance of action thereon. *McNulty v. Solley*, 95, 242.

See ATTORNEY AND CLIENT.

## DISCOVERY.

Provisions to compel. *Gould v. McCarthy*, 11, 575.

When proper to enable plaintiff to draw complaint. *Stihwell v. Priest*, 85, 649.

See CREDITOR'S ACTION; PLEADING.

## DISSEIZIN.

What sufficient to support a fine. *McGregor v. Comstock*, 17, 162.

## DISTRIBUTION.

Representation among collaterals — when next of kin take whole. *Adee v. Campbell*, 79, 52.

When statutes in regard to advancements and distribution are to be construed together. *Beebe v. Estabrook*, 79, 246.

See EXECUTOR AND ADMINISTRATOR; SURROGATE.

## Divorce.

See MARRIAGE.

## DOMICILE.

Change of — when not shown by evidence. *Dupuy v. Wurtz*, 53, 556.

See ALIENAGE; MARRIAGE; PARENT AND CHILD.

## Dower

See DEED; MARRIAGE; MORTGAGE; WILL.

## DRAINAGE.

Construction of act of 1826, chapter 216, as to Orange county. *Houston v. Wheeler*, 52, 641.

Acts of 1869 and 1871 constitutional — appointment of commissioners by interested judge. *Matter of Application of Ryers*, 72, 1; 28 Am. Rep. 88.

Compensation must be made for lands appropriated. *Matter of Petition of Cheesebrough*, 78, 232.

Petition to acquire easement must state reason why commissioners cannot agree with owner — act of 1869, chapter 888. *Matter of Application of Marsh*, 71, 315.

License — can be granted only by deed — when revocable. *Wiseman v. Luck-singer*, 84, 31; 38 Am. Rep. 479.

Easement of underground drainage, not created by sale of one tenement as against another of same owner. *Butterworth v. Crawford*, 46, 349; 7 Am. Rep. 352.

County Court may set aside assessment by commissioners based on acreage rather than on benefit. *People v. County Court of Jefferson Co.*, 55, 604.

Resignation of commissioner — assessment — license from owners — statement of expense. *Olmsted v. Dennis*, 77, 378.

See CONSTITUTIONAL LAW; DEED; EASEMENT.

## DRUGGIST.

Who warns purchaser of nature of drug, not liable for injury from overdose because omitting to label. *Wohlfahrt v. Beckert*, 92, 490; 44 Am. Rep. 406.

See NEGLIGENCE.

## DRUNKARD.

Habitual, not necessarily incompetent to execute deed. *Van Wyck v. Brasher*, 81, 260.

One under commission as an habitual drunkard cannot waive protest. *Wadsworth v. Sharpsteen*, 8, 388.

**DURESS.**

Note obtained by, void. *Osborn v. Robins*, 36, 365.

Money illegally exacted as a condition of delivering property to the owner may be recovered — what is involuntary payment. *Scholey v. Mumford*, 60, 498.

Threats of imprisonment or suicide of son, not duress of mother. *Metropolitan Life Ins. Co. v. Meeker*, 85, 614.

Threatening a woman to prosecute her husband for embezzlement may be. *Eadie v. Slimmon*, 26, 9.

Note of married woman obtained by, of husband, void in hands of innocent holder. *Loomis v. Ruck*, 56, 462.

Release obtained by threat to continue imprisonment of one unlawfully arrested void. *Guillaume v. Rowe*, 94, 268.

Surrender of insurance policy — where not procured by coercion — evidence of declaration. *Stillwell v. Mutual Life Ins. Co.*, 72, 385.

Creditor exacting money as condition to signing composition — relation by marriage paying under duress — cannot recover back — only debtor or blood relation. *Solinger v. Earls*, 82, 393.

When action lies against carrier for exaction of illegal compensation. *Baldwin v. Liverpool, etc., Steamship Co.*, 74, 125; 30 Am. Rep. 277.

Of goods — what constitutes. *Briggs v. Boyd*, 56, 279.

By stockbroker, of customer. *White v. Baxter*, 71, 254.

See CONTRACT; CRIMINAL LAW; NEGOTIABLE INSTRUMENT; PAYMENT; SHIP AND SHIPPING; TAXATION.

**DUTIES.**

Consignee not accepting the goods, not liable for the duties. *DuBeirat v. Wolfe*, 29, 436.

U. S. statute as to adding, on contracts of sale or manufacture. *Babbett v. Young*, 51, 238.

Adding to price. *Hudson Iron Co. v. Alger*, 54, 173.

See CONTRACT.

**DYING DECLARATIONS.**

See CRIMINAL LAW; EVIDENCE.

**E.****EASEMENT.**

Actual knowledge of servient easement not necessary to constitute, by prescription — where user open, notice and acquiescence implied — knowledge of agent attributed to principal. *Ward v. Warren*, 82, 265.

Restrictive covenant for benefit of other grantees — injunction — violation by other grantees — extinguishment. *Lattimer v. Livermore*, 72, 174.

Effect of severance of ownership upon easement charged by common owner on one portion of his land for benefit of another. *Lampman v. Milks*, 21, 505.

Of light, cut off by foreclosure sale under mortgage prior to grant of easement. *Rector of Christ Church v. Mack*, 93, 488; 45 Am. Rep. 260.

Right to maintain railroad embankment — release of liability for injury. *Van Rensselaer v. Albany & West Stockbridge R. Co.*, 62, 65.

Mere convenience not sufficient to create. *Ogden v. Jennings*, 62, 526.

In street not effectually dedicated — award to owners of adjacent lots on opening street. *Matter of Eleventh Avenue*, 81, 436.

In soil of street — change of street lines. *White's Bank of Buffalo v. Nichols*, 64, 65.

Acquired by grantee in alley laid out by grantor and referred to as boundary. *Wiggins v. McCleary*, 49, 346.

Servitude may be imposed by parol by common owner of land on both sides of city street in respect to manner of occupation. *Talmadge v. East River Bank*, 26, 105.

Where adjacent owner does not own fee of street he has no remedy for inconvenience of access caused by a railway in the street. *Kellinger v. Forty-second Street, etc., R. Co.*, 50, 206.

Owner may subject land to servitude of a ditch, with right to enter and repair, on severance of title. *Roberts v. Roberts*, 55, 275.

Grant of right to construct dam and take necessary lands—specific description not necessary—location of dam cannot be changed. *Evangelical Lutheran St. John's Orphan Home v. Buffalo Hydraulic Association*, 64, 561.

Right to flow presumed from twenty years' continuous injurious use. *Hammon v. Zehner*, 21, 118.

Of drainage can be granted only by deed—license, when revocable—adverse possession. *Wiseman v. Lucksinger*, 84, 31; 38 Am. Rep. 479.

Of underground drainage, not created by sale of one tenement as against another of same owner. *Butterworth v. Crawford*, 46, 349; 7 Am. Rep. 352.

To enter on lands and lay water pipe, once exercised, fixes the size of the pipe so that it cannot be increased. *Outhank v. Lake Shore, etc., R. Co.*, 71, 194; 27 Am. Rep. 35.

To draw water through pipe of specified size—pipe must be of uniform size throughout. *Markham v. Stowe*, 66, 574.

In reservoir and flume—when does not pass as appurtenant to deed. *Simmons v. Cloonan*, 47, 3.

To dig specified spring—does not prevent grantor from digging another although it renders former useless. *Bliss v. Greeley*, 45, 671; 6 Am. Rep. 157.

Agreement for consideration to furnish surplus water from spring through pipes to another, held only license and revocable. *Cronkhite v. Cronkhite*, 94, 323.

When right of way does not pass as appurtenance. *Parsons v. Johnson*, 68, 62; 23 Am. Rep. 149.

No extinguishment by mere non-user. *Wiggins v. McCleary*, 49, 346; *White's Bank of Buffalo v. Nichols*, 64, 65.

Permission to build structures on land inconsistent with easement works extinguishment. *Cartwright v. Maplesden*, 53, 622.

On lease, in yard, of light and air—when not waived by closing of access. *Doyle v. Lord*, 64, 432; 21 Am. Rep. 629.

See COVENANT; DEDICATION; DEED; DRAINAGE; HIGHWAY; LICENSE; WATER AND WATER-COURSE; WAY, and other specific titles.

## EJECTMENT.

Mere probability not enough to support claim against one having deed from same grantor. *Curtis v. Butts*, 3 Keyes, 626; 4 Trans. App. 404.

Defendant may show equitable title. *Crary v. Goodman*, 12, 266.

Deed in fact mortgage—grantee cannot maintain. *Carr v. Carr*, 52, 251.

Plaintiff cannot recover on strength of after-acquired title—new action necessary—evidence in second suit not sustaining first. *Dawley v. Brown*, 79, 390.

Actual not constructive possession necessary to maintain, under void deed. *Thompson v. Burhans*, 79, 93.

Where custody and possession of property is shown to be equally consistent with an outstanding title in a third person as with the title in one having possession, no presumption of ownership arises simply from such possession. *Rawley v. Brown*, 71, 85.

Evidence of possession and title. *Stevens v. Hauser*, 39, 302.

Evidence of divestiture—estoppel—boundary. *Sherman v. McKeon*, 38, 266.

Under grant in fee reserving rent—evidence of possession—no demand of rent necessary. *Hosford v. Ballard*, 39, 147.

Plaintiff cannot recover on proof of prior possession except adverse. *Drew v. Swift*, 46, 204.

Inaccessible premises — mesne profits. *Woodhull v. Rosenthal*, 61, 382.

Lies against city for lands taken for public use. *Strong v. City of Brooklyn*, 68, 1.

Title of bona fide purchaser from heirs at law, 1 R. S. 749, § 3 — concealment of will — what sufficient to divest title. *Cole v. Gourlay*, 79, 527.

When defendant is not a creditor cannot impeach grant as in fraud of creditors. *Moseley v. Moseley*, 15, 334.

When wife may maintain against husband. *Wood v. Wood*, 83, 575.

Not maintainable against town under act of 1875, chapter 49, authorizing people to recover money, etc., from public corporations. *People v. New York, etc., Ry. Co.*, 84, 565.

That plaintiff conveyed the lands while held adversely no defense to action. *Chamberlain v. Taylor*, 92, 348.

For dower — proceedings to admeasure, after recovery — notice to owner not necessary. *Stewart v. Smith*, 1 Keyes, 59.

Evidence — former judgment — lease in fee, right of entry for non-payment of rent — parties — infants — mesne profits. *Cagger v. Lansing*, 64, 417.

When presumed to be for re-entry on lease. *Samson v. Rose*, 65, 411.

For non-payment of rent does not lie unless right of re-entry is expressly reserved in the lease. *Van Rensselaer v. Jewett*, 2, 141.

When maintainable for undivided interest by virtue of rent charge. *Cruger v. McLaury*, 41, 219.

In action to recover real estate with damages for withholding, there can be no recovery for value of use and occupation. *Larned v. Hudson*, 57, 151.

Purchaser at foreclosure sale under mortgage assumed by evicted tenant is "assignee" entitled to apply to vacate ejectment judgment. *Howell v. Leavitt*, 90, 238.

Does not lie for easement of wharfage in common with others. *Child v. ChapPELL*, 9, 246.

Is proper remedy for owner of land subject to public easement against party appropriating it to private purposes. *Carpenter v. Oswego & Syracuse R. Co.*, 24, 655.

Plaintiff's possession limited upon trust estate, legal estate in trustees — plaintiff cannot maintain. *Bennett v. Garlock*, 79, 302; 35 Am. Rep. 517.

Defendant may allege mistake in description as defense, but must concede the same right to plaintiff. *Hoppough v. Struble*, 60, 430.

Facts insufficient to sustain judgment for plaintiff. *Carleton v. Darcy*, 90, 566.

Writ of possession, when and how executed. *Witbeck v. Van Rensselaer*, 64, 27.

Judgment by default not conclusive against claimants under defendants, unless it has been docketed three years. *Sheridan v. Linden*, 81, 182.

Docketing judgment, under Laws of 1840, chapter 38, not essential in — acquisition of subsequent title from lis pendens. *Sheridan v. Andrews*, 49, 478.

When new trial, of course. *Chautauqua Co. Bank v. White*, 23, 347; *Howell v. Leavitt*, 90, 238.

Provision for new trial, of course, not applicable to any other action. *Shumway v. Shumway*, 42, 143.

Application for new trial in, denied, where from papers, facts uncertain. *Sacia v. O'Connor*, 79, 260.

Mesne profits distinct cause of action. *Larned v. Hudson*, 57, 151.

Judgment not conclusive nor evidence against third person. *Sheridan v. Andrews*, 49, 478.

Judgment in, only conclusive as to title, litigated and established. *Dawley v. Brown*, 79, 390.

## ELECTION.

Construction of registry act of 1872, chapter 570. *People v. Wilson*, 62, 186.

Where majority vote for ineligible candidate, the next highest qualified is not elected. *People v. Clute*, 50, 451; 10 Am. Rep. 508.

Where three officers to be elected and statute prohibits voting for more than two — ballots not invalid because statute unconstitutional. *People v. Perley*, 80, 624.

When voter's intention open to inquiry, and how. Writing prevails over print in ballot. *People v. Saxton*, 22, 309.

Powers of inspectors — not judicial officers — evidence of intent of voters — poll-list admissible — burden of proof of alienage — presumption. *People v. Pease*, 27, 45.

Board of canvassers to deposit ballot-boxes in police department — delivery to officers sufficient compliance. *People v. Livingston*, 79, 279.

What not sufficient compliance as to "securely" sealing boxes — statute merely directory. *Id.*

Inspectors liable for rejecting vote of person challenged as deserter and refusing to answer under oath. *Goetchius v. Matthewson*, 61, 420. See also *Green v. Shumway*, 39, 418.

Removal of inspector in New York city. *Gardner v. People*, 62, 299.

Of justice of tenth judicial district — act annexing towns in Westchester county to New York. *People v. Flanagan*, 66, 237.

Of justices of peace — constitutionality — regularity — mandamus — joinder. *People v. Schiellein*, 95, 124.

See CONSTITUTIONAL LAW ; CRIMINAL LAW ; OFFICE AND OFFICER.

## ELECTION OF REMEDIES.

Party bound by. *Rodermund v. Clark*, 46, 354 ; *Steinbach v. Relief Fire Ins. Co.*, 77, 498 ; 33 Am. Rep. 655.

Threat not carried out is not an election. *Litchfield v. Irvin*, 51, 51.

Omission to defend. *Giles v. Austin*, 62, 486.

See PLEADING

## Emancipation.

See PARENT AND CHILD.

## EMBEZZLEMENT.

Action lies to recover the amount without proving specific property taken. *Gordon v. Hostetter*, 37, 99.

See CRIMINAL LAW.

## Emblements.

See CROPS ; LANDLORD AND TENANT ; MORTGAGE.

## EMIGRATION.

Commissioners not responsible for emigrant's loss of baggage. Baggage and passenger solicitors licensed by them are not their agents. *Murphy v. Commrs. of Emigration*, 28, 134.

## EMINENT DOMAIN.

- I. *Who may exercise power.*
- II. *Compensation.*
- III. *Practice in proceedings to condemn.*
- IV. *Acquiring lands dedicated to one public use.*
- V. *Railways in streets.*
- VI. *Title acquired.*
- VII. *Miscellaneous.*

### I. *Who may exercise power.*

Railroad companies may be authorized to acquire private property for their use. *Buffalo & N. Y. R. Co. v. Brainard*, 9, 100.

Right may be delegated — decision of delegate as to necessity not reviewable. *Matter of Fowler*, 53, 60.

Persons delegated to exercise right of, may discontinue proceedings before title is acquired — Albany park commission. *Matter of Commissioners of Washington Park*, 56, 144.

Cemetery association may not condemn lands. *Matter of Petition of Deansville Cemetery Assoc.*, 66, 569 ; 23 Am. Rep. 86.

## II. Compensation.

Legislature cannot transfer turnpike to railroad company without compensation to owners of fee. *Mahon v. New York Cent. R. Co.*, 24, 658.

Compensation must be made for lands used for ditches. *People v. Haines*, 49, 587.

Compensation awarded not liable for invalid assessment on land. *Matter of New York Cent., etc., R. Co.*, 90, 342.

Compensation sufficiently secured by authority to town to issue bonds to be paid by taxation. *Matter of Church*, 92, 1.

Right granted by State cannot be impaired except upon compensation. *Langdon v. Mayor of New York*, 93, 129.

## III. Practice in proceedings to condemn.

Requisites of proceedings to acquire lands held in common—Laws of 1834, chapter 256. *Dyckman v. Mayor, etc.*, 5, 434.

Trial by jury not essential to determination of question of necessity for public use. *People v. Smith*, 21, 595.

Necessity for taking must be shown to court—decision of board of directors not enough. *Rensselaer, etc., R. Co. v. Davis*, 43, 137.

Schedule referred to in and annexed to petition is part of petition. *Matter of Comm'rs of Washington Park*, 52, 131.

Commissioners to appraise damages may not be drawn by lot. *Menges v. City of Albany*, 56, 374.

Decision of commissioners inoperative until confirmation by General Term—power and duty to review and pass on facts—discretion as to confirming. *Kings Co. Elevated R.*, 82, 95.

Control of court as to payment of award for lands taken. *Matter of Mayor of New York*, 90, 390.

Court may open default of owner on motion to confirm report of commissioners. *Matter of New York, Lackawanna, etc., R. Co.*, 93, 385.

Costs in proceedings cannot be awarded against land-owners. *Matter of New York, etc., R. Co.*, 94, 287.

## IV. Acquiring lands dedicated to one public use.

Right to construct highway on railway lands. *Albany Northern R. Co. v. Brownell*, 24, 345.

Power of city to condemn railroad lands for public improvement—charter of Buffalo. *Matter of City of Buffalo*, 64, 547.

One corporation may acquire easement in lands of another for public use. *Matter of Application of Rochester Water Commissioners*, 66, 413.

Power to condemn land of one corporation for another. *Matter of City of Buffalo*, 68, 167.

Legislature may authorize one street railway company to use tracks of another upon making compensation. *Sixth Ave. R. Co. v. Kerr*, 72, 330.

One railroad crossing another—defective petition—not jurisdictional—how waived. *Matter of Boston & Hoosac, etc.*, 79, 64.

Land taken for public use cannot be afterward taken for another without legislative authority. *Prospect Park, etc., R. Co. v. Williamson*, 91, 552.

## V. Railways and streets.

Legislature cannot authorize railroad in highway without compensation to owners of fee. *Williams v. N. Y. Cent. R. Co.*, 16, 97.

Street cannot be taken for steam railroad without compensation to adjoining owners. *Wager v. Troy Union R. Co.*, 25, 526.

Horse railway in New York city streets may be authorized by legislature without compensation to adjacent owners. *People v. Kerr*, 27, 188.

Establishing horse railroad in city streets is additional burden. *Craig v. Rochester, etc., R. Co.*, 39, 404.

Abutting land-owner entitled to compensation for injury to interest in street by elevated railroad therein. *Story v. New York El. R. Co.*, 90, 122; 43 Am. Rep. 146.

VI. *Title acquired.*

No reversionary estate remains in lands acquired in fee-simple for public uses, and they may be converted to other necessary uses. *Heyward v. Mayor, etc.*, 7, 314.

Exercise of power of eminent domain divests inchoate dower. *Moore v. Mayor, etc.*, 8, 110.

Estate of city in lands acquired for park. *Brooklyn Park Co. v. Armstrong*, 45, 234; 6 Am. Rep. 70.

Intent to take fee will not be implied when easement sufficient. *Washington Cemetery v. Prospect Park, etc.*, R. Co., 68, 591.

Title does not vest until appraisalment — death of owner — dower — subsequent death of heir. *Ballou v. Ballou*, 78, 325.

Acquiring lessee's interests does not affect rights of reversioner. *Matter of Boston & Hoosac, etc.*, R. Co., 79, 69.

Fee may be condemned for public use although use special and not permanent. *Sweet v. Buffalo, etc.*, R. Co., 79, 293.

VII. *Miscellaneous.*

When appraisers are to assess the value of lands for a railroad without deduction for benefit, an appraisalment on condition of reservation of certain easements is unauthorized. *Hill v. Mohawk & H. R. R. Co.*, 7, 152.

Unauthorized taking cannot be confirmed by legislation. *Matter of Townsend*, 39, 171.

Award for park lands — when sustained. *Matter of Ninth Avenue and Fifteenth Street*, 45, 729.

Construction of act of 1871, chapter 579, on laying out Ocean avenue in Kings county — map must be filed. *Rider v. Stryker*, 63, 136.

When municipality may be compelled to complete proceeding to acquire land. *People v. Common Council of Syracuse*, 78, 56.

When action lies against city for damages for land taken, although assessments

not collected — amendment of charter. *Ganson v. City of Buffalo*, 2 Abb. 236.

See ASSESSMENTS; CONSTITUTIONAL LAW; DAMAGES; MUNICIPAL CORPORATION; NEW YORK CITY; RAILROAD; TAXATION.

ESCAPE.

Action — when deemed to be for escape — if debtor insolvent plaintiff cannot recover whole amount of judgment. *Smith v. Knapp*, 30, 581.

Removal of prisoner on jail liberties by warrant of congress to testify, not an escape. *Wilckens v. Willet*, 4 Abb. 596; 1 Keyes, 521.

No action lies for escape of a debtor where process on which he was arrested was void. *Carpentier v. Willet*, 1 Abb. 312; 1 Keyes, 510.

County judge with jurisdiction having ordered discharge is defense to sheriff — order reciting jurisdictional facts — proof aliunde — that arrest was unauthorized is defense. *Goodwin v. Griffiths*, 88, 629.

Liability of sheriff on voidable process — negligence — insolvency of debtor no defense. *Dunford v. Weaver*, 84, 445.

Defense that execution was set aside. *Pinckney v. Hegeman*, 53, 31.

When sheriff not estopped from contesting action for, by prosecution of limit bond. *Lawrence v. Campbell*, 32, 455.

See EXECUTION; SHERIFF.

ESCHEAT.

A purchaser at sheriff's sale dying before time for redemption expires is "seised" within the statute of escheats. *Englishbe v. Helmuth*, 3, 294.

See ALIENAGE.

ESCROW.

See DEED.

**ESTATE.**

By deed to one for life and after his death to his heirs forever, his children take an immediate vested estate. *Sheridan v. House*, 4 Keyes, 569; 4 Abb. 218.

When contingent remainder in fee-tail becomes vested — act of 1786 — conversion into fee-simple — stock of descent. *Wendell v. Crandall*, 1, 491.

See DEED; LANDLORD AND TENANT; MARRIAGE; TENANCY; TRUSTS; WILL.

**ESTOPPEL.**

I. *By record.*

II. *By deed.*

III. *In pais.*

IV. *General matters.*

I. *By record.*

A defendant is collaterally estopped by a judgment against himself although he was led to suffer it by the plaintiff's fraudulent statements. *White v. Merritt*, 7, 352.

Sheriff is not estopped by return of nulla bona canceled by order of court. *Barker v. Binnering*, 14, 270.

Mortgagee not estopped by judgment between mortgagor and prior mortgagee as to amount due on prior mortgage. *Campbell v. Hall*, 16, 575.

Sheriff having taken receipt for levy and got judgment for the value is estopped from denying judgment debtor's title to goods. *People v. Reeder*, 25, 302.

Estoppel of judgment creditor in foreclosure. *Frost v. Koon*, 30, 428.

When wife not precluded by judgment from asserting dower. *Malloney v. Horan*, 49, 111; 10 Am. Rep. 335.

Reversal of judgment destroys its force as an estoppel. *Smith v. Frankfield*, 77, 414.

When defendants in action on undertaking in claim and delivery not estopped by stipulation in original action. *Harri-son v. Wilkin*, 78, 390.

When estoppel by judgment in former action arises. *Smith v. Smith*, 79, 634.

When does not. *Cobwell v. Bleakley*, 1 Abb. 400.

Party who has elected to take judgment as for goods sold cannot maintain order of arrest for conversion. *Fields v. Bland*, 81, 239.

Judgment in another State conclusive as to defenses litigated in action. *Patrick v. Shaffer*, 94, 423.

II. *By deed.*

Municipal corporation estopped to impeach its records. *Buel v. Trustees of Village of Lockport*, 8, 55.

When mortgagor estopped from denying validity of assignment by his mortgagee. *Palmer v. Smith*, 10, 303.

Defendant in ejectment cannot impeach grant from common source of title as in fraud of creditors, he not being a creditor nor claiming under. *Moseley v. Moseley*, 15, 334.

Sub-tenant not estopped from showing that assignment by lessee was for security for a debt that had been paid. *Despard v. Walbridge*, 15, 374.

What does not amount to estoppel in lease respecting State right — when agent of State estopped. *Walrath v. Redfield*, 18, 457.

Guarantor and assignor of bond may not impeach its validity. *Remsen v. Graves*, 41, 471.

Grantee not estopped from showing that provision in deed was inserted by mistake. *Pope v. O'Hara*, 48, 446.

When party executing power of attorney is not estopped by its statements of his residence. *Bank of New Orleans v. Matthews*, 49, 12.

When one sued as trustee of corporation not estopped from denying incorporation. *De Witt v. Hastings*, 69, 518.

Where defendant in proceedings for claim and delivery gives bond and retakes he is estopped from denying that he had possession. *Diossy v. Morgan*, 74, 11.

Mortgagee estopped by his affidavit that mortgage is for value — holder may recover face, although he advanced less. *Grissler v. Powers*, 81, 57; 37 Am. Rep. 475.



Estoppel of county — bonds for railroad aid. *Dodge v. County of Platte*, 82, 218.

Mortgagor's certificate of no defense on assignment by insurance company to superintendent of insurance department is binding — binds married woman. *Smyth v. Munroe*, 84, 354.

Mortgagor and privies estopped by his statement on assignment that there is no defense. *Smyth v. Knickerbocker Life Ins. Co.*, 84, 589.

A lessee from a railroad company cannot set up in an action for the rent want of power to lease. *Woodruff v. Erie R. Co.*, 93, 609.

Grantor cannot set up fraud by grantee to defeat title of innocent purchaser from grantee. *Simpson v. Del Hoyo*, 94, 189.

Covenantor with executor that third persons shall satisfy mortgage may not deny right of executor to sue on covenant. *Farnham v. Mallory*, 2 Abb. 100.

### III. In pais.

Admission or assertion of conclusion of law upon undisputed facts does not work estoppel. *Brewster v. Stryker*, 2, 19.

The assignor of a chose in action is estopped by his declarations on the faith of which the assignee acted. *L'Amoreux v. Vischer*, 2, 278.

A creditor is not estopped by his receipt for a note in full of the maker's debt, given to the debtor's agent, unless the debtor has settled with the agent on the faith of the receipt. *Davis v. Allen*, 3, 168.

Where a manufacturer of cloth sells his wool, and the purchaser allows him to manufacture and deal with it as his own, he is estopped from claiming the manufacture as against a subsequent purchaser in good faith. *Thompson v. Blanchard*, 4, 303.

Where landlord agrees to pay lessee for building to be erected by him in a certain manner, the same not being erected in the prescribed manner, he is not estopped from refusing to pay by his neglect to give notice of his intention not to pay. *Pike v. Butler*, 4, 360.

Husband present and assenting to a mortgage of his personal property by his

wife is bound thereby. *Edgerton v. Thomas*, 9, 40.

Where receiver purchased assets and afterward sold them as the property of the trust, informing the purchaser, the latter is bound. *Jewett v. Miller*, 10, 402.

When proprietor of lands under water is estopped by long acquiescence from demanding new and correct apportionment, *O'Donnell v. Kelsey*, 10, 412.

Subscriber to corporate stock estopped by acting as director from denying validity of organization on the ground that no notice of election was given. *Schenectady & Saratoga Plank R. Co. v. Thatcher*, 11, 102.

One surety is bound by his parol agreement to indemnify his co-surety. *Barry v. Ransom*, 12, 462.

Creditor not estopped from recovering quantum meruit by previous statement of less sum in an account presented. *Williams v. Glenny*, 16, 389.

When estoppel arises as to award. *Viele v. Troy & Boston R. Co.*, 20, 184.

When lessee not estopped as against lessor. *People v. Rector, etc., of Trinity Church*, 22, 44.

Attorney in execution, refusing to state whether his client directed sale, estopped from denying his own responsibility. *Ford v. Williams*, 24, 359.

Owner forbidding sale may purchase without impairing his right of action. *Id.*

Execution creditor purchasing on prior execution subject to mortgage assumed to be prior to both, is estopped from disputing its validity. *Horton v. Davis*, 26, 495.

When creditor estopped from disputing his debtor's fraudulent conveyance. *Rapalee v. Stewart*, 27, 310.

Director of bank not estopped from showing his ignorance of its condition in action to rescind purchase of its stock. *Lefever v. Lefever*, 30, 27.

What is not estoppel in pais. *Booth v. Bunce*, 31, 246.

When sheriff not estopped from contesting action for escape by prosecution of limit bond. *Lawrence v. Campbell*, 32, 455.

Estoppel of mortgagor by acquiescence in irregular foreclosure. *Hogan v. Hoyt*, 37, 300.

When estoppel raised by consent to subdivision of joint claim. *Carrington v. Crocker*, 37, 336.

Receiptor for goods under execution may assert his title to them as against sheriff. *Russell v. Winne*, 37, 591.

Action by architect for pay for plans — effect of taking them back. *Nourry v. Lord*, 3 Abb. 392.

When assertion of title to land is defeated by encouragement of improvements near them. *Corning v. Troy Iron and Nail Factory*, 44, 577.

When payment under protest does not constitute estoppel. *Meyer v. Clark*, 45, 285.

When party not estopped to enforce contract by fraudulent cancellation. *Holten v. Putnam Fire Ins. Co.*, 46, 1; 7 Am. Rep. 287.

Person alleging that he is in possession of land may not dispute service of process on him for dispossession. *Finnegan v. Carraher*, 47, 493.

Where heirs bound by assent to executor's sale of lands without authority by the will. *Favill v. Roberts*, 50, 223.

When bank bound by the teller's statement that its apparent certification of check is genuine. *Continental Nat. Bank v. Nat. Bank of Commonwealth*, 50, 575.

Declaration not intended to be communicated does not estop declarant as to one afterward hearing of it and acting on it. *Mayenborg v. Haynes*, 50, 675.

Estoppel not raised where acts did not induce. *Van Deusen v. Sweet*, 51, 378.

One having lien on chattel, but not disclosing it, and claiming to be owner, may not set up his lien in action to recover possession. *Maynard v. Anderson*, 54, 641.

Estoppel to assert title does not arise where action was not induced by and in reliance upon apparent ownership. *Barnard v. Campbell*, 55, 456; 14 Am. Rep. 289.

Promise to make affidavit that mortgage was wholly and fairly due does not estop mortgagor from pleading usury. *Payne v. Burnham*, 62, 69.

Where trustee of savings bank, with knowledge and assent, reported mortgage

to bank department, in action to foreclose he is estopped from denying validity. *Best v. Thiel*, 79, 15.

Premises sold under sheriff's deed — tenants when estopped from denying landlord's title. *Terrett v. Cowenhoven*, 79, 400.

Defendant procuring discontinuance for want of jurisdiction, when estopped from asserting jurisdiction. *Bradner v. Howard*, 75, 417.

Estoppel applies to municipal corporations as well as to individual — when action governed by reliance on fact admitted by officer, admission cannot be withdrawn to prejudice of one relying on it. *Curnen v. Mayor*, 79, 511.

To constitute estoppel by omission to speak there must be opportunity and duty. *Viele v. Judson*, 82, 32.

Matters not calculated to mislead, although acted upon, do not work an estoppel. *Howe Machine v. Farrington*, 82, 121.

One not estopped from asserting the truth, unless other has acted on statements and will suffer loss if not held to be true. *Winegar v. Fowler*, 82, 315.

Party cannot claim estoppel when he does not rely upon the silence of another and is not damaged thereby. *Hamlin v. Sears*, 82, 327.

When conduct of party is estoppel. *Waring v. Somborn*, 82, 604.

Action to recover back insurance premiums — waiver. *Andrews v. Aetna Life Ins. Co.*, 85, 334.

Representation upon which extension of credit is procured cannot be denied by maker. *Fleischmann v. Stern*, 90, 110.

Party calling attorney into court in case cannot question his authority to appear. *Matter of Beckwith*, 90, 667.

Bank paying check with forged indorsement not estopped from recovering back by delay in discovering forgery. *Corn Exchange Bank v. Nassau Bank*, 91, 74; 43 Am. Rep. 655.

Acts of chattel mortgagee not forbidding enforcement of mortgage against purchaser from mortgagor. *Mack v. Phelan*, 92, 20.

One receiving fruits of judgment bound thereby. *Mills v. Hoffman*, 92, 181.

Statement in answer inducing discontinuance of suit does not estop defendant. *Andrews v. Aetna Ins. Co.*, 92, 596.

Admission by corporation through officer creates estoppel. *O'Leary v. Board of Education of New York*, 93, 1; 45 Am. Rep. 156.

Employee of State accepting less than statute compensation may claim residue. *Kehn v. State*, 93, 291.

One taking part in instituting proceedings to acquire land for public use is estopped from invoking statutory or constitutional objections thereto existing for his benefit. *Matter of Cooper*, 93, 507.

Failure to deny ex parte affidavits charging fraud upon which order of arrest is granted is not admission of their truth. *Talcott v. Harris*, 93, 567.

Owner of goods not parting with apparent ownership may reclaim them. *Hentz v. Miller*, 94, 64.

Representation by mortgagor to one purchasing mortgage that same is valid bars defense of usury. *Union Dime Sav. Inst. v. Wilmot*, 94, 221.

Payment voluntarily made of disputed claim for interest not applicable on principal. *Bennett v. Bates*, 94, 354.

An estoppel "in pais" is available against the defense of usury. *Mason v. Anthony*, 3 Abb. 207.

Purchaser at a wrongful sale on execution is estopped from saying that he acted merely as agent when sued for conversion. *Baltes v. Ripp*, 1 Abb. 78; 3 Keyes, 210.

Estoppel of lessee by consent to lessor's alteration of premises. *Rowan v. Kelsey*, 4 Abb. 125.

One who buys land in his own name and with his own money by agreement for benefit of another cannot set up statute of frauds. *Sandford v. Norris*, 4 Abb. 144.

One who contracts with a corporation de facto cannot question validity of its organization. *White v. Ross*, 4 Abb. 589.

#### IV. General matters.

Fraud counteracts estoppel. *Wilcox v. Howell*, 44, 398.

Estoppel may never be invoked to aid fraud. *Boyce v. Watrous*, 73, 597.

Design to mislead not essential to estoppel. *Blair v. Wait*, 69, 113.

Estoppel by fraud. *Kinsey v. Leggett*, 71, 387.

Estoppel may arise although affecting real estate. *DeHerques v. Marti*, 85, 609.

See FORMER ADJUDICATION; FRAUD; JUDGMENT.

#### ESTRAY.

Seizure of — jurisdiction. *Leavitt v. Thompson*, 52, 62.

See ANIMALS; CONSTITUTIONAL LAW.

#### EVICITION.

When grantee buys on foreclosure of prior mortgage, sells his bid and surrenders to the buyer, it is an eviction. *Cowdrey v. Coit*, 44, 382; 4 Am. Rep. 690.

See LANDLORD AND TENANT.

#### EVIDENCE.

I. *Matters judicially noticed.*

II. *Conclusions.*

III. *Presumptions.*

IV. *Burden of proof.*

V. *Best and secondary evidence.*

VI. *Opinions and expert evidence.*

1. *General subjects.*

2. *Handwriting.*

3. *Value.*

4. *Mental condition.*

5. *Physical condition.*

VII. *Parol evidence to affect writings.*

1. *To contradict.*

2. *To explain.*

(a.) *Miscellaneous.*

(b.) *To show that writing is not what it appears.*

3. *To aid.*
4. *Receipts.*
5. *General matters.*

VIII. *Admissions and declarations.*

1. *Of agent and principal.*
2. *Of other third persons.*
3. *Of person affected by.*
4. *Of owner or possessor of property.*
5. *Res gestæ.*

IX. *Writings.*

1. *Accounts and memoranda.*
  - (a.) *Accounts.*
  - (b.) *Memoranda.*
2. *Letters.*
3. *Other writings.*
  - (a.) *Public writings.*
  - (b.) *Photographs.*
  - (c.) *Miscellaneous.*

X. *Particular subjects and issues.*

1. *Agency*
2. *Consideration.*
3. *Contract.*
4. *Corporation.*
5. *Custom and usage.*
6. *Damages.*
7. *Death.*
8. *Eminent domain.*
9. *Fraud.*
10. *Insurance.*
11. *Intent.*
12. *Judgment.*
13. *Marriage, Dower, etc.*
14. *Negligence.*
15. *Negotiable instrument.*
16. *Partnership.*
17. *Payment.*
18. *Slander.*
19. *Title.*
20. *Miscellaneous.*

XI. *Criminal evidence.* See CRIMINAL LAW.XII. *Practice as to receipt of evidence.*XIII. *Admissibility and effect of evidence.*XIV. *Witnesses and their competency.*

1. *Commissions and depositions.*
2. *Impeachment and credibility.*
3. *Transactions with deceased party.*
4. *Refreshing memory.*
5. *Privileged testimony.*

I. *Matters judicially noticed.*

Judicial notice—not taken that kerosene is inflammable. *Wood v. North-western Ins. Co.*, 46, 421.

Width of streets—ordinances of New York city—street commissioner's certificate. *Porter v. Waring*, 69, 250.

Courts take judicial notice of common course of banking business. *Merchants' Nat. Bk. of Whitehall v. Hall*, 83, 338; 38 Am. Rep. 434.

Courts will take, that western portion of this State was by its own act ceded to Massachusetts. *People v. Snyder*, 41, 397.

II. *Conclusions.*

In a suit between creditors a fair judgment against the debtor is conclusive of the indebtedness and its amount. *Candee v. Lord*, 2, 269.

In action against sheriff, deputy may not contradict his return. *Sheldon v. Paine*, 10, 398.

Town clerk's minutes of proceedings of town meeting conclusive. *People v. Zeyst*, 23, 140.

Recital of incorporation in stock subscription conclusive against subscriber. *Black River & Utica R. Co. v. Clarke*, 25, 208.

Answer to cross-examination on collateral matter conclusive. *Carpenter v. Ward*, 80, 243.

In creditor's action, his judgment is conclusive of debt. *Burgess v. Simonson*, 45, 225.

Checks to order of cashier not conclusive that a loan was not to bank—conversations—entries. *Pierson v. Atlantic Nat. Bank*, 77, 304.

Conclusiveness of judgment of another State. *Pringle v. Woolworth*, 90, 502.

III. *Presumptions.*

Presumption that deed was delivered at date not affected by 1 R. S. 738, § 137. *Robinson v. Wheeler*, 25, 252.

Receipt of money unexplained raises presumption of payment and not of loan. *Bogert v. Morse*, 1, 377.

What evidence will countervail presumption. *Id.*

Where one has been shown to be a professional gambler, there will be no presumption of change from lapse of twenty months. *McMahon v. Harrison*, 6, 443.

Such employment is presumptive evidence of improvidence disqualifying him from being administrator. *Id.*

Presumption of negligence arises from accident by defect in railroad bed or apparatus. *Curtis v. Rochester & Syracuse R. Co.*, 18, 534.

Presumption as to place of indorsement. *International Bank v. Bradley*, 19, 245.

Grant presumed from twenty years' continuous injurious flowing. *Hammond v. Zehner*, 21, 118.

No presumption of title in people against actual occupant of land unless vacancy within forty years is shown. *People v. Rector, etc., of Trinity Church*, 22, 44.

Presumption of possession as against one who receives property of intestate agreeing to take out letters of administration — when conclusive. *People v. Hascall*, 22, 188.

No presumption that foreign usury law is like our own. *Cutler v. Wight*, 22, 472.

Sanity is presumed. *Walter v. People*, 32, 147.

Notary's certificate of protest — intentions in favor of. *McAndrew v. Radway*, 34, 511.

Presumption as to extent of ruling, when no ground stated. *International Bank v. Monteath*, 39, 297.

Acknowledgment presumed to have been taken within officer's jurisdiction — deed presumed to have been delivered at its date. *People v. Snyder*, 41, 397.

Continuance of possession of personal property — when presumed. *Wilkins v. Earle*, 44, 172 ; 4 Am. Rep. 655.

Delivery of bill of sale, not presumed. *Bryant v. Bryant*, 42, 11.

Presumption of posting notice of execution sale. *Wood v. Morehouse*, 45, 368.

Ancient deed — presumption of possession before Revised Statutes. *Cahill v. Palmer*, 45, 478.

Presumption of payment of judgment — lapse of time — defendant's ability. *Duly v. Ericsson*, 45, 786.

Pledge of mortgage not presumed without writing. *Powers v. Johnson*, 49, 432.

Presumption from satisfying judgment is that it was done on payment. *Booth v. Farmers and Mechanics' Nat. Bank*, 50, 396.

Non-payment of rent for more than twenty years does not raise presumption of release of covenant. *Lyon v. Odell*, 65, 28.

Presumption from failure to call witness. *Bleecker v. Johnston*, 69, 309.

No presumption arises as to ownership of produce of farm of one cultivated by another. *Ranley v. Brown*, 71, 85.

No presumption of survivorship in common disaster. *Newell v. Nichols*, 75, 78 ; 31 Am. Rep. 424.

No presumption that resolution of common council received requisite vote — estoppel — limitation. *Matter of City of Buffalo*, 78, 362.

When goods delivered by debtor to creditor, no presumption that they were delivered in payment. *Green v. Disbrow*, 79, 1 ; 35 Am. Rep. 496.

No presumption that dishonored or overdue paper is invalid. *Cowing v. Altman*, 79, 167.

In absence of evidence of fraud by its officer, presumption is that overpayments went to association. *Taylor v. City of New York*, 82, 10.

No presumption that law of marriage in another State is different from ours. *Hynes v. McDermott*, 82, 41 ; 37 Am. Rep. 538.

Parol testimony not admissible to fortify or create presumption as to testator's intention, where not raised by law. *Reynolds v. Robinson*, 82, 103 ; 37 Am. Rep. 555.

When jurisdiction of appellate court of another State presumed although record does not contain notice of appeal — when statute book of another State competent. *Pacific Pneumatic Gas Co. v. Wheelock*, 80, 278.

Separate and personal possession by married woman of personal property

draws after it presumption of ownership — otherwise as to household furniture, etc. — paraphernalia purchased by husband, title in wife. *Whiton v. Snyder*, 88, 299.

Non-resident of State not presumed to know its laws. *Stedman v. Davis*, 93, 32.

#### IV. Burden of proof.

Burden of proof of negligence is on party alleging — when on railroad. *Holbrook v. Utica & S. R. Co.*, 12, 236.

Burden of proof to show want of jurisdiction in surrogate to grant letters is on party disputing. *Welch v. New York Cent. R. Co.*, 53, 610.

Burden of proof, in action against agent for negligence, is on plaintiff, and is not shifted by prima facie evidence of negligence. *Heinemann v. Heard*, 62, 448.

One claiming to be bona fide purchaser must show that he is. *Stevens v. Brennan*, 79, 254.

Burden of proof is on party producing ballot-boxes, to show that they have not been disturbed. *People v. Livingston*, 79, 279.

Burden of proof is on party alleging that statement was intentionally false. *Babcock v. Libby*, 82, 144.

One claiming an individual note is a partnership one, has the burden of proof. *Gernon v. Hoyt*, 90, 631.

In accounting by agent as to trust, burden is on him. *Marvin v. Brooks*, 94, 71.

Burden of proof as to validity of railroad bonds. *Nichols v. Mase*, 94, 160.

Where a husband sues for damages for instigating his wife to leave him, the burden of proof is on him to show an unlawful motive on defendant's part. *Barnes v. Allen*, 1 Abb. 111.

#### V. Best and secondary evidence.

Substituted execution in place of lost one admissible, without proof of loss. *Burkle v. Luce*, 1, 163.

Evidence in case of lost deed — sufficiency of parol, to set aside title. *Metcalf v. Van Benthuyssen*, 3, 424.

Charter of city of New York may be read from volume printed by common council, whether before or after April 17, 1832. *Howell v. Ruggles*, 5, 444.

Evidence of fraudulent destruction of will — when not sufficient to warrant parol evidence of its contents. *Knapp v. Knapp*, 10, 276.

Lost will may be proved by one witness. *Harris v. Harris*, 26, 433.

Evidence of loss of execution — what sufficient to justify parol evidence of contents — presumption. *Leland v. Cameron*, 31, 115.

Parol evidence of a contract is properly struck out when the contract is subsequently produced. *Newkirk v. New York & H. R. Co.*, 38, 158.

Parol, competent to prove old notes surrendered on giving new. *Chrysler v. Renois*, 43, 209.

Letter-press copies of letters not competent primarily. *Foot v. Bentley*, 44, 166 ; 4 Am. Rep. 652.

Under 1 R. S. 759, § 17, record of conveyance is primary evidence. *Clark v. Clark*, 47, 664.

Minutes of former trial by deceased attorney not competent. *Crouch v. Parker*, 56, 597.

Evidence of contents of lost deed — what is requisite. *Edwards v. Noyes*, 65, 125.

Evidence of entry of judgment when roll is missing. *Mandeville v. Reynolds*, 68, 528.

Sufficiency of foundation for parol evidence of lost instrument is in discretion of trial court. *McCulloch v. Hoffman*, 73, 615.

Notice to produce writing not necessary if pleadings give notice. *Lawson v. Bachman*, 81, 616.

Notice to produce writing, not necessary where pleadings or nature of action give notice. *Howell v. Huyck*, 2 Abb. 423.

It is for the court to determine whether destruction established where the contents of lost instrument are sought to be proved by parol. *Mason v. Libbey*, 90, 683.

Minutes of testimony of deceased witness admissible on second trial where cross-

examination waived on first. *Bradley v. Mirick*, 91, 293.

Proof essential to show loss of material paper. *Keárney v. Mayor of New York*, 92, 617.

Memorandum of business transactions not provable by secondary evidence. *Peck v. Valentine*, 94, 569.

Testimony given by deceased witness on former trial admissible. *Emerson v. Bleakley*, 2 Abb. 22.

Lost document—ancient will—double title—when grant presumed. *Enders v. Sternburgh*, 2 Abb. 31; 1 Keyes, 264.

Lost document—witness who merely thinks can give substance not competent—impeachment of witness. *Graham v. Chrystal*, 2 Abb. 263.

Parol, of writing whose absence not accounted for, inadmissible. *Hatch v. Pryor*, 2 Abb. 343.

Parol, of contract, should be struck out when the contract is subsequently shown to have been in writing. *Hatch v. Pryor*, 3 Keyes, 441.

## VI. *Opinions and expert testimony.*

### 1. *General matters.*

Expert opinion incompetent, when not founded on knowledge of facts. *Willard v. Brown*, 35, 297.

Opinions incompetent as to amount of damage on breach of contract to feed good hay to cattle. *Morehouse v. Matthews*, 2, 514.

Opinions as to what are necessities for an infant are inadmissible. *Merritt v. Seaman*, 6, 168.

Opinion when competent as to whether certain buildings were "brick houses." *Mead v. North-western Ins. Co.*, 7, 530.

Opinions of an expert are competent although he may have abandoned the pursuit of which he testifies—lawyer as tanner. *Bearss v. Copley*, 10, 93.

Opinions that waste was not injurious are inadmissible. *McGregor v. Brown*, 10, 114.

The question for whom services were rendered does not call for opinion. *Sweet v. Tuttle*, 14, 465.

Opinion of expert that machine is constructed in unworkmanlike manner is competent, though defects not pointed out. *Curtis v. Gano*, 26, 426.

Opinion as to what is a "permanent policy" inadmissible. *Baptist Church v. Brooklyn Fire Ins. Co.*, 28, 153.

Opinion as to amount of goods—when inadmissible. *Teerpenning v. Corn Ex. Ins. Co.*, 43, 279.

Opinions of experts as to necessity of jettison are competent. *Price v. Hartshorn*, 44, 94; 4 Am. Rep. 645.

Opinion of expert calling for mere inference which jury can draw is incompetent. *Van Zandt v. Mut. Ben. Life Ins. Co.*, 55, 169; 14 Am. Rep. 215.

Opinion of witness competent when equivalent to admission of points denied. *Schell v. Plumb*, 55, 592.

When witness not expert. *Hoyt v. Long Island R. Co.*, 57, 678.

In hypothetical questions to experts counsel may assume facts as claims them to exist. *Hartnett v. Garvey*, 66, 641; *Filer v. N. Y. Cent. R. Co.*, 49, 42; *Dilleber v. Home Life Ins. Co.*, 87, 79.

Hypothetical question to expert—evidence essential to shift burden of proof. *Stearns v. Field*, 90, 640.

A witness who has heard testimony of others as to nature and extent of services may give his opinion as to the value. *Seymour v. Fellows*, 77, 178.

Opinion of expert on matter not subject of general knowledge—breach of warranty in cotton gin—plaintiff cannot object to defendant giving same evidence. *Scattergood v. Wood*, 79, 263; 35 Am. Rep. 515.

Opinion of expert as to conduct of ship on collision incompetent—cannot draw inferences from evidence of other witnesses—auction prices when competent to show value. *Guterman v. Liverpool, etc., Steamship Co.*, 83, 358.

As to indications of suffocation when competent in action for death by steamboat explosion. *Erickson v. Smith*, 2 Abb. 64.

Opinion whether gas-meters are gas-fixtures, competent. *Downs v. Sprague*, 2 Keyes, 57.

Witness may give opinion as to quantity of grass growing on acre: *Phillips v. Terry*, 1 Trans. App. 235.

## 2. Handwriting.

Comparison of signatures is incompetent on question of handwriting, either in chief or on cross-examination. *Van Wyck v. McIntosh*, 14, 439.

Opinion — same ink — erasures — comparison with other writings in evidence. *Dubois v. Baker*, 30, 355.

Comparison of hands by means of writings not in evidence for other purposes, inadmissible. *Randolph v. Loughlin*, 48, 456.

Opinion of witness who has seen party write once is competent — recognition by party of other signatures. *Hammond v. Varian*, 54, 398.

Admissions of intestate. *Bardin v. Stevenson*, 75, 164.

Witness may give opinion of disputed handwriting founded on comparison with other writings in evidence. *Miles v. Loomis*, 75, 288 ; 31 Am. Rep. 470.

Evidence of handwriting, founded on comparison, when competent. *Remington Paper Co. v. O'Dougherty*, 81, 474.

Expert testifying from comparison should have papers before him in court. *Hynes v. McDermott*, 82, 41 ; 37 Am. Rep. 558.

Under act of 1880, chapter 36, no writings can be proved except those of person whose writing is in question. *Peck v. Callaghan*, 95, 73.

## 3. Value.

Opinions as to value of real estate are competent. *Clark v. Baird*, 9, 183.

Value of attorney's services — opinion — cross-examination. *Harland v. Lilienthal*, 53, 438.

When opinion of value may be based on plaintiff's testimony. *McCollum v. Seward*, 62, 316.

As to value of services in nursing person sick with cancer. *Reynolds v. Robinson*, 64, 589.

Expert evidence as to value of services: *Mercer v. Vose*, 67, 56.

Witness may testify as to value, never having seen article and description testified to by others. *Whitton v. Snyder*, 88, 299.

Expert testimony as to value of materials and work to restore building burned admissible in action for insurance. *Wynkoop v. Niagara Fire Ins. Co.*, 91, 478 ; 43 Am. Rep. 686.

An architect is competent to testify in his own behalf as to the value of his services. *Nourry v. Lord*, 3 Abb. 392 ; 2 Keyes, 617.

## 4. Mental condition.

Non-expert opinions of mental capacity incompetent. *De Witt v. Barley*, 9, 371 ; *Holcomb v. Holcomb*, 95, 316.

Opinions of non-experts as to mental capacity, founded on personal observation, competent. *De Witt v. Barly*, 17, 340.

Non-experts may testify to their opinion of facts observed by them on questions of sanity. *Hewlett v. Wood*, 55, 634.

A medical opinion as to sanity, founded on hearing a portion of the evidence, is incompetent. *People v. Lake*, 12, 358.

On cross-examination such witness may be asked whether certain proved facts indicate insanity. *Id.*

Non-professional witnesses as to testator's capacity. *Matter of Ross*, 87, 514 ; *Rider v. Miller*, 86, 507.

## 5 Physical condition.

Opinion that one was intoxicated is competent. *People v. Eastwood*, 14, 562.

Opinion of physicians as to whether habits of intoxication affected constitution — action on life policy. *Rawls v. Am. Mut. Life Ins. Co.*, 27, 282.

Expert opinions, as to personal injuries. *Filer v. New York Cent. R. Co.*, 49, 42.

Proper basis of medical opinion. *Higbie v. Guardian Mut. Life Ins. Co.*, 53, 603.

As to cause of fatal disease in action on life policy — prohibition of physician's



testimony. *Edington v. Aetna Life Ins. Co.*, 77, 564.

Physician's opinion from sight of patient inadmissible as privileged — Code, section 834. *Grattan v. Metropolitan, etc., Ins. Co.*, 92, 274.

To identify body, dentist testifying as to teeth — competent. *Lindsay v. People*, 63, 143.

## VII Parol evidence to affect writings.

### 1. To contradict.

A parol agreement by one surety to indemnify his co-surety on a written agreement does not contradict the written obligation. *Barry v. Ransom*, 12, 462.

Inadmissible to prove permission to use camphene where prohibited by insurance policy. *Lamatt v. Hudson River Fire Ins. Co.*, 17, 199.

When parol evidence inadmissible to contract terms of payment on contract of sale. *Baker v. Higgins*, 21, 397.

Recital of consideration in bond cannot be varied by parol, nor can it be shown an escrow. *Cocks v. Barker*, 49, 107.

Not competent to contradict sheriff's return to execution unsatisfied *Humerton v. Hay*, 65, 380.

One not party to written contract may contradict it by parol. *Brown v. Thurber*, 77, 613.

To contradict or vary written agreement — rule only applies to parties or their privies — between one of parties and stranger, neither concluded. *Lowell Manuf. Co. v. Safeguard Fire Ins. Co.*, 88, 591.

Not competent to contradict written contract. *Thomas v. Hunt*, 3 Trans. App. 191.

### 2. To explain.

#### (a.) Miscellaneous.

Parol evidence of situation of parties and subject-matter competent to explain ambiguity in deed. *French v. Carhart*, 1, 96.

Competent to show what questions were controverted and the grounds of decisions in a former action between the same parties, to show that the matter is res adjudicata. *Doty v. Brown*, 4, 71.

Competent in second action to show same matter litigated in first. *Smith v. Smith*, 79, 634.

Admissible to show meaning of figures and technical terms in contract. *Dana v. Fiedler*, 12, 40.

Competent to show meaning of "C. O. D.," but not to vary contract thus made clear. *Collender v. Dinsmore*, 55, 200; 14 Am. Rep. 224.

Competent to ascertain lands mentioned in contract under statute of frauds. *Tallman v. Franklin*, 14, 584.

Competent to explain a doubt as to description of insured premises, not apparent on the face. *Burr v. Broadway Ins. Co.*, 16, 267.

When instruments referred to in mortgage are competent to explain the admission of indebtedness and disprove personal claim. *Hamilton v. Taylor*, 18, 358.

Of exception on sale of lands by sheriff, when admissible. *Bartlett v. Judd*, 21, 200.

Admissible to identify property in chattel mortgage. *Galen v. Brown*, 22, 37.

When admissible to show ground of former nonsuit. *White v. Madison*, 26, 117.

Is competent to explain and contradict the expressed consideration of a chattel mortgage. *McKinster v. Babcock*, 26, 378.

Competent to aid uncertain description in deed. *Pettit v. Shepard*, 32, 97.

When competent to explain contract. *Field v. Munson*, 47, 221.

When admissible in explanation of record of seizure and condemnation by government. *McKnight v. Devlin*, 52, 399; 11 Am. Rep. 715.

Of circumstances, competent to explain writing. *Knapp v. Warner*, 57, 668.

Where in part performance of an entire parol contract a part only is reduced to writing, parol evidence of the contract is competent. *Hope v. Balen*, 58, 380.

Competent to show collateral agreement when writing covers only part of agreement. *Chapin v. Dobson*, 78, 74; 34 Am. Rep. 512.

When competent to determine whether order is assignment or bill of exchange. *Brill v. Tuttle*, 81, 454; 37 Am. Rep. 515.

When competent to explain what debts intended by agreement of compromise. *Baxter v. Bell*, 86, 195.

Admissibility of prior oral agreement to explain written agreement. *Juillard v. Chaffee*, 92, 529.

Unambiguous instrument not extended by parol testimony. *Brady v. Reed*, 94, 631.

(b.) *To show that writing is not what it appears to be.*

Parol, is competent to show that an apparent deed was intended as a mortgage. *Hodges v. Tennessee Marine and Fire Ins. Co.*, 8, 416; *Van Dusen v. Worrell*, 3 Keyes, 311.

Competent to show that assignment of lease was intended as mortgage. *Despard v. Walbridge*, 15, 374.

Admissible to show that absolute bond is held as collateral. *Chester v. Bank of Kingston*, 16, 336.

Competent to show absolute assignment to be mere collateral security. *Mulford v. Muller*, 1 Keyes, 31.

Incompetent to show that an absolute grant was in trust for grantor. *Sturtevant v. Sturtevant*, 20, 39.

Bill of sale may be shown to be in trust for creditors. *Britton v. Lorenz*, 45, 51.

Competent to show that writing was not intended by parties as contract. *Grierson v. Mason*, 60, 394.

Assignment of life policy may be shown to have been intended as security. *Mathews v. Sheehan*, 69, 585.

### 3. *To aid writing.*

Parol, incompetent to import consideration into written guaranty. *Brewster v. Silence*, 8, 207.

Admissible to show real consideration — evidence. *Wheeler v. Billings*, 38, 263.

Not competent to aid written evidence of trust in lands. *Cook v. Barr*, 44, 156.

Of agreement to procure right of way to highway, as part of consideration of deed, when competent. *Dempsey v. Kipp*, 61, 462.

Memorandum of contract, when competent to corroborate oral evidence. *Lathrop v. Bramhall*, 64, 365.

### 4. *Receipts.*

Parol, not competent to contradict an instrument acknowledging the receipt of a sum of money in full of a claim for damages for personal injury. *Coon v. Knap*, 8, 402.

When parol competent as to receipt in nature of contract. *Scovill v. Griffith*, 12, 509.

Receipt by third party for property describing it as in good order not conclusive. *Hunt v. Michigan Southern, etc., R. Co.*, 37, 162.

Parol, admissible to explain receipt. *Buswell v. Poineer*, 37, 312; *Eaton v. Alger*, 2 Abb. 5.

Consideration of receipt may be shown by parol. *Barker v. Bradley*, 42, 316; 1 Am. Rep. 521.

Parol, to contradict receipt competent — copy of letter incompetent without notice to produce original — impeachment. *Foster v. Newbrough*, 58, 481.

Receipt not conclusive. *Boardman v. Gaillard*, 60, 614.

Receipt embodied in note explainable. *Smith v. Holland*, 61, 635.

When parol competent to explain receipt for money "payable on demand." *DeLavallette v. Wendt*, 75, 579; 31 Am. Rep. 494.

### 5. *General matters.*

In action on contract, when parol not admissible. *Sherman v. Mayor*, 1, 316.

Parol — of letter — of witnesses' conclusions. *Nichols v. Kingdom Iron Ore Co.*, 56, 618.

VIII. *Admissions and declarations.*1. *Of agent and principal.*

Unofficial statements of deputy sheriff not evidence against sheriff. *Barker v. Binninger*, 14, 270.

Declarations of driver of car carelessly driven over one, incompetent against employer in action of negligence. *Luby v. Hudson River R. Co.*, 17, 131.

Protest of master of vessel — when admissible against owners. *Atkins v. Ellwell*, 45, 753.

Declarations of agent made six months after accident incompetent. *Anderson v. Rome, etc., R. Co.*, 54, 334.

Declarations of agent subsequent to transaction incompetent. *White v. Miller*, 71, 118 ; 27 Am. Rep. 13.

Declarations of agent — contradicting immaterial cross-examination — offer to strike out. *Furst v. Second Ave. R. Co.*, 72, 542.

Declarations of clerk in making sale admissible. *Low v. Hart*, 90, 457.

Declarations of principal to agent — when not competent. *Crounse v. Fitch*, 7 Trans. App. 101.

2. *Of other third persons.*

Declarations of deceased partner that he and plaintiff were copartners, incompetent in action by survivor. *Brown v. Mailler*, 12, 118.

Admission of one of two joint contractors, not partners, does not bind the other. *Lewes v. Woodworth*, 2, 512.

Admissions by party competent against him in action by his heirs — motion to strike out. *Spaulding v. Hallenbeck*, 35, 204.

Declarations of joint owner, when competent against others. *Crippen v. Morss*, 49, 63.

Testator's declarations incompetent to show that a legacy was intended as payment of a debt. *Phillips v. McCombs*, 53, 494.

Declarations of principal subsequent to act to which they relate, not competent against surety. *Hatch v. Elkin*, 65, 489.

Declarations of persons referred to for information — prior declarations do not bind. *Cohn v. Goldman*, 76, 284.

When declarations of executor, as an individual, not in action by him in representative capacity. *Church v. Howard*, 79, 415.

Declarations of third persons in absence of party inadmissible. *Starin v. Kelly*, 88, 418.

Letter of third party — when inadmissible as declaration. *Tomlinson v. Miller*, 3 Keyes, 517.

3. *Of person affected by.*

In action on an agreement by a miller to take wheat and give flour therefor, evidence of subsequent declarations and conduct of defendant is not admissible to construe the contract. *Norton v. Woodruff*, 2, 153 ; *Bearss v. Copley*, 10, 93.

Declarations of party that he had heard statements inconsistent with testimony of his own witnesses is inadmissible. *Stephens v. Vroman*, 16, 381.

Declarations when not admissible in party's own favor. *Erben v. Lorillard*, 19, 299.

Effect of admission of maker of note on holder. *City Bank of Brooklyn v. McChesney*, 20, 240.

In action of breach of promise of marriage, declarations by defendant of his reasons, when admissible. *Johnson v. Jenkins*, 24, 252.

On issue whether goods were sold to one or another, cautions not to trust the one may be shown, and by cautioner. *Bonner v. Frauenthal*, 37, 166.

Declarations of sheriff holding execution not admissible to prove payment. *Woodgate v. Fleet*, 44, 1.

When admission in pleading in another action competent. *Cook v. Barr*, 44, 156.

Declarations of party to record competent although they contradict others called by adverse party — objection must be specific. *Williams v. Sargeant*, 46, 481.

Evidence of agreement of plaintiff to share recovery with his attorney is incompetent. *Sussendorf v. Schmidt*, 55, 319.

Declarations and acts of parties competent to show practical location of boundary or adverse possession. *Donahue v. Case*, 61, 631.

Declarations to show that release was executed on unexpressed conditions, incompetent. *Van Bokkelen v. Taylor*, 62, 105.

Effect of admission in answer given in evidence—estoppel. *Mott v. Consumers' Ice Co.*, 73, 543.

Declarations, when incompetent to prove dedication. *McCarthy v. Whalen*, 87, 148.

Declarations of witness showing hostile feelings admissible. *Schultz v. Third Ave. R. Co.*, 89, 242.

An admission of a party that an account was correct is admissible in evidence against him, though made when negotiating a settlement. *Bartlett v. Tarbox*, 1 Abb. 120; 1 Keyes, 495.

False representations, as to the settlement of former debts, made at time of purchase of goods, may be shown. *Byrd v. Hall*, 1 Abb. 286.

Evidence of verbal representations of the insured, not admissible. *Mayor of N. Y. v. Brooklyn Fire Ins. Co.*, 3 Abb. 251.

#### 4. Of owner or possessor of property.

Declarations of former owner of personalty not admissible to prove sale to one claiming under him. *Worrall v. Parmelee*, 1, 519.

Character of possession of land may be shown by declarations of person in possession, as against him and his claimants. *Pitts v. Wilder*, 1, 525.

In action by assignee of mortgage against mortgagor, the latter may not show declarations of mortgagee prior to assignment to prove usury. *Booth v. Sweeney*, 8, 276.

Declarations of deceased mortgagor inadmissible to establish usury. *Tousley v. Barry*, 16, 497.

In action for deceit in sale of land, statements by defendant after delivery of deed are competent. *Thomas v. Beebe*, 25, 244.

Declarations of party in possession are competent against him and his privies. *Gibney v. Marchay*, 34, 301.

Declarations of grantor after sale but while in possession incompetent as against grantee. *Vrooman v. King*, 36, 477.

Declarations of assignor after assignment incompetent to invalidate—what proof is competent. *Cuyler v. McCartney*, 40, 221.

In ejectment, on question of character of possession, the declarations of the person in possession are competent. *Moore v. Hamilton*, 44, 666.

Declarations of owner at sheriff's sale of land that he had no interest, competent as against his grantees and heirs. *Mattoon v. Young*, 45, 697.

Declarations of former occupant to characterize possession. *Morse v. Salisbury*, 48, 636.

Declarations of fraudulent assignor in possession competent. *Newlin v. Lyon*, 49, 661.

Admission by holder of title to land of parol agreement to sell, competent. *Chadwick v. Fonner*, 69, 404.

Declarations by seller after sale and delivery not competent against purchaser. *Burnham v. Brennan*, 74, 597.

Declarations of mortgagor, while owner and in possession, as to payments, incompetent as against grantee—one through whom the plaintiff derives title is incompetent to prove such declarations of a deceased mortgagor. *Footte v. Beecher*, 78, 155.

Declarations of assignor of chose in action not competent as against assignee's title. *Truax v. Slater*, 86, 630.

Declarations of seller not competent to impeach title of buyer. *Tabor v. Van Tassel*, 86, 642.

Declarations of former holder of note are inadmissible against a holder for value though made after maturity of note. *Clews v. Kehr*, 90, 633.

Of deceased grantor when incompetent. *Sanford v. Ellithorp*, 95, 48.

Declarations of assignor of mortgagor before assignment not competent to invalidate mortgage. *Earl v. Clute*, 1 Keyes, 36.

5. *Res gestæ*.

In action for personal injury plaintiff's complaints of pain may be proved. *Caldwell v. Murphy*, 11, 416.

In assault and battery plaintiff's complaints of pain made at and about time are competent. *Werely v. Persons*, 28, 344.

Declaration of public officer not admissible to bind municipal corporation unless part of *res gestæ*. *Cortland Co. v. Herkimer Co.*, 44, 22.

Conversation between conductor and ejected passenger — when not part of *res gestæ* inadmissible to show animus. *Hamilton v. New York Cent. R. Co.*, 51, 100.

Declarations of testator as to burning will, made before destruction, admissible as *res gestæ* — otherwise if made after. *Highmy v. People*, 79, 546.

Declarations made by person injured as to the circumstances half an hour after the injury are incompetent. *Waldele v. New York Cent., etc., R. Co.*, 95, 274.

IX. *Writings*.*Accounts and memoranda*(a.) *Accounts*.

When party produces his adversary's books of account in his own favor, he must take them also against himself. *Low v. Payne*, 4, 247.

Books of account not evidence of cash lent. *Id.*

Entries in books of bank and pass-book of maker of note held by bank, made while the bank owned the note, are evidence in a suit on the note by a transferee after maturity, to show payment, and are *prima facie* evidence of time when made. *Jermain v. Denniston*, 6, 276.

Bank books are not *per se* evidence against its customers. *White v. Ambler*, 8, 170.

When entries in notary's memorandum book competent. *Cole v. Jessup*, 10, 96.

Book entries — declarations — *res gestæ* — of good credit — parol, to explain ambiguity. *Moore v. Meacham*, 10, 207.

When some books of account have been given in evidence, opposite party may give the rest. *Pendleton v. Weed*, 17, 72.

Books of account, introduced by one party, may be used by other. *Dewey v. Hotchkiss*, 30, 497.

When special verdict may be taken as to apparent alterations in account books in evidence. *Kelly v. Indemnity Fire Ins. Co.*, 38, 322.

Entries in bank books charging mortgage to the president not proof of payment. *Whitehouse v. Bank of Cooperstown*, 48, 239.

As between stockholders books of corporation and sworn copies are competent to show its acts. *Hubbell v. Meigs*, 50, 480.

Entries by bank clerk can be proved only by clerk, if alive and within State. *Ocean Nat. Bank of New York City v. Carll*, 55, 440.

Surrogate's book of minutes does not supersede original minutes. *Haddow v. Lundy*, 59, 320.

Contents of account books — declarations of bankrupt as against assignee. *Von Sachs v. Kretz*, 72, 548.

Entries in party's own book not competent to prove upon whose credit loan was made. *Peck v. Von Keller*, 76, 604.

Paper containing statement of account, admissible on objection that account not sufficiently proved. *Green v. Disbrow*, 79, 1; 35 Am. Rep. 496.

Handwriting in books admitted may be compared by jury, — declarations showing acquaintance with signature. *Pontius v. People*, 82, 339.

Record of accidents kept at police station — when incompetent in action for negligence. *Hoffman v. New York Cent. R. Co.*, 87, 25; 41 Am. Rep. 337, note.

Original entries made on slate transferred to ledger — ledger properly received as book of original entries — when rule excluding does not apply. *McGoldrick v. Traphagen*, 88, 334.

Account books — settlements by ledger — transfer of entries from slate — books competent although party is competent witness. *Stroud v. Tilton*, 4 Abb. 324; 3 Keyes, 139.

In an action for materials furnished, the book of original entry is competent evidence. *Philben v. Patrick*, 3 Abb. 605.

Entry in party's book, competent to prove sale, if shown to have been read to and admitted correct by other party — actual value or unsoundness immaterial as to price. *Tanner v. Parshall*, 4 Abb. 356; 3 Keyes, 431.

#### (b.) Memoranda.

Memorandum only auxiliary and not substitute for oral testimony. *Russell v. Hudson River R. Co.*, 17, 134.

Memorandum of interest on note, when admissible on question of time of indorsement. *Guy v. Mead*, 22, 462.

Memorandum, not competent. *Marcy v. Shults*, 29, 346.

Copies of memoranda, when competent as statement in detail of testimony. *McCormick v. Pennsylvania Cent. R. Co.*, 49, 303.

Memorandum of conductor and regulations of railroad company, when admissible. *Barker v. New York Cent. R. Co.*, 24, 599.

Memorandum cannot be received unless writing identified. *Gilchrist v. Brooklyn Grocers' Mfg. Assoc.*, 59, 495.

Memorandum — witness may refer to list of items which he has made and list may be put in — mode of examination. *Howard v. McDonough*, 77, 592.

Memorandum — inventory, when competent. *Starin v. Kelly*, 88, 418.

Memorandum made by both parties admissible. *Bigelow v. Hall*, 91, 145.

#### 2. Letters

Objection to a series of letters is unavailing if any one is evidence. *Day v. Roth*, 18, 448.

Extracts from letters admissible. *Wright v. Cabot*, 89, 570.

If part of a letter is introduced the whole is admissible. *Grattan v. Metropolitan Ins. Co.*, 92, 274; 44 Am. Rep. 372.

#### 3. Other writings.

##### (a.) Public writings.

Return on execution, effect of, to show sale. *Wright v. Douglass*, 7, 564.

Return of inspectors of election not affected by visible erasure and alteration on quo warranto. *People v. Minck*, 21, 539.

Certificate, required but not made evidence by the statute, of assent of tax payers to issue of bonds, is not evidence for a bona fide holder of such assent. *People v. Mead*, 24, 114.

Exemplification of will must contain proofs. *Hill v. Crockford*, 24, 128.

Minutes of justice of peace competent to determine whether scope of action was changed from issue by evidence. *Thurst v. West*, 31, 210.

Judgment against personal representatives, when not competent in action to set aside intestate's deed. *Sharpe v. Freeman*, 45, 802.

Notary's certificate of protest founded on presentment by clerk is void — entries by deceased clerk in his register competent to prove presentment. *Gawtry v. Doane*, 51, 84.

Ballots — how far admissible as evidence. *People v. Livingston*, 79, 279.

Record of signal service department — when sufficiently certified "under oath." *Schle v. Brokhahus*, 80, 614.

Certificate of inspector of steamboat boiler — not competent as against a stranger except as to fact of inspection. *Erickson v. Smith*, 2 Abb. 64.

In probate proceedings, judgment-roll between parties, when competent. *Peck v. Callaghan*, 95, 73.

##### (b.) Photographs.

Photographs of deceased persons taken after death admissible to identify. *Ruloff v. People*, 45, 213.

Photograph of premises competent in action for injury to premises. *Cozzens v. Higgins*, 3 Keyes, 206.

(c.) *Miscellaneous.*

Effect of act of 1833 upon provision of Revised Statutes, as to requisites of acknowledgment to entitle instrument to be read or recorded in another county. *Wood v. Weiant*, 1, 77.

Bill of lading, by master, no evidence of quantity of replevied cargo in action against sheriff for loss. *Moore v. Westervelt*, 21, 108.

Evidence of bond by Delaware & Hudson Canal Company to bind owner for damages. *Selden v. Delaware & Hudson Canal Co.*, 29, 634.

Act of congress as to rule as to unstamped documents is applicable only to Federal courts. *People v. Gates*, 43, 40.

A writing competent in part is not made incompetent because another part is inadmissible. *Dutchess Company v. Harding*, 49, 321.

Verified answer is not evidence. *Stilwell v. Carpenter*, 62, 639.

When unexecuted written contract competent as *res gestæ*. *Eager v. Crawford*, 76, 97.

If plaintiff offer paper in evidence defendant is entitled to benefits of such facts as it contains. *Fitch v. Mayor*, 88, 500.

Ex parte affidavits upon which order of arrest is granted, not denied, are not admissible as evidence of the facts charged. *Talcott v. Harris*, 93, 567.

Writing referred to in oral agreement as containing some of the terms need not be proved as to execution. *Smith v. New York Cent. R. Co.*, 4 Abb. 263.

Subscribing witness must be produced to prove attested document. *Weigand v. Schel*, 4 Abb. 592.

X. *Particular subjects and issues.*1. *Agency.*

Averment of agent's authority is sustained by proof of ratification. *Hoyt v. Thompson's Exr.*, 19, 207.

That father has lent son money incompetent to show son's authority to sign

father's name. *Hammond v. Varian*, 54, 398.

Charging goods to agent is not conclusive on point of credit. *Foster v. Persch*, 68, 400.

Authority of agent of corporation not provable by testimony of officer. *Benninghoff v. Agricultural Ins. Co.*, 93, 495.

2. *Consideration.*

Under plea of non-assumpsit, without notice, evidence of partial want or failure of consideration inadmissible. *Eldridge v. Mather*, 2, 157.

Evidence of want of consideration not admissible, when. *Benedict v. De Groot*, 1 Abb. 125.

3. *Contracts.*

Telegrams as evidence of contract. *Beach v. Raritan, etc., R. Co.*, 37, 457.

When contract and deed may be read together to determine whether sale was by acre or piece. *Wilson v. Randall*, 67, 338.

Unsigned paper, when not competent to show contract — to show failure to perform — quantum meruit. *Flood v. Mitchell*, 68, 507.

Evidence of acceptance, in answer to claim that work was not according to contract — as to transactions with party dying before examination concluded — diagram. *Comins v. Hetfield*, 80, 261.

Under general denial, facts showing non-performance of contract admissible. *Chatfield v. Simonson*, 92, 209.

4. *Corporation.*

Evidence of principal place of business of corporation under Laws of 1854, chapter 232. *Western Transp. Co. v. Scheu*, 19, 408.

Judgment against corporation in action against stockholder. *Belmont v. Coleman*, 21, 96.

Judgment against manufacturing, not competent in action against trustees for failure to file report. *Miller v. White*, 50, 137.

Directors of corporation party, cannot be examined before trial, nor compelled to produce books or copies. *Boorman v. Atlantic & Pacific R. Co.*, 78, 599.

Record of judgment against corporation competent against stockholder — reopening case for putting in certain evidence does not authorize putting in other evidence. *Stephens v. Fox*, 83, 313.

Resolutions of directors of corporation, when competent in action to compel payment of dividends. *Boardman v. Lake Shore, etc., R. Co.*, 84, 157.

Evidence of incorporation of school trustees — as against trespasser, long possession sufficient. *Robie v. Sedgwick*, 4 Abb. 73.

#### 5. Custom and usage.

Evidence of local custom incompetent to control contract of reinsurance. *Mutual Safety Ins. Co. v. Hone*, 2, 235.

Evidence of commercial usage incompetent to control or modify a contract of sale, explicit or capable of being made so by proof of subject-matter. *Vail v. Rice*, 5, 155.

Usage of a bank not to allow grace upon checks payable on a future day is inadmissible. *Bowen v. Newell*, 8, 190.

Local custom to sell commercial paper pledged at private sale, inadmissible. *Wheeler v. Newbould*, 16, 392.

Local usage among banks not available to contradict rule of law. *Corn Exchange Bank v. Nassau Bank*, 91, 74; 43 Am. Rep. 655.

Local usage, when inadmissible. *Higgins v. Moore*, 34, 417.

When usage is part of contract — proof of knowledge of. *Walls v. Bailey*, 49, 464; 10 Am. Rep. 407.

Usage must be uniform, continuous and well settled. *Miller v. Burke*, 68, 615.

Evidence of usage — essentials. *Dickinson v. City of Poughkeepsie*, 75, 65.

Unreasonable custom — not to rely on representations of brokers as to responsibility of purchasers of cigars. *Fuller v. Robinson*, 86, 306; 40 Am. Rep. 540.

#### 6. Damages.

On question of value of goods, what they brought at auction is competent. *Campbell v. Woodworth*, 20, 499.

In action against sheriff as bail on mesne process, he cannot show debtor's insolvency in mitigation of damages. *Metcalf v. Stryker*, 31, 255.

On question of value, price paid on other business sales may be shown on cross-examination. *Wells v. Kelsey*, 37, 143.

In action for personal injury, proof of amount of injured party's earnings is competent. *Beisiegel v. New York Cent. R. Co.*, 40, 9.

Evidence of value, in action of conversion. *Gill v. McNamee*, 42, 44.

In action for value of services under contract void within statute of frauds, the compensation fixed by the contract not evidence of value, when. *Galvin v. Prentice*, 45, 162; 6 Am. Rep. 58.

What proper evidence of market value. *Durst v. Burton*, 47, 167; 7 Am. Rep. 428.

In action to recover for chartering vessel, customary price in that port may be shown. *Sturgis v. Hendricks*, 51, 635.

Value of one article cannot be shown by that of another closely resembling it. *Gouge v. Roberts*, 53, 619.

In determining value of services, comparison of amount of labor necessary to perform two different kinds of business is improper. *Siegel v. Lewis*, 54, 651.

Price current list in newspaper is not evidence of market value without extrinsic proof of sources. *Whelan v. Lynch*, 60, 469; 19 Am. Rep. 202.

Evidence of motive, competent in false imprisonment, on question of damages. *Voltz v. Blackmar*, 64, 440.

Judgment of another State held admissible upon subject of damages. *First Nat. Bank v. Fourth Nat. Bank*, 89, 412.

To prove the value of furniture at a given time, it is competent to show what it sold for at a public sale three months afterward. *Crounse v. Fitch*, 1 Abb. 475.



7. *Death.*

On question of probability of suicide, evidence that deceased was an infidel or atheist is incompetent. *Gibson v. American Mut. Life Ins. Co.*, 37, 580.

Northampton tables competent to show probable duration of life. *Schell v. Plumb*, 55, 592; *Sauter v. New York Cent., etc., R. Co.*, 66, 50; 23 Am. Rep. 18.

In action for dower record of probate of husband's will not competent to prove his death. *Carroll v. Carroll*, 60, 121; 19 Am. Rep. 144.

8. *Eminent domain.*

Evidence in proceedings to acquire land in city of New York for widening streets — consent of owners. *Embury v. Conner*, 3, 512.

In condemnation proceedings no proofs required of allegations not put in issue. *Matter of Boston & Hoosac, etc., R. Co.*, 79, 64.

9. *Fraud.*

Where fraud is charged in the suppression of information obtained from a letter defendant may show the contents of the letter. *Bronson v. Wiman*, 8, 182.

Affirmance of a contract alleged to have been fraudulently procured may be shown by declarations of the person setting up the fraud. *Id.*

Evidence of keeping house of ill-fame inadmissible on question of fraud. *Johnson v. Carnley*, 10, 570.

To impeach a chattel mortgage for fraud it is not competent to show other fraudulent mortgages on same goods. *Ford v. Williams*, 13, 577.

Parties may testify as to intent to defraud. *Stearns v. Gage*, 79, 102.

On question of fraudulent assignment assignor may be asked whether he intended to defraud. *Seymour v. Wilson*, 14, 567; *Griffin v. Marquardt*, 21, 121; *Forbes v. Waller*, 25, 430.

On question of fraudulent purchase evidence of similar contemporaneous frauds

is competent. Nature of evidence. *Hall v. Naylor*, 18, 588.

Evidence in action to recover money obtained by conspiracy to forge — accomplices — wife of accomplice — other crimes — statements of defendant — showing different testimony before grand jury. *New York Guard. and Indemnity Co. v. Gleason*, 78, 503.

When evidence incompetent to rebut charge of fraud. *Canaday v. Krum*, 83, 67.

Evidence in action for fraudulent representations. *Bradner v. Strang*, 89, 299.

City department books showing prices of similar work, to establish fraud from extravagant prices. *Matter of Righter*, 92, 111.

Evidence in action to set aside fraudulent conveyance. *Wright v. Nostrand*, 94, 31.

Evidence in action for fraud in inducing formation of partnership — misrepresentation — reliance. *Thorn v. Helmer*, 4 Abb. 408.

10. *Insurance.*

What necessary to authorize assessment by receiver of insolvent mutual insurance company. *Sands v. Kimbark*, 27, 147.

Secretary of insurance company may testify that he had no authority to waive condition — corroboration. *Adams v. Greenwich Ins. Co.*, 70, 166.

Not error to exclude question as to whether clause in policy favorable or unfavorable in insurance company. *Standard, etc., Co. v. Amazon*, 79, 506.

In action on insurance policy — parol, competent to show actual transaction in answer to claim of fraud — physician's testimony — opinion as to disease by non-expert. *Grattan v. Metropolitan Life Ins. Co.*, 80, 281; 36 Am. Rep. 617.

When evidence of inquiry by examining surgeon into pecuniary circumstances of applicant for life insurance competent. *Valton v. Loan Fund Assurance Soc.*, 1 Keyes, 21.

11. *Intent.*

On question of good faith of purchase, purchaser may be examined as to his intent. *Bedell v. Chase*, 34, 386.

When issue is intent, party may testify to his intent. *Thurston v. Cornell*, 38, 281.

When material, party may testify to his intent. *Cortland Co. v. Herkimer Co.*, 44, 22.

See ante, 9.

12. *Judgment.*

Evidence incompetent to impeach judgment in collateral proceeding. *McCarthy v. March*, 5, 263.

Evidence admissible to apply former judgment in trespass to particular part of premises. *Dunkel v. Wiles*, 11, 420.

Judgment of another State sued on here may be impeached for fraud. *Dobson v. Pearce*, 12, 156; *Mandeville v. Reynolds*, 68, 542; *O'Mahoney v. Belmont*, 62, 145.

Attestation of judgment of another State — when insufficient. *Morris v. Patchin*, 24, 394.

Authentication of foreign judgment — requisites and effect. *Lazier v. Westcott*, 26, 146.

Record of judgment of another State — certificate of "foregoing" attestation speaks only of the last one — recital of writ, when sufficient without setting out copy. *Burnell v. Weld*, 76, 103.

13. *Marriage, divorce, etc.*

Evidence of promise of marriage — of seduction — of defendant's pecuniary circumstances — of defendant's lewd conduct. *Kniffen v. McConnell*, 30, 285.

Wife's opinion not competent against husband. *Stillwell v. New York Cent. R. Co.*, 34, 29.

Complaints of injured wife to physician on surgical examination competent in action by husband for injury to her; also declarations as to health. *Matteson v. New York Cent. R. Co.*, 35, 487.

What sufficient to prove adultery — party cannot impeach his own witness — testimony of alleged paramour denying criminality. *Pollock v. Pollock*, 71, 137.

Evidence to prove marriage — when insufficient. *Chamberlain v. Chamberlain*, 71, 423.

Evidence in crim. con. — judgment record of divorce — of usual manner of marriage in foreign country. *Wottrich v. Freeman*, 71, 601.

Mere association with no criminating circumstances, will not sustain charge of adultery. *Conger v. Conger*, 82, 603.

Evidence of marriage by cohabitation — letters — competency of witness. *Badger v. Badger*, 88, 546; 42 Am. Rep. 263.

14. *Negligence.*

Evidence of absence of negligence inadmissible in action of nuisance. *Tremain v. Cohoes Co.*, 2, 163.

In action against railroad for fire set by locomotive sparks, evidence of emission of sparks on other occasions is competent in rebuttal. *Sheldon v. Hudson R. R. Co.*, 14, 218.

Evidence of arrest of driver of car for running over one, not competent in action of negligence — so of his declarations. *Luby v. Hudson R. R. Co.*, 17, 131.

In action of negligence party may show injured limb to surgeon testifying before jury. *Mulhado v. Brooklyn City R. Co.*, 30, 370.

In action for injury by defect in railway track, proof of subsequent repairs is incompetent. *Reed v. New York Cent. R. Co.*, 45, 574.

In action for accident on bridge — that one side had no railing — that defendant erected railing day after, admissible on question of negligence. *Morrell v. Peck*, 88, 398.

When accident affords prima facie proof. *J. Russell Manuf'g Co. v. New Haven Steamboat Co.*, 50, 121; *Mullen v. St. John*, 57, 567; *Roberts v. Johnson*, 58, 613; *Edgerton v. New York, etc., R. Co.*, 39, 229; *Brown v. N. Y., etc.*, 32, 597.

When does not. *Deyo v. N. Y. Cent.*, 34, 12; *McPadden v. N. Y. Central, etc.*, 44, 478.

Of communication of fire to greater distance by other engines, competent. *Crist v. Erie Ry. Co.*, 58, 638.

When evidence as to how many times a scow had been accidentally sunk competent in action for sinking it by negligence. *Baird v. Daly*, 68, 547.

In action for accidental killing at highway and railway crossing as to what occurred after, when *res gestæ*—custom to keep flagman. *Casey v. New York Cent., etc., R. Co.*, 78, 518.

That life of deceased was insured, incompetent in action for causing death. *Kellogg v. N. Y. C. & H. R. R. Co.*, 79, 72.

In action of negligence for not guarding open draw-bridge by gates—custom—opinion. *Hart v. Hudson River Bridge Co.*, 84, 56.

All inferences to be drawn from the proof in cases of negligence are for the jury. *Bernhard v. Rens. & Sar. R. Co.*, 1 Abb. 131; *Hart v. Hudson River Bridge Co.*, 84, 56; *Belton v. Baxter*, 58, 411.

In action for injury by explosion of fire-works wrongfully kept in city—other accidents—explosive character—anonymous warnings to city marshal—exception. *Fillo v. Jones*, 2 Abb. 121; 4 Keyes, 328.

#### 15. Negotiable instrument.

A check drawn on and paid by a bank is no evidence of drawer's indebtedness to the bank. *Wood v. Ambler*, 8, 170.

To rebut defense that indorsement was forged, it is proper to show that the indorser had previously given the maker indorsements in blank. *Van Wyck v. McIntosh*, 14, 439.

What is sufficient evidence of assignment of note. *Brown v. Richardson*, 20, 472.

#### 16. Partnership

In suit on note made by retired partner in name of firm, evidence of payment of

judgment by default against firm in another like case is competent. *City Bank of Brooklyn v. Dearborn*, 20, 244.

On partnership accounting. *Gandolfo v. Appleton*, 40, 533.

Of motion, when competent to contradict inference of partnership. *Tracy v. McManus*, 58, 257.

Evidence justifying inference that surviving partner to continue business on his own account. *Collender v. Phelan*, 79, 366.

#### 17. Payment.

Acknowledgment of satisfaction of bond and mortgage by legatee evidence of payment of interest thereon. *Giddings v. Seward*, 16, 365.

Evidence of payment by mortgagor as against assignee. *Foster v. Beals*, 21, 247.

Discharge of mortgage on the record, and possession of it and the bond, canceled, by owner of the land, *prima facie* shows payment. *Braman v. Bingham*, 26, 483.

Possession of note by maker—when not evidence of discharge. *Grey v. Grey*, 47, 552.

As to what account moneys credited in account rendered were paid upon. *Richard v. Wellington*, 66, 308.

That assignee has not paid one preferred creditor incompetent to show that he has not paid another. *Whintringham v. Dibble*, 66, 634.

After evidence of a payment of \$1,000 to a decedent, evidence that no such sum was deposited in his accustomed bank at or about that time is incompetent. *Carroll v. Deimel*, 95, 252.

#### 18. Slander.

In action for libel on character of an attorney of Superior Court, evidence of denial of admission to practice in Supreme Court is inadmissible. *Huff v. Bennett*, 6, 337.

In slander facts may be proved in mitigation although tending to justify. *Bush v. Prosser*, 11, 347.

19. *Title.*

Evidence of title—ancient will—recitals in statute—tradition as to destruction of letters-patent. *McKinnon v. Bliss*, 21, 206.

Of title and possession of unimproved lands. *Miller v. Long Island R. Co.*, 71, 380.

State map competent to show title to State lands. *Carpenter v. City of Cohoes*, 81, 21; 37 Am. Rep. 468.

When evidence concerning title to real property may be given in justice's court. *Bowyer v. Schofield*, 1 Abb. 177.

Of ownership of vessel—proceedings in rem for supplies, incompetent to prove. *Van Vechten v. Griffiths*, 1 Keyes, 104.

When judgment record competent to show failure of title—offer to show. *Farnham v. Hotchkiss*, 2 Keyes, 9.

20. *Miscellaneous.*

Officer justifying under execution as against claimant under alleged fraudulent sale by defendant must show judgment as well as execution. *Sheldon v. Van Buskirk*, 2, 473.

In action for a false imprisonment directed by defendant, he cannot show judgment and execution in his favor under plea of not guilty, in bar or in mitigation. *Coats v. Darby*, 2, 517.

In action for not delivering goods to be paid for on delivery, no demand need be proved, but evidence of ability and readiness is sufficient. *Vail v. Rice*, 5, 155.

Evidence of waiver of tender supports averment of tender. *Holmes v. Holmes*, 9, 525.

On issue of employment proof of conduct of alleged employee inconsistent with employment is competent—also on value of services. *Miller v. Irish*, 63, 652.

Evidence of practical location of public boundary. *Hunt v. Johnson*, 19, 279.

Evidence of defendant's ill will admissible in assault and battery—omission to deny charge of having committed. *Jewett v. Banning*, 21, 27.

Evidence of appointment of receiver—of solvency. *Potter v. Merchants' Bank*, 28, 641.

On question whether money was paid by guardian and administrator for widow or for wards, evidence that he had no funds of wards is immaterial. *Elliott v. Gibbons*, 31, 67.

Evidence of act of war by Confederate vessel. *Swinerton v. Columbian Ins. Co.*, 37, 174.

Evidence to show circumstances in action by sheriff on indemnity bond. *Griffiths v. Hardenbergh*, 41, 464.

In action of assault on arrest against police officer, threats and violence of plaintiff may be shown. *Fulton v. Staats*, 41, 498.

What is evidence of loan to firm and not to individual partners. *Tremper v. Conklin*, 44, 58.

Newspaper account of accident incompetent—declarations—negotiations for settlement. *Downs v. New York Cent. R. Co.*, 47, 83.

In action against physician for malpractice, proof that he had presented no claim for services, incompetent. *Baird v. Gillett*, 47, 186.

Rules of evidence by congress not binding on State courts. *Caldwell v. New Jersey Steamboat Co.*, 47, 282.

Under general denial, letters of administration prima facie show appointment. *Belden v. Meeker*, 47, 307.

Of jurisdiction of court of limited jurisdiction may be shown aliunde—inquisition de lunatico inquirendo not conclusive evidence of incapacity. *Van Deusen v. Sweet*, 51, 378.

Of executor's recognition of claim of deceased executor for commissions. *Scholey v. Mumford*, 64, 521.

In action against railway company for unlawful ejection of passenger, conductor may testify to his belief that ticket had not been surrendered. *Yates v. New York Cent., etc., R. Co.*, 67, 100.

Of locus in quo in trespass—agreement as to location of line. *Wood v. Lafayette*, 68, 181.

Objection of infamy must be sustained by proof. *Elverson v. Vanderpoel*, 69, 610.

In action on contract of indemnity against payments to be made to State on sale of lands, record of judgment of eviction is prima facie evidence against defendant. *Taylor v. Barnes*, 69, 430.

Destruction of vouchers without fraudulent intent does not prevent recovery. *Steele v. Lord*, 70, 280; 26 Am. Rep. 602.

Witness having testified as to purchase of articles, may also as to quantity and amount. *Green v. Disbrow*, 79, 1; 35 Am. Rep. 496.

On issue as to whether mortgage was payment or security—value—abandonment—declarations of joint debtor. *Wallis v. Randall*, 81, 164.

In action on guaranty of payment of mortgage, defendant may prove breach of parol agreement of plaintiff for value to keep premises insured. *Van Brunt v. Day*, 81, 251.

Evidence in action for conspiracy. *Neudecker v. Kohlberg*, 81, 296.

Method and sufficiency of proof as to foreign laws. *Hynes v. McDermott*, 82, 40; 37 Am. Rep. 538.

Evidence of claim against estate for services as nurse, etc. *Fredenburg v. Biddlecom*, 85, 196.

Of lawful acts as links in chain constituting tort. *Rich v. New York Cent., etc., R. Co.*, 87, 382.

Evidence in special proceedings before board of audit for allowances under contract with State. *Swift v. State*, 89, 52.

Evidence of good faith in action for conversion. *King v. McKellar*, 94, 317.

Evidence of practical location of boundary. *Ratchiffe v. Cary*, 4 Abb. 4.

Witness cannot be required to ask a person in court for information—impeachment—specific acts inadmissible—affidavits on motion for new trial inadmissible. *Wehrkamp v. Willett*, 4 Abb. 548.

In action to enforce lien on collaterals. *Dorsheimer v. Nichols*, 2 Keyes, 260.

Of execution of memorandum. *Smith v. New York Cent. R. Co.*, 4 Keyes, 180.

## XI. Criminal evidence.

See CRIMINAL LAW.

## XII. Practice as to receipt of evidence.

Admission of evidence by incompetent witness not cured by objector's subsequent proof by competent witness. *Worrall v. Parmelee*, 1, 519.

Error in excluding evidence cured by subsequent admission. *Barringer v. People*, 14, 593.

Voir dire is matter of right. *Seeley v. Engell*, 13, 542.

Exclusion of competent evidence cured by subsequent admission—grounds of objection must be stated. *Fountain v. Pettee*, 38, 184.

Communication to attorney, when privileged. *Williams v. Fitch*, 18, 546.

Communications to attorney in presence of all parties not privileged. *Britton v. Lorenz*, 45, 51.

Party not required on trial to produce documents, proved de bene esse, until he would read them in evidence. *Edmonstone v. Hartshorn*, 19, 9.

Admission of leading questions discretionary—witness stating his understanding of conversation—admission of trustee of school district does not affect title to its land. *Walker v. Dunsbaugh*, 20, 170.

Variance—objection. *Bank of Cooperstown v. Woods*, 28, 545.

It is error to exclude defendant's testimony on hypothesis that if jury should believe plaintiff's, the defendant would be estopped. *McIntyre v. Clapp*, 31, 569.

Cross-examination—limits of disparaging and irrelevant evidence. *Great Western T. Co. v. Loomis*, 32, 127.

Cross-examination—laying basis for contradiction. *Rockwell v. Brown*, 36, 207.

Objection to competency of witness must be specific. *Hoxie v. Allen*, 38, 175.

Error in excluding, obviated by subsequent admission—general objection insufficient—harmless error. *Matter of Crosby v. Day*, 81, 242.

Evidence permitted without objection cannot be struck out. *Quin v. Lloyd*, 41, 349.

Evidence cannot be struck out when none but general objection was made on its admission. *Levin v. Russell*, 42, 251.

Objection to copy as incompetent and immaterial does not raise objection that it is a copy. *Atkins v. Elwell*, 45, 753.

Objection not specifying valid ground — error to exclude, although a good ground exists. *Height v. People*, 50, 392.

Remedy when effect has been destroyed by subsequent evidence. *Gawtre v. Doane*, 51, 84.

Extent of cross-examination discretionary, subject to correction for plain abuse. *White v. McLean*, 57, 670.

Court may strike out clearly immaterial testimony admitted without objection. *Stokes v. Johnson*, 57, 673.

General objection does not raise question of admissibility under pleadings. *Schwarz v. Oppold*, 74, 307.

Order of proof — conversations with plaintiff's deceased husband — relevancy — hearsay — motion to strike out — whole conversation competent when part has been given. *Platner v. Platner*, 78, 90.

Objections need not be repeated relating to same class and subject-matter. *Church v. Howard*, 79, 415.

Receiving incompetent, to be made competent — declarations as to other similar transactions to disprove usury — harmless error — witnesses' belief — chattel mortgage. *Bayliss v. Cockcroft*, 81, 363.

When improper evidence not objected to, excluding discretionary with court, exception to the overruling of objection made after evidence received not available. *Fontius v. People*, 82, 339; *Marks v. King*, 64, 628.

Objection must be specific. *Wilson v. New York Cent. R. Co.*, 2 Trans. App. 298.

Error in admission of evidence to answer immaterial matter, immaterial. *Bronson v. Tuthill*, 3 Keyes, 32.

Immaterial whether competent or not if facts are found independently of it. *Secor v. Lord*, 3 Keyes, 525.

### XIII. Admissibility and effect of evidence.

Effect of answer in equity. *Jacks v. Nichols*, 5, 178.

Whole of conversation competent when part has been given. *Rouse v. Whited*, 25, 170.

Competent to prove waiver of rights under an order for payment of money, after delivery. *Parker v. City of Syracuse*, 31, 376.

Evidence to palliate always competent to answer matter of aggravation. *Millard v. Brown*, 35, 297.

Uncontradicted witness cannot be disregarded. *Fordham v. Smith*, 46, 683.

Uncontradicted testimony of a single interested witness raises question for jury. *Kavanagh v. Wilson*, 70, 177.

Evidence of uncontradicted but interested witness not conclusive. *McNulty v. Hurd*, 86, 547.

Evidence of uncontradicted but impeached and interested witness must be submitted to jury — whole pleading must be taken together, but not estopped. *Gildersleeve v. Landon*, 73, 609.

Refusal to charge that if jury believe certain witnesses they must find for party in whose favor they testified, not error. *Chapman v. Erie Ry. Co.*, 55, 579.

Testimony of unimpeached witness cannot be disregarded. *Moran v. McLarty*, 75, 25.

Force of undisputed interested testimony. *Brooklyn Crosstown R. Co. v. Strong*, 75, 591.

When uncontradicted evidence raises question of fact for jury. *Koehler v. Adler*, 78, 287.

On question as to whom credit was given to, proof of poverty of one party, and of the other's payment of his debts, incompetent. *Green v. Disbrow*, 56, 334.

Showing broken hook to jury — witness' compensation as affecting credibility — opinion on issue of identity. *King v. New York Cent. R. Co.*, 72, 607.

Testimony untrue in part but not corruptly, not necessarily to be disregarded entirely. *Deering v. Metcalf*, 74, 501.

Question calling for construction of facts, incompetent — memorandum made by witness, when competent to contradict him. *Nicolay v. Unger*, 80, 54.

Evidence of matter not pleaded inadmissible. *Metropolitan Nat. Bank v. Loyd*, 90, 530.

Jury entitled to disbelieve interested witness as to uncontradicted statements. *Wohlfahrt v. Beckert*, 92, 490; 44 Am. Rep. 406.

#### XIV. Witnesses and their competency.

##### 1. Commissions and depositions.

Objection to deposition, when must be raised on the taking. *Ward v. Whitney*, 8, 442.

Objection to commission for omission to answer cross interrogatory must be raised before trial. *Vilmar v. Schall*, 61, 564.

Deposition — objection to, on trial — scope and effect of. *Commercial Bank of Pennsylvania v. Union Bank of New York*, 11, 203.

Commission — requisites of certificate on wrapper — identification of exhibits. *Brumskill v. James*, 11, 294.

Commission to take testimony, not under seal, is null. *Ford v. Williams*, 24, 359.

Deposition — foundation for admission. *Bronner v. Frauenthal*, 37, 166.

General objection to deposition before read, unavailing. *Champney v. Blanchard*, 39, 111.

Deposition on commission not excluded because answer to cross-interrogatory not full. *Baker v. Spencer*, 47, 562.

Evidence on commission, not incompetent because not responsive if otherwise competent. *Fassin v. Hubbard*, 55, 465.

Commission — “and further deponent knoweth not,” when held answer to general cross interrogatory. *Gates v. Beecher*, 60, 518; 19 Am. Rep. 207.

Objection to imperfect execution of commission cannot be raised at trial. *Wright v. Cabot*, 89, 570.

Suppression of commission, when must be made on motion before trial. *Newton v. Porter*, 69, 133; 25 Am. Rep. 152.

Party in interest, not of record, cannot be examined before trial as “party to action.” *Seeley v. Clark*, 78, 220.

Deposition of party read — may also be examined. *Misland v. Boynton*, 79, 630.

Commission to take testimony out of State cannot issue in disbarment proceeding. *Matter of an Attorney*, 83, 164.

Deposition of party before trial may not be ordered to be taken before referee. *Berdell v. Berdell*, 86, 519.

##### 2. Impeachment and credibility.

Party calling witness cannot impeach his character or show his contrary statements, but may contradict him as to particular fact. *Thompson v. Blanchard*, 4, 303.

In crim. con. the plaintiff cannot show his wife's previous good character, in the absence of impeaching evidence. *Pratt v. Andrews*, 4, 493.

On cross-examination a witness may be asked concerning his expressions of hostility against the opposite party, and if he denies them, they may be proved by others. *Newton v. Harris*, 6, 345.

When contrary statements of witness incompetent upon cross-examination. *Bearss v. Copley*, 10, 93.

Cross-examination as to contradictory statements — discrediting by others. *Patchin v. Astor Mutual Ins. Co.*, 13, 268.

To impeach, minutes of former testimony of a living witness taken by counsel who testifies to their correctness but has no recollection independent, may be read by him. *Halsey v. Sinsebaugh*, 15, 485.

Witness cannot be discredited by proof of contradictory statements, until his attention has been particularly called to them. *Pendleton v. Empire Stone Dressing Co.*, 19, 13; *Lee v. Chadsey*, 3 Keyes, 225.

Witness not to be asked if he has been convicted of a crime, although he does not object. *Newcomb v. Griswold*, 24, 298.

Party may object to like questions, although witness does not. *Id.*

Evidence not competent to contradict witness as to a collateral fact testified to on cross-examination without objection. *Plato v. Reynolds*, 27, 586.

Evidence of witness not to be disregarded because inconsistent with his

former testimony — charge as to discrepancy. *Dunn v. People*, 29, 523.

What proper to impeach married woman's general character. *Shepard v. Parker*, 36, 517.

Evidence of inconsistent statements out of court — form of question — opinions — privilege of physician. *Sloan v. New York Cent. R. Co.*, 45, 125.

Mode of impeachment by inconsistent writings. *Romertze v. East River Nat. Bank*, 49, 577.

Right to interrogate party's own witness as to previous inconsistent declarations. *Bullard v. Pearsall*, 53, 230.

Party may not impeach his own witness by proof of his contradictory statements. *Coulter v. American Merch. Un. Ex. Co.*, 56, 585.

Plaintiff may be asked, in the discretion of the court, where usury is pleaded, whether he is not under indictment for usury. *Southworth v. Barnett*, 58, 659.

Impeachment — where witness may testify that he would believe, although he does not know general character. *Adams v. Greenwich Ins. Co.*, 70, 66.

Evidence of hostility of witness — remoteness and uncertainty. *Gale v. New York Cent., etc., R. Co.*, 76, 594.

Discharge of servant for inefficiency or drunkenness cannot be proved by way of impeachment — when denied, bound by answer. *Kirkpatrick v. N. Y. Cent. & H. R. Co.*, 79, 240.

Evidence of interest — party may contradict his own interest. *Hunter v. Wet-sell*, 84, 549 ; 38 Am. Rep. 544.

Impeachment — specific acts may not be shown. *Conley v. Meeker*, 85, 618 ; *Wehrkamp v. Willett*, 1 Keyes, 250.

Owner of stock in corporation not an interested witness adversely to it. *Trustees Can. Acad. v. McKechnie*, 90, 618.

Evidence showing interest in pecuniary condition admissible as affecting credibility. *Meltzer v. Doll*, 91, 365.

Letters written previous to giving of an order introduced in evidence held admissible as affecting credibility of witnesses. *Mead v. Shea*, 92, 122.

The credibility of an interested witness is for the jury. *Honegger v. Wettstein*, 94, 252.

To impeach witness — character some years previous competent. *Graham v. Chrystal*, 2 Keyes, 21.

Foundation for contradicting witness — impeached witness competent — jury may, but not bound to disregard. *Lee v. Chadsey*, 2 Keyes, 543.

Laying basis for contradicting witness — proof that he said he would swear false — disregarding testimony. *Lee v. Chadsey*, 3 Keyes, 225.

Impeachment — witnesses need not be asked if they would believe the witness under oath — circumstances of examination — charge. *Wright v. Paige*, 3 Keyes, 581 ; 3 Trans. App. 134.

### 3. Transactions with deceased party.

That conversation was had with deceased person, not incompetent under Code of Procedure, section 399. *Hier v. Grant*, 47, 278.

Evidence of deceased witness on former trial inadmissible if he would be incompetent under Code of Procedure, section 111. *Eaton v. Alger*, 47, 345.

In action against surviving partner, party cannot testify to conversation between him and deceased partner. *Green v. Edick*, 56, 613.

Party may testify to statements made by deceased person to that person's counsel. *Cary v. White*, 59, 336.

Personal communication with deceased person. *Brague v. Lord*, 67, 495.

Transaction with deceased party. *Chadwick v. Fonner*, 69, 404 ; *Ballou v. Ballou*, 78, 325.

Personal transaction with deceased — objection. *Tooley v. Bacon*, 70, 34.

Where "a person interested in the event," within section 829 of the Code of Civil Procedure, testifies, evidence of same facts by others does not cure the error nor submission to jury on other grounds. *Church v. Howard*, 79, 415.

Witness competent to testify on own behalf — called by adverse party — cross-



examination to explain—Code of Procedure, section 399. *Merritt v. Campbell*, 79, 625.

Party may testify to transactions with agent of deceased person. *Pratt v. Elkins*, 80, 198.

Parting with a note is a "personal transaction"—title of assignee of non-negotiable note cannot be affected by declarations of assignor after assignment. *Van Gelder v. Van Gelder*, 81, 625.

"Personal transaction." *Wadsworth v. Heermans*, 85, 639.

When evidence competent to answer testimony of deceased person concerning same transaction. *Potts v. Mayer*, 86, 302.

When special and residuary legatee not within prohibition of section 829 of the Code. *Carpenter v. Soule*, 88, 251; 42 Am. Rep. 248.

Evidence of party as to transaction with deceased person—extraneous facts competent—contradiction. *Pinney v. Orth*, 88, 447.

Conversation with deceased grantor of adversary in action involving title cannot be testified to by party. *Pope v. Allen*, 90, 298.

Witness in privity with party cannot testify as to transaction with deceased assignor to other party. *Smith v. Cross*, 90, 549.

"Transaction or communication" includes conduct, actions and statements not addressed to witness. *Holcomb v. Holcomb*, 95, 316.

— what is, between draftsman of will and testator. *Matter of Will of Smith*, 95, 516.

See WITNESS.

#### 4. Refreshing memory.

Witness may refresh his memory by reference to memorandum if he can thereafter swear to facts from recollection. *Huff v. Bennett*, 6, 337.

Judge's minutes not competent to discredit witness on a subsequent trial, where judge cannot testify to their correctness. *Id.*

Hearsay—refreshing recollection of examiner's own witness. *O'Hagan v. Dillon*, 76, 170.

#### 5. Privileged testimony.

Opinion of physician from appearance of patient. *Grattan v. Metropolitan Life Ins. Co.*, 92, 274; 44 Am. Rep. 372.

Communications to attorney. *Williams v. Fitch*, 18, 546.

To attorney in presence of all parties not privileged. *Britton v. Lorenz*, 45, 51.

See CRIMINAL LAW; WITNESS; and various specific titles.

### Exceptions.

See APPEAL; EVIDENCE; TRIAL

### EXCISE.

Acts of 1857, chapter 628, section 14, and 1870, chapter 175, section 4, construed together—license to sell liquors to be drunk on premises invalid to any but inn-keepers. *People v. Smith*, 69, 175.

Actions under act of 1857 not abated by act of 1870. *Board of Excise of Ontario Co. v. Garlinghouse*, 45, 249.

Special charter provision for bringing actions—act of 1857, chapter 628—license contrary to vote of electors under provision for local option is no protection. *Village of Gloversville v. Howell*, 70, 287.

Commissioners in New York city properly appointed under general act of 1870. *People v. Morrison*, 78, 84.

Under act of 1879, chapter 175, section 2, in all cities except New York and Brooklyn all appointments of commissioners are to be made by mayor. *People v. Gates*, 56, 387.

Commissioners cannot be appointed orally. *People v. Murray*, 70, 521.

Commissioners may revoke licenses in Brooklyn. *People v. Comm'rs of Police*, 59, 92.

Commissioners cannot license non-resident. *People v. Davis*, 36, 77.

Commissioners cannot delegate authority. *Board of Excise v. Sackrider*, 35, 154.

Commissioners may employ an attorney at county charge to prosecute for penalties. *People v. Supervisors of Delaware Co.*, 45, 196.

Offense of selling liquor to intoxicated persons, Laws of 1857, chapter 628, section 18, not indictable. *People v. Hislop*, 77, 331.

Treasurer of Inebriates' Home, Kings county, entitled to percentage of excise money — mandamus. *People v. Board of Police, etc.*, 63, 623.

Conviction of bar-tender of licensee for offense against act of 1873, annuls license. *People v. Myers*, 95, 223.

See CIVIL DAMAGE ACT; CONSTITUTIONAL LAW; CRIMINAL LAW.

## EXECUTION.

### I. Against the person.

#### II. Against property.

##### 1. Issue.

##### 2. Levy.

(a.) *Property leviable.*

(b.) *What constitutes.*

(c.) *Sale.*

(d.) *Sale of lands.*

(e.) *Exemption.*

(f.) *Miscellaneous.*

##### 3. Lien of.

##### 4. Redemption.

##### 5. General matters.

### I. Against the person.

Requisites of. *Hutchinson v. Brand*, 9, 208.

Remedy for illegal arrest, how waived. *Smith v. Knapp*, 30, 581.

To authorize arrest under in New York city District Court, the right must be stated in judgment. *Carpenter v. Willett*, 31, 90.

Authorized by judgment for conversion. *Richtmeyer v. Remsen*, 38, 206.

When cannot issue. *Wood v. Henry*, 40, 124; *Elwood v. Gardner*, 45, 349.

Order setting aside, justifies release. *Pinckney v. Hegeman*, 53, 31.

A justice cannot on a subsequent day order, unless the right to arrest has already been passed upon. *Carpentier v. Willett*, 1 Abb. 312; 1 Keyes, 510.

Cannot issue against defeated plaintiff on judgment for costs in action to recover real property. *Merritt v. Carpenter*, 2 Keyes, 462.

Cannot issue in action to recover real property. *Merritt v. Carpenter*, 3 Keyes, 142.

### II. Against property.

#### 1. Issue.

On motion, by assignee of judgment for leave to issue, it is no answer that judgment debtor is assignee of greater amount in judgments against moving party — practice. *Betts v. Garr*, 26, 383.

Party issuing may bind sheriff by direction as to which of several defendants the collection shall be made from. *Root v. Wagner*, 30, 9

Against estate — when leave improperly granted by surrogate — his leave necessary. *Marine Bank of Chicago v. Van Brunt*, 49, 160.

Not signed by clerk, as required, by section 64, Code of Procedure, still protects sheriff in making levy. *Hill v. Haynes*, 54, 153.

Surety on undertaking in claim and delivery cannot object to irregularity in issuing. *Harrison v. Wilkin*, 78, 390.

Not directing collection of interest, none can be collected on it or subsequent execution. *Todd v. Botchford*, 86, 517.

Omission of teste is mere irregularity. *Douglas v. Haberstro*, 88, 611.

#### 2. Levy.

##### (a.) *Property leviable.*

When levied on goods liable to distress, and landlord has claimed them, court may order payment of monsy into court. *Acker v. Ledyard*, 8, 62.

As against assignee of B. sheriff cannot levy on moneys in his hands collected upon execution in favor of B. *Baker v. Kenworthy*, 41, 215.

Property consigned, title not to pass until payment, not liable to sale on execution against consignee. *Cole v. Mann*, 62, 1.

Where a seller was authorized, under a contract to retain goods sufficient to pay notes or drafts unpaid, vendee has no leviable interest therein. *Tuthill v. Bogart*, 79, 215.

#### (b.) What constitutes.

Manual interference with chattels not necessary to a levy. *Barker v. Bining*, 14, 270; *Elias v. Farley*, 3 Keyes, 398; 2 Abb. 11.

Manual seizure not essential to levy—stay does not constitute abandonment. *Bond v. Willett*, 31, 102; 1 Keyes, 377; 1 Abb. 165.

What is valid levy on goods—when sheriff may take goods substituted by debtor for others levied on. *Roth v. Wells*, 29, 471.

Ratification of illegal levy. *Brainerd v. Dunning*, 30, 211.

Levy after return day invalid. *Smith v. Smith*, 60, 161.

Officer may not remove property from possession of lienor. *Truslow v. Putnam*, 1 Keyes, 568.

#### (c.) Sale.

Notice by purchaser to sheriff not to pay over amount of bid does not impair his title. *Spraker v. Cook*, 16, 567.

Purchaser does not get title to goods of A. wrongfully sold as those of B., the judgment debtor. *Chambers v. Lewis*, 28, 454.

Purchaser under void—when can recover purchase-money. *Schwinger v. Hickok*, 53, 280.

Sheriff accepting check on sale liable to creditor for amount thereof. *Robinson v. Brennan*, 90, 208.

The purchaser at a wrongful sale on execution is estopped from setting up

when sued that he was merely an agent in the purchase. *Baltes v. Ripp*, 1 Abb. 78.

#### (d.) Sale of lands.

Against grantee by quit-claim deed of one in possession under contract of purchase gives no title. *Sage v. Cartwright*, 9, 49.

Sale of several lots in gross is voidable and not void. *Cunningham v. Cassidy*, 17, 276.

Sufficiency of notice of sale of lands. *Olcott v. Robinson*, 21, 150.

Death of debtor—notice of sale of real estate—requisites and omission—redemption—assignment of certificate. *Wood v. Morehouse*, 45, 368.

#### (e.) Exemption.

Under Laws of 1842, chapter 157, section 2, appraisers may set off specific articles of furniture. *Kain v. Fisher*, 6, 597.

A man having a wife and relatives and servants, living with him, although no children, has a "family." *Id.*

Householder cannot waive prospective exemption. *Kneettle v. Newcomb*, 22, 249.

"Team"—evidence. *Wilcox v. Hawley*, 31, 648.

Extends to partnership property. *Steward v. Brown*, 37, 350.

Plaintiff liable, in an execution wrongfully levied on property exempt from execution, if present at the levy. *Armstrong v. Dubois*, 1 Abb. 8.

Of property from process—debtor not bound to point out—officer may not claim for one creditor waiver in favor of another. *Frost v. Mott*, 34, 253.

#### (f.) Miscellaneous.

When levy is satisfaction—rules as to senior and junior. *Peck v. Tiffany*, 2, 451.

Receiptor—covenant to return property or pay debt is valid—cannot show that property did not belong to debtor—nor that it was worth less than sum agreed. *Cornell v. Dakin*, 38, 253.

Release of damages for levy on one execution no bar as to other levies. *Noble v. Kelly*, 40, 415.

Judgment debtor remains owner, notwithstanding levy, and can convey subject to. *Mumper v. Rushmore*, 79, 19.

### 3. *Lien of.*

Tender of amount discharges lien — refusal to accept and sale is conversion. *Tiffany v. St. John*, 65, 314; 22 Am. Rep. 612.

When dormant as to bona fide purchasers. *Sage v. Woodin*, 66, 578.

When delivered with orders to merely hold for further orders, no lien attaches. *Smith v. Erwin*, 77, 466.

No lien on personalty after return-day without previous levy. *Walker v. Henry*, 85, 130.

Issued on judgment filed on Saturday when clerk's office not open for business — levy does not attach until judgment becomes operative on Monday. *Hathaway v. Howell*, 70, 610.

### 4. *Redemption.*

Sheriff's deed under, executed after time for redemption, relates back. *Wright v. Douglass*, 2, 373.

Of lands—various principles. *People v. Fleming*, 2, 484; *People v. Ransom*, 2, 490.

Satisfaction of judgment—mortgagee in possession. *Ten Eyck v. Craig*, 62, 406.

Equity will not permit after time expired, on ground of mistake as to legal rights. *Weed v. Weed*, 94, 243.

Effect on junior judgment, on which sale was also had but not reached on application of proceeds. *Bodine v. Moore*, 18, 347.

Of land acquired under collateral pledge of contract for sale—charges by pledgee. *Kelly v. Falconer*, 45, 42.

Affidavit of mortgagee must state sum due so positively that perjury might be assigned. *People v. Becker*, 20, 354.

Must be made to officer who made sale, if present, at sheriff's office. *People v. Lynch*, 68, 473.

By creditor, must be made at office of sheriff of county where sale took place — last day. *Morse v. Purvis*, 68, 225; *Gilchrist v. Comfort*, 34, 235.

County clerk may not receive redemption money unless specially deputed. *People v. Rathbun*, 15, 528.

To whom made — evidence — when certificate sufficient. *Livingston v. Arnoux*, 56, 507.

### 5. *General matters.*

Liability of indemnifying creditor on. *Herring v. Hoppock*, 15, 409.

Rights under, as between receiver under creditor's bill and prior judgment creditor not party. *Chautauque Co. Bank v. Risley*, 19, 369.

Receiver in supplementary proceedings is bound by his promise to sell subject to a prior levy. *Becker v. Torrance*, 31, 631.

Requisites of return. *Hutchinson v. Brand*, 9, 208.

Return amendable. *People v. Ames*, 35, 482.

Where judgment reversed after levy, but before collection, sheriff not entitled to poundage. *Campbell v. Cothran*, 56, 279.

Death of judgment debtor in custody does not entitle sheriff to poundage. *Flack v. State*, 95, 460.

Fees of sheriff on judgment of Marine Court filed in county clerk's office. *Crofut v. Brandt*, 58, 106; 17 Am. Rep. 213.

Attachment against plaintiff does not excuse want of return. *Wehle v. Conner*, 63, 258.

Against land after death of defendant—when invalid. *Wallace v. Swinton*, 64, 188.

Superseding, by opening of judgment. *Phillips v. Wheeler*, 67, 104.

Right of action for concealment of property exists in favor of creditor—facts essential to relief. *Scott v. Morgan*, 94, 508.

Satisfaction, not impeachable collaterally. *People v. Lansing*, 5 Trans. App. 96.

As between judgment debtor's grantee and a purchaser for his benefit of the premises on execution. *Carnes v. Platt*, 59, 405.

See CREDITOR'S ACTION; JUDICIAL SALE; JUDGMENT; SHERIFF; SUPPLEMENTARY PROCEEDINGS.

## EXECUTOR AND ADMINISTRATOR.

- I. *Appointment and qualifications.*
  1. *In general.*
  2. *Bonds of.*
- II. *Powers of.*
  1. *In general.*
  2. *Administrator with will annexed.*
  3. *Suits by.*
  4. *Dealings with estate.*
- III. *Liabilities of.*
  1. *To third persons for contracts and acts.*
  2. *To estate for negligence.*
  3. *Generally.*
- IV. *Accounting.*
- V. *Compensation.*
- VI. *Actions and proceedings against.*

### I. *Appointment and qualifications.*

#### 1. *In general.*

Professional gambler incompetent as administrator. *McMahon v. Harrison*, 6, 443.

Illiteracy, poverty and mismanagement do not constitute "improvidence" to remove. *Emerson v. Bowers*, 14, 449.

Surrogate on affidavit of intention to object to letters testamentary to one of several, must suspend the grant to all. *McGregor v. Buel*, 24, 166.

Relatives entitled to administer even though not entitled to share in distribution. *Lathrop v. Smith*, 24, 417.

Appointment of administrator by clerk's filling up and sealing blank in his possession, void, unless surrogate has heard application and authorized appointment. *Roderigas v. East River Sav. Inst.*, 76, 316; 32 Am. Rep. 309.

Statute giving unmarried woman preference as to letters, not repealed by Laws of 1867, chapter 782, and notice need not be given to married one. *Matter of Curser*, 89, 401.

Non-resident citizen may be executor—bad temper no disqualification. *McGregor v. McGregor*, 1 Keyes, 133.

### 2. *Bonds of.*

Bond of administrator with will annexed may be in ordinary form—insertion of words, "with the will annexed," after execution, immaterial. *Casoni v. Jerome*, 58, 315.

Where creditor appoints his debtor executor, liens for the debt still subsist. *Soverhill v. Suydam*, 59, 140.

Bond on removal of executor from State is retroactive—evidence—conclusiveness of decree. *Scotfield v. Churchill*, 72, 565.

Mistake in administrator's bond—revocation—accounting—decree binding on sureties. *Gerould v. Wilson*, 81, 573.

### II. *Powers of.*

#### 1. *In general.*

Act of 1847, chapter 80, authorizing compromises, not restrictive but ampliative. *Chouteau v. Suydam*, 21, 179.

Administrator of insolvent estate may insure buildings for benefit of creditors. *Herkimer v. Rice*, 27, 163.

Assignment by foreign executor to citizen of this State valid. *Peterson v. Chemical Bank*, 32, 21.

One executor cannot demand deposit of securities by co-executor with a third person. *Burt v. Burt*, 41, 46.

Contract with executor does not bind estate. *Austin v. Munro*, 47, 360.

Action in form against executor as such cannot be converted into one against him individually on demurrer. *Id.*

May employ an agent if necessary. *O'Gara v. Clearkin*, 58, 663.

Executor under act of 1871, chapter 603, pending appeal, may be sued and

may pay debts—act general—powers do not cease till revocation of probate and notice thereof. *Thompson v. Tracy*, 60, 175.

Payment to administrator formally appointed valid although the alleged decedent is living. *Roderigas v. East River Savings Inst.*, 63, 460; 20 Am. Rep. 555.

When settlement by administrator of deceased partner with survivors conclusive on creditors of deceased. *Sage v. Woodin*, 66, 578.

Executors may submit to arbitration—effect of award as to other creditors. *Wood v. Tunnickliff*, 74, 38.

Executor may not invest in mining stocks—ratification by cestui que trust—debt of executor to estate—accounting of several—credits—liability of one for act of others. *Adair v. Brimmer*, 74, 539.

One of several executors cannot bind estate for loan for its benefit. *Bryan v. Stewart*, 83, 270.

When executor may take foreign security to save investment by co-executor. *Ormiston v. Olcott*, 84, 339.

When executor here gets no title to assets in another State. *Sherman v. Page*, 85, 123.

Surrogate may limit powers of, in letters of administration. *Martin v. Dry Dock, etc., R. Co.*, 92, 70.

Land bought by executor on foreclosure, is personalty—he may confer title. *Lockman v. Reilly*, 95, 64.

Power of two executors to sell land cannot be executed by one alone. *Wilder v. Ranney*, 95, 7.

## 2. Administrator with will annexed.

Takes power of the executor named annexed to office unless confidence in discretion of the person named is expressed or implied. *Bain v. Matteson*, 54, 663.

Cannot execute a personal trust. *Dunning v. Ocean Nat. Bk.*, 61, 497; 19 Am. Rep. 293.

When power of sale passes to administrator with will annexed. *Mott v. Ackerman*, 92, 539.

## 3. Suits by.

Assignee of foreign executor may sue here. *Petersen v. Chemical Bank*, 32, 21.

Executor cannot maintain action to construe will unless invested with trust—expenses incurred, adjusted on accounting. *Dill v. Wisner*, 88, 153.

Executor may sue to recover property of estate wrongfully converted with his consent. *Wetmore v. Porter*, 92, 76.

Husband, as administrator of wife, may recover bond executed by him to a third person for her benefit. *Halsted v. McChesney*, 2 Abb. 310.

Administrator de bonis non may sue executor of executor for assets—complaint need not allege the defendant ever got the assets. *Walton v. Walton*, 4 Abb. 512.

Administrator de bonis non can maintain action against representatives of deceased executor for assets—when judgment against executor for legacy is not satisfaction. *Clapp v. Meserole*, 1 Keyes, 281.

## 4. Dealings with estate.

May convey land in another State. *Newton v. Bronson*, 13, 587.

Executor empowered to sell lands must act personally, but the sale by an agent may be ratified. *Id.*

Executor indebted to estate assigning insurance policy to himself as executor and depositing proceeds in bank to his creditor as executor, thus pays the debt. *Scranton v. Farmers and Mechanics' Bank*, 24, 424.

Administrator may not purchase intestate's real estate on sale to pay debts. *Forbes v. Halsey*, 26, 53.

May not become interested in decedent's real estate after sale and before confirmation. *Terwilliger v. Brown*, 44, 237.

Administrator may purchase his intestate's land on foreclosure. *Hollingsworth v. Spaulding*, 54, 636.

Executor may not buy testator's lands on execution. *Lytle v. Beveridge*, 58, 592.

Sale of decedent's lands by administrator to pay debts is void unless proceedings begun within three years after original grant of letters. *Slocum v. English*, 62, 494.

Rule as to reasonable time in which executor must sell realty—conclusiveness of accounting. *Matter of Weston*, 91, 502.

Conveyance by executor to another who conveys to him individually, held invalid. *People v. Open Board, etc., Co.*, 92, 98.

A foreign executor can dispose of personal assets in this State. *Middlebrook v. Mer. Bank of N. Y.*, 3 Abb. 295.

### III. Liabilities of.

#### 1. To third persons for contracts and acts.

Administrator personally and not estate liable for all contracts made by him for funeral expenses. *Ferrin v. Myrick*, 41, 315.

Public administrator when personally liable to chattel mortgagee for conversion. *Levin v. Russell*, 42, 251.

Personally liable to attorney retained by them on final accounting—liability joint. *Mygatt v. Wilcox*, 45, 306; 6 Am. Rep. 90.

Liable for rent reserved in lease to decedent, to amount of rent received by him—landlord may resort to him or to estate. *Miller v. Knox*, 48, 232.

Executor personally liable for his counsel fees, and may charge to estate. *Seaman v. Whitehead*, 78, 306.

Administrator personally liable for auditor's fees—subject to attachment—payment of claims against, what is not. *Dunford v. Weaver*, 84, 445.

#### 2. To estate for negligence.

Administrator not protected against wrong payment by surrogate's decree. *President, etc. v. Hasbrouck*, 6, 216.

Executors conveying land, under a power of sale, of which their testator was in equity a mere trustee, are liable to the holder of the equitable title for the purchase-money as damages. *Wall v. Kellogg's Ex'rs*, 16, 385.

Administrator selling on credit must account for the price although greater than value and not realized. *Hasbrouck v. Hasbrouck*, 27, 182.

When executor not liable for negligence in loss of securities by conversion by agent. *McCabe v. Fowler*, 84, 314.

Liable for loss of funds, if he delivers to co-executors—if passive not liable unless he assents, or having knowledge and mean of preventing neglects to do so—both sold real estate, payment to one in presence of other—misappropriation—other not liable—negligence which did not contribute to loss. *Croft v. Williams*, 88, 384.

Liable to estate for debt lost by neglect to collect—statute runs from time of loss. *Harrington v. Keteltas*, 92, 40.

Not liable for mistake when no bad faith or want of prudence in investments—judgment in action by beneficiary precludes after inquiry. *Crabb v. Young*, 92, 56.

Where executors sell property at an inadequate price, they are personally liable. *Matter of Saltus*, 3 Abb. 243.

#### 3. Generally.

Executor's liability to legatee not discharged by written receipt of nominal sum in full, nor by her conveyance to him of all her estate on passive trust under ante-nuptial settlement. Surrogate may compel accounting. *Harris v. Ely*, 25, 138.

Bound to account for loan to him by testator although usurious note subsequently given for it. Liable for debt of his firm to testator. *Matter of Accounting of Consaulus*, 95, 340.

Executor must include assets in another State. *Matter of Estate of Butler*, 38, 397.

Six months' notice to creditors exempts executor from liability to creditors not proving. *Erwin v. Loper*, 43, 521.

Wife, administratrix, not chargeable with moneys of husband invested by her in land in her own name in his life-time. *Shuttleworth v. Winter*, 55, 624.

When not chargeable with interest. *Id.*

When executor chargeable with compound interest — counsel fee in discretion of surrogate — charging beneficiaries for use of his property. *Hannahs v. Hannahs*, 68, 610.

Double charge against executor for taxes disallowed. *Deraismes v. Deraismes*, 72, 154.

Administrator not liable to action to reach proceeds of sale of intestate's lands to pay debts. *Stillwell v. Swarthout*, 81, 109.

Executor, though insolvent, is liable for debt due from him to testator for money. *Baucus v. Stover*, 89, 1.

Cannot be charged in equity for gift to him in will admitted to probate. *Post v. Mason*, 91, 539; 43 Am. Rep. 689.

Three joined in conveyance — check made payable to order of M., in good faith indorsed to G., and he obtained money — on accounting after G.'s death, others not liable for the amount received by G. *Paulling v. Sharkey*, 88, 432.

#### IV. Accounting.

When executor compellable to account for rents, profits and proceeds of real estate as personalty. *Stagg v. Jackson*, 1, 206.

Executor may set up statute of limitations on citation to account. *Martin v. Gage*, 9, 398.

Administrator when not bound to account for rents and profits. *Hillman v. Stephens*, 16, 278.

When foreign administrator not liable to account here. *Parsons v. Lyman*, 20, 103.

When one executor may call his co-executor to account. *Wood v. Brown*, 34, 337.

Petition to compel account — proceedings on. *Peck v. Sherwood*, 56, 615.

When executor liable to account as for equitable conversion — liability of sureties of non-resident — equitable action to establish devastavit — assignment by legatees — parties. *Hood v. Hood*, 85, 561.

Executor whose letters were revoked and who takes no part in the management of estate is not necessary party to final ac-

counting — executors are responsible for acts of their agents — how far executor liable for acts of co-executor — contribution between executors. *Earle v. Earle*, 93, 104.

Successors of a removed administrator cannot petition the former administrator for an accounting, legatees must do so — effect of lapse of time. *Clark v. Ford*, 1 Abb. 359.

When executors may be compelled to account — all sums unpaid in executor's hands are undistributed assets. *Clapp v. Meserole*, 1 Abb. 362.

#### V. Compensation.

On investing at interest and paying over interest under will are entitled only to executors' commissions. *Drake v. Price*, 5, 430.

Compensation of administrator on sale of lands to pay debts. *Higbie v. Westlake*, 14, 281.

Executor not entitled to commissions on transfer of corporate stock specifically bequeathed. *Schenck v. Dart*, 22, 420.

Under will devising land in another State, executor must prove the will there, and the decree there giving him the costs thereof will be recognized here. *Young v. Brush*, 28, 667.

Executor cannot receive any compensation beyond statutory commissions. *Collier v. Munn*, 41, 143.

Provision for executor's commission on "moneys collected" does not mean all moneys received. *Ireland v. Corse*, 67, 343.

Executor, when not entitled to commissions as trustee. *Hall v. Hall*, 78, 535.

Money separated from estate by — distinct account as trustee — entitled to separate commissions — legatees accepting payment when precluded. *Hurlburt v. Durant*, 88, 121.

Executor entitled to compensation for services to estate outside of his duties. *Lent v. Howard*, 89, 169.

Co-executors share commissions equally without regard to labor performed. *White v. Bullock*, 4 Abb. 578.



Devastavit — interest — commissions.  
*Cook v. Lowry*, 95, 103.

Executor and trustee — commissions.  
*Johnson v. Lawrence*, 95, 154.

Executor and trustee may deduct commissions on paying over annuity, without waiting till accounting. *Hancox v. Meeker*, 95, 528.

## VI. *Actions and proceedings against.*

Where a declaration describes plaintiff as executor, but sets forth a cause of action in his individual right, on a debt due his testator, defendant cannot set off a demand against the testator. *Merritt v. Seaman*, 6, 168.

A creditor may maintain, against fraudulent vendee of decedent, and his administrator refusing to take proceedings to set aside sale. *Bate v. Graham*, 11, 237.

Judgment for costs against executor as such, collectible only from estate of testator. *Dodge v. Crandall*, 30, 294.

Agreement for reference of claims — waives short statute of limitations, although no referee is chosen. *Nat. Bk. of Fishkill v. Speight*, 47, 668.

What constitutes rejection of claim.  
*Hoyt v. Bonnett*, 50, 538.

Action lies to prevent administrators wasting the estate — receiver may be appointed. *Haddow v. Lundy*, 59, 320.

Right of widow to damages for withholding dower. *Kyle v. Kyle*, 67, 400.

Claims against deceased to be presented to, including contingent — deceased and plaintiff co-sureties — contribution — limitation. *Cornes v. Wilkin*, 79, 129.

In action on undertaking on appeal against executor, want of assets no defense. *Yates v. Burch*, 87, 409.

Proceedings to compel payment of judgment for deficiency on foreclosure — joint account — admission of liability — power in trust to sell — accounting for rents. *Glacius v. Fogel*, 88, 434.

Equity has jurisdiction as to executor.  
*Wager v. Wager*, 89, 161.

Service of attachment on, while special administrator acting, does not bind estate.  
*Matter of Flandrow*, 92, 256.

Court may require security for costs in suit by executor. *Tolman v. Syracuse, etc., R. Co.*, 92, 353.

Service of citation personally on executor in another State equivalent to publication, and six weeks need not intervene. *Matter of Macaulay*, 94, 574.

Practice as to petition to compel payment of legacy — denial of claim. *Id.*

Action by administrator to recover unadministered assets of testator — when maintainable against executor of executor. *Walton v. Walton*, 1 Keyes, 15.

See CONFLICT OF LAWS; COSTS; SURROGATE; TRUSTS; WILL.

## Exemption.

See EXECUTION.

## Ex Post Facto.

See CONSTITUTIONAL LAW; CRIMINAL LAW.

## Express Company.

See CARRIER.

## EXTRADITION.

Affidavits must show criminal offense — conspiracy to cheat — habeas corpus — refusal to discharge does not bar a new writ — question of guilt or innocence immaterial. *People v. Brady*, 56, 182.

Provisions of United States Revised Statutes embrace all criminal offenses punishable by law of demanding State — warrant conclusive on court. *People v. Donohue*, 84, 438.

Warrant need not state facts of crime. *Id.*

Extradited person may be detained by arrest on civil process. *Adrianse v. Lagrave*, 59, 110; 17 Am. Rep. 317.

Recitals in warrant are prima facie true. *People v. Pinkerton*, 77, 245.

— when alone sufficient to authorize. *People v. Donohue*, 84, 438.

## F.

## FACTOR.

I. *Factor.*

1. *Construction of factors' act.*
2. *Generally.*

I. *Factor.*1. *Construction of factors' act.*

Construction of factors' act, Laws of 1830, chapter 179. *Cartwright v. Wilmerding*, 24, 521; *Hazard v. Fiske*, 83, 287; *Kinsey v. Leggett*, 71, 387.

Constructive possession not sufficient under. *Houland v. Woodruff*, 60, 73.

Applies only to consignees named in bill of lading. *Mechanics and Traders' Bank v. Farmers and Mechanics' Nat. Bank*, 60, 40.

Intermediate consignee issuing new bill of lading — conflict of laws — laches. *First Nat. Bank of Toledo v. Shaw*, 61, 283.

When does not apply. *Kinsey v. Leggett*, 71, 387.

Act of 1858, chapter 326 — weigher's return not "receipt." *West Trans. Co. v. Barber*, 56, 544.

2. *Generally.*

Who is — when liable to arrest. *Standard Sugar Refinery Co. v. Dayton*, 70, 486.

Instructed to sell on a certain day, may not make offer to be accepted on next day — damages. *Scott v. Rogers*, 4 Abb. 157.

Right of factor to sell contrary to instructions. *Marfield v. Goodhue*, 3, 62; *Blot v. Boiceau*, 3, 78.

One consigned goods to a factor for sale, assigning the forwarder's receipt to a bank as security for the acceptance of his draft on the factor, discounted by the bank. The factor receiving the goods and converting them, with notice of the transaction, held liable in trover to the bank. *Bank of Rochester v. Jones*, 4, 497.

Instructed to sell consignment upon arrival is bound to strict conformity, and liable for damages by failure. *Evans v. Root*, 7, 186.

Receiving bill of lading of property shipped for sale, with directions to insure and notice of draft, gets no lien until acceptance of consignment on those terms. *Winter v. Coit*, 7, 288.

When merchandise is consigned for sale, the factor may dispose of it as his own, and apply the ownership to other goods of the same kind in his possession. *Seymour v. Wyckoff*, 10, 213.

Directed to wait effect of act of parliament on market before selling — when may sell. *Milbank v. Dennistoun*, 21, 386.

Can only transfer goods in usual course of trade. *Easton v. Clark*, 35, 225.

May sell principal goods for reimbursements for advances and maintain action for deficiency. *Blackmar v. Thomas*, 28, 67.

Must recognize principal's title. *Barnard v. Kobbe*, 54, 516.

Not obeying instructions, guilty of conversion — damages. *Scott v. Rogers*, 31, 676.

Does not get title unless by force of advances or agreement. *Beebe v. Mead*, 33, 587.

May waive fraud and ratify sale so as to bind principal. *Joslin v. Cowee*, 52, 90.

When factor accepts principal's bills against consignments, and pays them to holders by goods of less value than face of bills, the principal is entitled to benefit. *Hidden v. Waldo*, 55, 294.

Unauthorized sale — evidence of market price. *Harrison v. Glover*, 72, 451.

Bound to follow instruction as to terms of sale — right as to advances. *Hilton v. Vanderbilt*, 82, 591.

Sale by owner, when does not affect factor's rights. *Matthews v. Coe*, 70, 239; 26 Am. Rep. 583.

In action by, for goods, vendee cannot set off claim against principal. *Young v. Thurber*, 91, 388.

See AGENCY.

## FALSE IMPRISONMENT.

Procuring arrest of wrong person without warrant for misdemeanor is. *Thorne v. Turck*, 94, 90.

Detention of railroad passenger for failure to produce lost ticket or pay fare constitutes. *Lynch v. Metropolitan, etc., R. Co.*, 90, 77; 43 Am. Rep. 131.

Plaintiff liable for, under void attachment. *Miller v. Adams*, 52, 409.

Defendant being discharged on giving bail and rearrested for bail failing to justify, sheriff being advised that he was not liable to be, because of stipulation between attorneys—he and his sureties liable. *Arteaga v. Conner*, 88, 403.

Voluntary appearance not constructive imprisonment. *Dusenbury v. Keiley*, 85, 383.

Justices of peace committing for contempt without authority liable for. *Rutherford v. Holmes*, 66, 368.

Action lies only where imprisonment was immediate result of defendant's action. *Farnam v. Feeley*, 56, 451.

Committee of board of supervisors, when liable for—witness—on vacating attachment for contempt, court may not impose condition not to sue for false imprisonment. *Matter of Bradner*, 87, 171.

Conclusiveness of judgment of justice of the peace on penalty. *Halleck v. Dominy*, 69, 238.

See MALICIOUS PROSECUTION.

## FALSE PRETENSE.

Obtaining money by, under statute previous to Penal Code, not larceny. *Thorne v. Turck*, 94, 90.

See CRIMINAL LAW.

## Fees.

See COSTS; EXECUTOR AND ADMINISTRATOR; OFFICE AND OFFICER; SHERIFF; TRUST AND TRUSTEE.

## FENCES.

Where a boundary fence has been maintained by division by consent, no prescription is established. *Adams v. Van Alstyne*, 25, 232.

See BOUNDARY; RAILROAD.

## FERRY.

Under chapter 111 of Laws of 1840, Western Railroad Company has no right to transport gratuitously any but passengers or employees across Hudson river at Albany. *Aikin v. Western R. Co.*, 20, 370.

Ordinary rules of negligence apply to—burden of proof. *Wyckoff v. Queens County Ferry Co.*, 52, 32; 11 Am. Rep. 650, note.

When liable for negligence to passenger. *Hauman v. Hoboken Land and Improvement Co.*, 50, 53.

Negligence—letting down chains before landing. *Ferris v. Union Ferry Co.*, 36, 312.

When proprietor not chargeable with negligence as to floating bridge in slip. *Loftus v. Union Ferry Co. of Brooklyn*, 84, 455; 38 Am. Rep. 533, note.

It is not negligent to take a young and timid horse on a ferry boat—company liable if horse injured. *Clark v. Union Ferry Co.*, 35, 485.

## Fines.

See CRIMINAL LAW

## Fires.

See INSURANCE; NEGLIGENCE; RAILROAD.

**FISHERY.**

When right of, granted by colonial patent, presumptively free. *Trustees of Brookhaven v. Strong*, 60, 56.

Grant of right to oyster fishing to town and rights of lessee of town. *Robins v. Ackerley*, 91, 98.

Lease of oyster fishery by town having title to land under water. *Hand v. Newton*, 92, 88.

**FIXTURES**

A building erected upon land of another is part of the realty in absence of different agreement. *Ritchmyer v. Morss*, 3 Keyes, 349.

Portable grist-mill, when realty. *Potter v. Cromwell*, 40, 287.

Hop-poles are, although taken down and piled. *Bishop v. Bishop*, 11, 123.

Mirror frames, when — evidence. *Ward v. Kilpatrick*, 85, 413; 39 Am. Rep. 674.

An out-door statue and sun dial are. *Snedeker v. Warring*, 12, 170.

A removable building erected by tenant for trade, not — ball-room resting on stone posts. *Ombony v. Jones*, 19, 234.

Elevator and boiler held part of leased building as between landlord and tenant. *Finkelmeier v. Bates*, 92, 172.

Rails put into fence by tenant under agreement for removal are personalty as to the landlord. *Mott v. Palmer*, 1, 564.

Rule as between mortgagor and mortgagee. *Voorhees v. McGinnis*, 48, 278.

Engine and boiler as between chattel mortgagee and mortgagee of land. *Tiff v. Horton*, 53, 377; 13 Am. Rep. 537.

Gas fixtures and mirrors not within mortgage of land — declaration by owner that they go with the land, ineffectual — but they pass by bargain and delivery — estoppel — assignment. *McKeage v. Hanover Fire Ins. Co.*, 81, 38; 37 Am. Rep. 471, note.

Looms, as between mortgagor and mortgagee. *Murdock v. Gifford*, 18, 28.

Machinery, as between mortgagee and grantee. *McRea v. Cent. Nat. Bk.*, 66, 489.

Salt kettles not, as between chattel mortgagee and grantee. *Ford v. Cobb*, 20, 344.

Engine and boiler, as between chattel mortgagee and judgment creditor. *Sisson v. Hibbard*, 75, 542.

As between purchaser under lessor's mortgage subsequent to lease, and lessee — merger. *Globe Marble Mills Co. v. Quinn*, 76, 23; 32 Am. Rep. 259.

Action may lie for conversion although recovery of property barred. *McEntee v. Harrison*, 58, 654.

**FORCIBLE ENTRY AND DETAINER.**

Owner regaining possession peaceably, may resist attempts to retake, without being liable. *Bliss v. Johnson*, 73, 529.

**Foreclosure.**

See MORTGAGE.

**FORGERY.**

One paying instrument with forged indorsement may recover back. *Corn Exchange Bk. v. Nassau Bk.*, 91, 74; 43 Am. Rep. 655.

When several parties to a forgery are liable in action for money had and received — wife aiding husband. *National Trust Co. v. Gleason*, 77, 400; 33 Am. Rep. 632, note.

Action to recover moneys obtained by forgery by conspiracy — evidence — connecting party with transaction. *New York Guardian and Indemnity Co. v. Gleason*, 78, 503.

Delay in discovering forgery does not release liability to refund money paid. *Bank of Brit. N. Amer. v. Merchants' Nat. Bk.*, 91, 106; also *Frank v. Lanier*, 91, 112.

See BANKS; CRIMINAL LAW; NEGOTIABLE INSTRUMENT.

**FORMER ACTION PENDING.**

It must appear that first action is for same cause—that same property in controversy is not enough. *Dawley v. Brown*, 79, 390.

Where plaintiffs claim in ejectment as heirs of R., a former action by them and R.'s widow abates second action. *Ritter v. Worth*, 58, 627.

On plea of, in ejectment—unless same title predicated in both trials, no bar. *Dawley v. Brown*, 79, 390.

For goods sold at one date, no defense in suit for goods subsequently sold, all on like term of credit, though one account rendered of all. *Zimmerman v. Erhard*, 83, 74; 38 Am. Rep. 396.

When not defense, in replevin. *Witty v. Campbell*, 44, 410.

When is no defense to third person. *Welch v. Sage*, 47, 143; 7 Am. Rep. 423.

Unsatisfied judgment does not support plea of former action pending—appeal in former action has no retroactive effect. *Porter v. Kingsbury*, 77, 164.

When stay on account of, may be refused. *Lacustrine, etc., Co. v. Lake Guano, etc., Co.*, 82, 476.

See MECHANICS' LIEN; NOTICE OF PENDENCY.

**FORMER ADJUDICATION.**

- I. *What constitutes.*
- II. *When former judgment a bar.*
- III. *When former judgment not a bar.*
- IV. *Effect of former judgment.*
- V. *Practice.*

I. *What constitutes.*

To sustain plea of "autrefois acquit" it must appear that the party was put in jeopardy. *Cunter v. People*, 1 Abb. 305.

Conclusive upon parties as to all matters which actually were or might have been determined under the issue. *Embury v. Conner*, 3, 511.

Where nonsuit is reversed the plaintiff's right to recover on the facts stated in

their pleading is established by the judgment. *Buell v. Trustees of Village of Lockport*, 8, 55.

Nonsuit no bar to second action. *Audubon v. Excelsior Ins. Co.*, 27, 216; *Wheeler v. Ruckman*, 51, 391.

Judgment against plaintiff in action for value of property as on sale, no bar to action for its use. *Rider v. Union India Rubber Co.*, 28, 379.

To constitute bar, the identical question involved must have been passed upon. *Kerr v. Hayes*, 35, 331.

Must be between parties or privies. *Booth v. Powers*, 56, 22.

Former action is bar where same relief could have been had, although different in form. *Draper v. Stouvenel*, 38, 219.

On mandamus—when not bar. *People v. Lynch*, 68, 473.

On default in summary proceedings—effect on damages in action for rent. *Jarvis v. Driggs*, 69, 143.

Bankruptcy proceedings not an adjudication of a fact against one not legally a party. *Meltzer v. Doll*, 91, 365.

II. *When former judgment a bar.*

In replevin, in favor of seller without notice to holder of bill of lading does not bar the latter. *Rawls v. Deshler*, 4 Abb. 12.

Adjudication that the plaintiff had performed an agreement is a bar to subsequent action by the defendant for damages for non-performance, although that question was withdrawn from first trial. *Davis v. Tallcot*, 12, 184.

Decree of specific performance bar to action to rescind. *Tompkins v. Hyatt*, 28, 347.

Although only for damages is bar as to all issues. *Caster v. Shipman*, 35, 533.

For damage by flooding—when estops defendants. *Plate v. New York Cent. R. Co.*, 37, 472.

On contract is bar as to all claims then due. *O'Beirne v. Lloyd*, 43, 248.

In action by assignee in bankruptcy when bar to action to recover property. *Truska v. O'Brien*, 68, 446.

Against a corporation for debt is bar to action for fraud in respect to same matter. *Caylus v. New York, Kingston & Syracuse R. Co.*, 76, 609.

Carrier's judgment for freight is bar to shipper's action for loss of property by carrier's failure to transport. *Dunham v. Bower*, 77, 76 ; 33 Am. Rep. 570.

When conclusive in action to construe a will. *Leavitt v. Wolcott*, 95, 212.

In favor of physician, in justice's court, in action for services, after answer but without trial, is bar to action for malpractice as to same services. *Blair v. Bartlett*, 75, 150 ; 31 Am. Rep. 455.

### III. When former judgment not a bar.

As between same parties. *Cohell v. Bleakley*, 1 Abb. 400.

On part of claim—not bar, when action so brought at debtor's request. *Mills v. Garrison*, 3 Keyes, 40.

In action to set aside contract of reinsurance, no bar to action on policy by insured against reinsurer. *Fischer v. Hope Mut. Life Ins. Co.*, 69, 161.

When judgment for accounting not a bar to action for fraud—different receivers representing same interest in the two actions. *Verplanck v. Van Buren*, 76, 247.

In action by general assignee, when not conclusive against creditor alleging fraud in assignment. *Raymond v. Richmond*, 78, 351.

Foreclosure for lien of collateral holder, when no bar to foreclosure by mortgagee. *O'Dougherty v. Remington Paper Co.*, 81, 496.

In action for wrongful dismissal from employment no bar to action for wages. *Perry v. Dickerson*, 85, 345 ; 39 Am. Rep. 663.

For loss of baggage, when not bar to action for loss of merchandise therein. *Millard v. Missouri, etc., R. Co.*, 86, 441.

In action for wages for part of term—no bar to prove subsequent dismissal. *Weed v. Burt*, 87, 191.

In action of damages for fraudulently inducing purchase of bond, a judgment

recovered by the plaintiff for interest on the bond, in an action upon a guaranty of payment thereof, is no bar. *Bowen v. Mandeville*, 95, 237.

When judgment no bar to defense of usury. *Moses v. McDivitt*, 88, 62.

Of usury does not conclude one not a party. *Bissell v. Kellogg*, 65, 432.

### IV. Effect of.

In action by tenant against trespasser—conclusiveness in action by landlord for waste. *Freer v. Stotenbur*, 2 Abb. 189.

Decree of Chancery dismissing bill by default, after order closing proofs, is a bar to a subsequent suit, although no proofs were taken. *Oggsbury v. La Forge*, 2, 113.

In former action, on question directly involved, is conclusive in a second suit between the same parties although the subject-matter is different—what is not splitting cause of action. *Doty v. Brown*, 4, 71.

A forwarder, receiving property for transportation, and employing a carrier, is estopped by a judgment in favor of the owner in his suit against the carrier for non-delivery. *Green v. Clark*, 12, 343.

When not conclusive as to amount due. *Campbell v. Consalus*, 25, 613.

Not conclusive as to a fact immaterial to the issue, although expressly adjudged. *People v. Johnson*, 38, 63.

In replevin—effect of. *Angel v. Hollister*, 38, 378.

Effect of, as to statute of limitations—contract for stock. *Johnson v. Albany & Susquehanna R. Co.*, 54, 416 ; 13 Am. Rep. 607.

Recovery on one of several past due notes against same parties, no bar to others. *Nathans v. Hope*, 77, 420.

In action on contract, is bar to action to reform the contract. *Steinbach v. Relief Fire Ins. Co.*, 77, 498 ; 33 Am. Rep. 655.

When not estoppel. *Remington Paper Co. v. O'Dougherty*, 81, 474.

When establishes relation of landlord and tenant—recovery on undertaking for part of rent, when not bar. *Ackley v. Westervelt*, 86, 448.

When finding as to "fiduciary capacity" does not necessarily imply fraud. *Palmer v. Hussey*, 87, 303.

In action by beneficiary against executor, estops as to further claim on prior facts. *Crabb v. Young*, 92, 56.

When order to receiver to deliver and sell property does not include good-will. *Boon v. Moss*, 70, 465.

In partition and for construction of will—when not conclusive as to subsequently born beneficiaries. *Monarque v. Monarque*, 80, 320.

Judgment in action by executor for construction of will not bar to action for legacy by legatee. *Scott v. Stebbins*, 91, 605.

### V. Practice.

Decree on libel in rem for supplies to ship not competent evidence of ownership of supplies in subsequent action. *Van Vechten v. Griffiths*, 4 Abb. 487.

On plea of former recovery, the record must show the same matter, and cannot be waived by parol. *Campbell v. Butts*, 3, 173.

To operate as estoppel, grounds should be made to appear. *Cohell v. Bleakley*, 1 Keyes, 62.

When not bar although evidence was given competent on subsequent trial. *East New York, etc., R. Co. v. Elmore*, 53, 624.

Parol evidence is competent to show what questions were controverted and grounds of decision in first action. *Doty v. Brown*, 4, 71.

See ESTOPPEL; JUDGMENT; PLEADING.

### FORWARDER.

Contracting to forward by particular vessel, liable for loss if forwarded by another—owner's receiving insurance, no ratification. *Goodrich v. Thompson*, 44, 324.

When not liable as common carrier. *Stannard v. Prince*, 64, 300.

Having lien for advances may sue for possession of goods—carrier is agent of. *Fitzhugh v. Wyman*, 9, 559.

See CARRIER.

## FRAUD.

### I. In general.

1. *Undue influence.*
2. *Representations to obtain credit.*
3. *In respect to corporate dealings.*
4. *Upon sales by vendors.*
5. *Miscellaneous matters.*

### II. Fraudulent conveyances.

1. *Who may attack.*
2. *When fraudulent.*
3. *Notice to affect grantee.*
4. *Effect of.*
5. *Evidence as to.*

### III. Evidence of fraud.

### IV. Effect of fraud in general.

### V. Relief.

### I. In general.

#### 1. Undue influence.

Deed by a feeble widow shortly before death to her brothers without consideration set aside. *Sears v. Shafer*, 6, 268.

Constructive—when not established as to gift from client to attorney's clerk. *Nesbit v. Lockman*, 34, 167.

Ante-nuptial agreement of wife to release claims upon husband's estate rigidly scrutinized in favor of the wife. *Pierce v. Pierce*, 71, 154; 27 Am. Rep. 22, note.

Grandfather employing grandchild does not impose burden of proving fairness of compensation on grandchild. *Cowee v. Cornell*, 75, 91; 31 Am. Rep. 428.

Finding of undue influence justified—evidence—commission of lunacy—opinions as to irrationality of certain acts. *Rider v. Miller*, 86, 507.

#### 2. Representations to obtain credit.

Omission of purchaser to disclose insolvency, not. *Nichols v. Pinner*, 18, 295.

In obtaining credit may consist in concealing insolvency. *Devoe v. Brandt*, 53, 462; *Johnson v. Morrell*, 2 Abb. 470; 2 Keyes, 655.

Fraudulent representation, to avoid sale, need not be false pretense. *Nichols v. Michael*, 23, 264.

Purchase with preconceived design not to pay is fraudulent, and the design may be inferred from contemporaneous transactions. *Hennequin v. Naylor*, 24, 139; *Van Kleek v. LeRoy*, 4 Abb. 479.

Purchase with design not to pay — when question of fact — evidence. *Byrd v. Hall*, 2 Keyes, 646; 1 Abb. 285; *Johnson v. Morrell*, 2 Keyes, 655.

One purchasing from fraudulent vendee cannot hold as against vendor when he received the goods in performance of an executory contract of sale. *Barnard v. Campbell*, 58, 73; 17 Am. Rep. 208.

Where sale induced by, seller may retake from any one except bona fide purchaser. *Stevens v. Brennan*, 79, 254.

Where credit on sale was procured by fraud, seller may sue on the contract and avoid the credit. *Weigand v. Sichel*, 4 Abb. 592; 3 Keyes, 120.

When reference by dormant partner of intending purchaser to statement by the other partners is not fraudulent. *Chamberlin v. Prior*, 2 Keyes, 539.

### 3. In respect to corporate dealings.

Evidence of unsoundness of bank — copy of proceedings on petition for re-establishment. *Lefever v. Lefever*, 30, 27.

Action lies for fraudulently inducing to subscribe to stock of insolvent bank and give mortgage as security, although subscription not paid. *Hubbard v. Briggs*, 31, 518.

In formation of corporation — evidence — effect of, as to creditors. *Booth v. Bunce*, 33, 139.

Requisites of proof in action for selling stock fraudulently overissued — burden of proof. *Bruff v. Mali*, 36, 200.

Cannot be imputed to director of corporation in making published reports

without proof of knowledge or suspicion or intent to convey impression that he had knowledge. *Wakeman v. Dalley*, 51, 27; 10 Am. Rep. 551.

By means of fictitious subscriptions for formation of business company by associates. *Getty v. Devlin*, 54, 403.

Fictitious subscriptions for organization of corporation — promoters liable to bona fide subscribers — accounting — parties. *Getty v. Devlin*, 70, 504.

When director of corporation not liable for misrepresentations of active managers. *Arthur v. Griswold*, 55, 400.

When agreement not in fraud of corporation. *Graves v. Waite*, 59, 156.

When director of corporation liable for false prospectus. *Morgan v. Skiddy*, 62, 319.

Action for imposing spurious stock under contract for full-paid stock. *Barnes v. Brown*, 80, 527; *Johnson v. Hathorn*, 2 Abb. 465; 2 Keyes, 476.

### 4. Upon sales by vendor.

Action lies against grantor or lessor for fraudulent representation as to territorial extent of his right. *Whitney v. Allaire*, 1, 305.

And is not waived by lessee's taking possession at commencement of term and after discovery of fraud. *Id.*

Action for fraudulently misrepresenting boundaries of land may lie. *Clark v. Baird*, 9, 183.

Representation that there is no incumbrance on a house, not shown to be false by proof of filing of claim of homestead exemption. *Robinson v. Wiley*, 15, 439.

Action against vendor of land for fraudulent representations, when lies. *Haight v. Hayt*, 19, 464.

Sale of check avoided by suppression of fact that check had been protested. *Brown v. Montgomery*, 20, 287.

False recommendation of trader, when actionable. *Marsh v. Falker*, 40, 562.

For what fraudulent representations an action may be maintained — findings — presumptions in aid of. *Meyer v. Amidon*, 45, 169; *Oberlander v. Spiess*, 45, 175.



Implies knowledge — measure of damages — evidence. *Hubbell v. Meigs*, 50, 480.

When opinions as to value are fraudulent. *Simar v. Canaday*, 53, 298 ; 13 Am. Rep. 523.

Mere false statement as to value is not fraudulent. *Ellis v. Andrews*, 56, 83 ; 15 Am. Rep. 379.

Cannot be set up in avoidance of payment of consideration after acceptance of deed. *Vernol v. Vernol*, 63, 45.

Action for fraudulent representations on sale of legacy. *Duffany v. Ferguson*, 66, 482.

Action for fraudulent representations — when plaintiff bound to return property — opinion of value accompanied by statement of facts putting buyer off guard — evidence of representation to others — damages. *Miller v. Barber*, 66, 558.

False representation that there is no quack grass on land immaterial when purchaser sees land. *Long v. Warren*, 68, 426.

When vendee of land may maintain action for fraud-in sale. *Beardsley v. Duntley*, 69, 577.

Buyer seeking to avoid sale for fraud, not bound to reimburse vendee for government tax paid by him. *Guckenheimer v. Angevine*, 81, 394.

In sale of land — misrepresentation as to quantity — question of fact — charge — change of theory after trial. *Salisbury v. Howe*, 87, 128.

False statements as to value of property sold, in absence of artifice or vendee's ignorance, not fraud. *Chrysler v. Canaday*, 90, 272 ; 43 Am. Rep. 166.

### 5. Miscellaneous matters.

A false, fraudulent and injurious representation is a good cause of action, although no benefit accrued to the party making it. *White v. Merritt*, 7, 352.

Action for fraudulent recommendation of solvency — complaint — variance — scope of credit given — assignability — non-joinder. *Zabriskie v. Smith*, 13, 322.

Bank may set up fraud of customer in getting discounts, although it has paid the

money, in defense or counter-claim in his action for subsequent deposit — evidence. *Andrews v. Artisans' Bank*, 26, 298.

Compromise of cause of action for fraudulent representations, binding though induced by repetition of same — estoppel. *Adams v. Sage*, 28, 103.

When principal cannot maintain charge of, against agent in sales. *Price v. Keyes*, 62, 378.

When principal liable for agent's false representations. *Indianapolis, etc., Ry. Co. v. Tyng*, 63, 653.

Action maintainable for fraudulent prevention of contract void under statute of frauds, if it would, nevertheless, have been performed. *Rice v. Manley*, 66, 82 ; 23 Am. Rep. 30.

Equitable action does not lie to set aside judgment for perjury. *Ross v. Wood*, 70, 8.

Liability of one becoming party to and aiding fraudulent combination. *Morehouse v. Yeager*, 71, 594.

When release not voidable for fraud. *Dambmann v. Schutting*, 75, 55.

When settlement for less than amount due is not fraudulent — compromise cannot be set aside as fraudulent without putting parties in statu quo. *McMichael v. Kilmer*, 76, 36.

When action lies against insurance company for fraudulently inducing one to insure. *Rohrschneider v. Knickerbocker Life Ins. Co.*, 76, 216 ; 32 Am. Rep. 290.

Action for, not maintainable upon representations in a letter as to another's ability to pay, coupled with disclaimer of knowledge except as therein stated and suggesting inquiry of the party — statement must be intentionally false — if not, subsequent false statement to others immaterial. *Babcock v. Libbey*, 82, 144.

When action lies against person making false report of his financial standing to mercantile agency. *Eaton, Cole & Burnham Co. v. Avery*, 83, 31 ; 38 Am. Rep. 389.

Providing for payment of one obligation in preference to another not fraudulent. *Juilliard v. Chaffee*, 92, 529.

Fraud on the part of a debtor in inducing sureties to sign an undertaking is no

defense to a suit against sureties. *Coleman v. Bean*, 1 Abb. 394.

Deceptive conduct in obtaining payment of part of just debt, no defense to action for balance. *Thompson v. Menck*, 4 Abb. 400.

Action for inducing formation of partnership—dissolution no release—evidence. *Thorn v. Helmer*, 4 Abb. 408; 2 Keyes, 27.

## II. Fraudulent conveyances.

### 1. Who may attack.

In fraud of creditors—creditor at large—subrogation of grantee for inadequate consideration—paying grantor's debts. *Robinson v. Stewart*, 10, 189.

Creditors of husband at time of fraudulent transfer to wife have equity superior to subsequent creditor secured by mortgage of the property by wife. *Wood v. Robinson*, 22, 564.

One sued for attachment may show that prior sale by defendant in attachment to claimant was in fraud of creditors. *Hall v. Stryker*, 27, 596.

Grantor to wife cannot assert fraud against himself as creditor of husband. *Phillips v. Wooster*, 36, 412.

Creditors without lien cannot attack. *Spring v. Short*, 90, 538.

See CREDITOR'S ACTION.

### 2. When fraudulent.

A mortgage is not rendered fraudulent as against creditors by including equitable but uncollectible interest. *Spencer v. Ayrault*, 10, 202.

Conveyance may be void as against creditors, even if debtor believed himself solvent, if his solvency is contingent upon the stability of the market. *Carpenter v. Roe*, 10, 227.

When deed not void as in trust for grantor or to defraud creditors. *Curtis v. Leavitt*, 15, 9.

When transfer by husband to wife not voluntary and reasonable. *Babcock v. Eckler*, 24, 623.

Sale by embarrassed firm to infant, partly on credit, not fraud in law. *Matthews v. Rice*, 31, 457.

Fair sale on payment by failing debtor is valid. *Bedell v. Case*, 34, 386.

Conveyance without change in possession—when fraudulent. *Savage v. Murphy*, 34, 508.

Conveyance when void as to subsequent creditors. *Case v. Phelps*, 39, 164.

Sale by failing debtor is not necessarily fraudulent—finding. *Loeschig v. Bridge*, 42, 421.

When general assignment to an indorser not presumed fraudulent. *Clark v. Wise*, 46, 612.

Husband out of debt may pay for land and take title to his wife in good faith. *Curtis v. Fox*, 47, 299.

Sale of entire effects of insolvent co-partnership on credit at fair price—not per se fraudulent—honest purchaser gets title. *Ruhl v. Phillips*, 48, 125; 8 Am. Rep. 522.

Retaining ample fund to pay debts is only effectual where conveyance was made in good faith. *Fox v. Moyer*, 54, 125.

Creditor may purchase debtor's property to pay his honest debts, although he knew it was debtor's intent to hinder and delay his creditors. *Dudley v. Danforth*, 61, 626.

Voluntary conveyance not necessarily void—finding of consideration. *Holden v. Burnham*, 63, 74.

When conveyance fraudulent as to creditors. *Cole v. Tyler*, 65, 73.

Lease need not be accompanied by immediate change of possession. *Booth v. Kehoe*, 71, 341.

Case of fraudulent sale by an insolvent—evidence. *Blaut v. Gabler*, 77, 461.

When conveyance by husband for benefit of wife not fraudulent as to subsequent creditor. *Carr v. Breese*, 81, 584.

Canceling old account against insolvent without consideration—not disposition of property with intent to defraud within statute. *Hoyt v. Godfrey*, 88, 669.

Mortgage by fraudulent grantee to innocent mortgagee for antecedent debt, valid. *Murphy v. Briggs*, 89, 446.

That assignment is without consideration does not make it fraudulent. *Genesee Riv., etc., Bank v. Mead*, 92, 637.

Conveyance by husband in consideration of wife's services fraudulent as to creditors. *Coleman v. Burr*, 93, 17; 45 Am. Rep. 160.

Not fraud for a son of an insolvent to purchase insolvent's stock in trade and furnish means for him to carry on business as agent. *McClune v. Cain*, 3 Abb. 76.

### 3. Notice to affect grantee.

What is constructive notice to purchaser of land. *Baker v. Bliss*, 39, 70.

Vendee not chargeable with constructive notice of vendor's intent to defraud. *Stearns v. Gage*, 79, 102.

Vendee must have knowledge or belief of fraud to render void, and owes no duty of diligence to creditors. Proof essential to establish notice. *Parker v. Conner*, 93, 118; 45 Am. Rep. 178, note.

### 4. Effect of.

A sale of personal property, fraudulent as to creditors, binds the parties. *Waterbury v. Westervelt*, 9, 598.

Fraudulent transfer cannot be assailed unless something remains of the property. *Cramer v. Blood*, 48, 684.

May be impeached on reference as to surplus on foreclosure. *Bergen v. Carman*, 79, 146.

Fraudulent deed cannot stand as security. *Davis v. Leopold*, 87, 620.

Lien of unrecorded chattel mortgage. *Lane v. Lets*, 3 Abb. 19.

Remedy of judgment creditor fraudulently deprived of his lien — equities between him and bona fide purchaser — legal and equitable title to land — receiver — accounting. *Warner v. Blakeman*, 4 Keyes, 487.

Taking in payment or as security for antecedent debt does not constitute bona fide purchaser. *Stevens v. Brennan*, 79, 254.

### 5. Evidence as to.

Evidence of fraud on question of agency in creditor's action. *McCabe v. Brayton*, 38, 196.

Continuance of grantor's possession of real estate not conclusive evidence. *Clute v. Newkirk*, 46, 684.

When buyer must be implicated — inadequacy of price does not establish. *Jaeger v. Kelley*, 52, 274.

In sale by insolvent, question of fact. *May v. Walter*, 56, 8.

Question of fact — declarations of vendor after regaining possession of chattels sold not competent against vendee. *Tilson v. Terwilliger*, 56, 273.

Presumption against one paying consideration for grant to another, how rebutted. *Dunlap v. Hawkins*, 59, 342.

In action to set aside fraudulent deed, the judgment being for property sold after delivery of the deed, grantor may show that he was not carrying on business for himself. *Teed v. Valentine*, 65, 471.

Sufficient to show fraudulent intent of vendor — if purchaser paid value either knowledge of vendor's intent or actual participation in fraud must be shown. *Starin v. Kelly*, 88, 418.

Evidence held insufficient to establish fraud in conveyance by husband to wife. *Phoenix Bank v. Stafford*, 89, 405.

Proof required of notice of fraud to vendee — doctrine of constructive notice considered. *Parker v. Conner*, 93, 118; 45 Am. Rep. 178, note.

### III. Evidence as to fraud.

In chattel mortgage whether question for jury. *Butler v. Miller*, 1, 496.

When proof of other similar frauds competent — vendor not bound to disaffirm until maturity of purchase — notes — nor to offer to return notes before trial. *Hathorne v. Hodges*, 28, 486.

When question of fact. *Kelsey v. Northern Light Oil Co.*, 45, 505; *Stitt v. Little*, 63, 427.

Burden of proof of bona fide purchase of goods fraudulently obtained is on purchaser—execution creditor is not bona fide purchaser on sale upon his execution. *Devoe v. Brandt*, 53, 462.

In transfer of note—when title not shown in plaintiff, evidence of fraudulent payment immaterial. *Terry v. Wait*, 56, 91.

That contract is drawn for one party by attorney of opposite party does not invalidate contract in absence of fraud. *Joslin v. Cowee*, 56, 626.

Party alleging, must show that he was influenced by fraudulent representations. *Taylor v. Guest*, 58, 262.

In obtaining bond and mortgage—may be shown by parol—payment to assignor valid. *Hall v. Erwin*, 66, 649.

What sufficient finding of. *Hardt v. Schulting*, 85, 624.

Facts not establishing existence of. *Humphrey v. Hayes*, 94, 594.

What evidence admissible in an action for deceit in sale of mortgage. *Craig v. Ward*, 1 Abb. 454.

Evidence to avoid sale—representation long before—reliance on—by agent—estoppel. *King v. Fitch*, 2 Abb. 508.

Evidence of other like contemporaneous frauds competent. *Van Kleek v. Leroy*, 4 Trans. App. 295.

#### IV. Effect of fraud in general.

A fraudulent contract must be repudiated whenever the fraud is discovered. *Bruce v. Davenport*, 1 Abb. 233; 3 Keyes, 472.

When defense may be waived. *Sweetman v. Prince*, 26, 224.

Waived by retaining benefits. *Lindley v. Ferguson*, 49, 623; *Cobb v. Hatfield*, 46, 533.

What waives and ratifies sale. *Joslin v. Cowee*, 52, 90.

When delay to prosecute is not waiver—estoppel. *Brooklyn Crosstown R. Co. v. Strong*, 75, 591.

One not injured cannot complain. *Garvey v. Jarvis*, 46, 310; 7 Am. Rep. 335.

A fraud is a cause of complaint to the person only upon whom it is committed. *Comstock v. Ames*, 1 Abb. 411.

Compromise does not defeat action for, unless made with knowledge. *Baker v. Spencer*, 47, 562.

Rescission of agreement on account of—putting other party in statu quo. *Allerton v. Allerton*, 50, 670.

Innocent party receiving money obtained by, protected to extent of his interest. *Justh v. Nat. Bk. of Commonwealth*, 56, 478.

Rescission of fraudulent contract—judgment—parties—dower. *Hammond v. Pennock*, 61, 145.

Want of diligence in discovering, does not defeat right of rescission. *Baker v. Lever*, 67, 304; 23 Am. Rep. 117.

Laches—tender—limitation—payment of interest. *Gould v. Cayuga Co. Nat. Bank*, 86, 75.

In action to recover money fraudulently obtained on notes, notes need not be offered back before trial—demand. *King v. Fitch*, 1 Keyes, 432.

Recovery by stranger to a transaction for fraud no bar to recovery by party defrauded. *Comstock v. Ames*, 3 Keyes, 357.

#### V. Relief.

Collusive decree set aside. *Wright v. Miller*, 8, 9.

Judgment fraudulently obtained in another State may be impeached therefor in action on it here. *Dobson v. Pearce*, 12, 156.

An instrument procured by fraudulent representations may be reformed. *DePuyster v. Hasbrouck*, 11, 582.

Fraudulent sale not enforceable—evidence. *Smith v. Countryman*, 30, 655.

Which of two must bear loss for fraud of third where one has title. *Ohio & Miss. R. R. Co. v. Kasson*, 37, 218.

Surrender of instrument fraudulently obtained may be adjudged—cross actions. *McHenry v. Hazard*, 45, 580.

Fraudulently procuring release of mortgage — when lien cannot be restored, recovery may be had for amount. *Stebbins v. Howell*, 1 Keyes, 240.

Trial by jury not compellable in action to set aside — action by receiver. *Wright v. Nostrand*, 94, 31.

Party fraudulently induced to execute contract may rescind and recover consideration paid, or affirm and recover damages

for the fraud. *Bowen v. Mandeville*, 95, 237.

See ASSIGNMENT FOR CREDITORS; CONTRACT; JUDGMENT; MARRIAGE; WILL.

### Freight.

See CARRIER; RAILROAD; SHIP AND SHIPPING.

## G.

### GAME.

Act of 1871, chapter 721, constitutional. *Phelps v. Racey*, 60, 10; 19 Am. Rep. 140.

See FISH AND FISHERY.

### Gaming.

See BETTING AND GAMING; CRIMINAL LAW.

### GAS-LIGHT COMPANY.

May not lay pipes in country highway without consent of or compensation to owners of land. *Bloomfield, etc., Gas-light Co. v. Calkins*, 62, 386.

Lands of, may be condemned for railroad purposes. *In Matter of Petition of New York Cent., etc., R. Co. v. Metropolitan Gas-light Co.*, 63, 326.

Stockholders after incorporation liable for debts until capital stock paid up. *Briggs v. Waldron*, 83, 582.

Taxable as manufacturing company under act of 1880. *Nassau Gas-light Co. v. City of Brooklyn*, 89, 409.

Mains not taxable as real estate. *People v. Board of Assessors*, 39, 81.

Injunction will lie to prevent from using pipes of another company in street. *Poughkeepsie Gas Co. v. Citizens' Gas Co.*, 89, 493.

See NEGLIGENCE.

### GIFT.

The law does not presume a gift. *Grey v. Grey*, 47, 552.

Assignment of estate in expectancy, without consideration — when valid. *Ham v. Van Orden*, 84, 257.

There must be delivery with intent to invest donee with title — certificates of stock — trust for benefit of child. *Jackson v. Twenty-third St. Railway*, 88, 520. See *Bedell v. Carll*, 33, 581.

Question of fact whether completed by delivery — release. *Trow v. Shannon*, 78, 446.

Check on savings bank, when not. *Curry v. Powers*, 70, 212; 26 Am. Rep. 577.

Of deposit in savings bank — when effectual. *Martin v. Frunk*, 75, 134; 31 Am. Rep. 446, note.

Of bonds — when not executed inter vivos — trust. *Young v. Young*, 80, 422; 36 Am. Rep. 634.

When receipt for purchase-money is. *Ferry v. Stephens*, 66, 321.

May be made, of debt due from donee to donor. *Gray v. Barton*, 55, 68; 14 Am. Rep. 181.

A transfer by father to adult son may be sustained as a gift although it purports to be for value. *Van Deusen v. Rowley*, 8, 358.

And may be sustained if the donor has sufficient capacity to do business with his

family, although not to do business generally. *Id.*

Father held mortgage against son — executed receipt for part, to be indorsed on mortgage — debt extinguished pro tanto. *Carpenter v. Soule*, 88, 251; 42 Am. Rep. 248.

Of household furniture to married woman by third person, when valid as against husband's creditors. *Allen v. Cowan*, 23, 502.

Of insurance policy by husband to wife. *Marcus v. St. Louis Mut. Life Ins. Co.*, 68, 625.

When not made out, by husband to wife. *Shuttleworth v. Winter*, 55, 624.

By husband to trustee for wife on separation is valid. *Griffin v. Banks*, 37, 621.

To prejudice of donor's wife and children, under insane delusion that they were contriving to injure him, set aside. *Riggs v. American Tract Society*, 95, 503.

Causa mortis — when valid. *Grymes v. Hone*, 49, 17; 10 Am. Rep. 313; *Champney v. Blanchard*, 39, 111.

Donor's draft upon a third party is not valid as a gift causa mortis. *Harris v. Clark*, 3, 93.

Of chose in action causa mortis — recovery of, when ownership mistaken. *Westerly v. De Witt*, 36, 340.

Evidence — memorandum on stub of note. *Cowee v. Cornell*, 75, 91; 31 Am. Rep. 428.

Subsequent declaration may determine whether loan or gift. *Doty v. Willson*, 67, 580.

See ADVANCEMENT; FRAUD; MARRIAGE.

## GOOD-WILL.

Sale of — what is not failure of consideration. *Levis v. Seabury*, 74, 409; 30 Am. Rep. 311.

Covenant not to engage in same business, how evaded. *Sander v. Hoffman*, 64, 248.

Of newspaper route. *Hathaway v. Bennett*, 10, 108.

On sale of newspaper good-will passes. *Boon v. Moss*, 70, 465.

See PARTNERSHIP.

## Grand Jury.

See CRIMINAL LAW; JURY.

## GRANT.

Colonial, to Trinity Church, construed. *People v. Rector, etc., of Trinity Church*, 22, 44.

See DEED; EMINENT DOMAIN; CONSTITUTIONAL LAW.

## GUARANTY.

- I. *Contract of.*
- II. *Consideration.*
- III. *Liability of guarantor.*
- IV. *Rights of guarantor.*
- V. *Action against guarantor.*
- VI. *Avoidance of contract of.*

### I. *Contract of.*

Of a note by the payee on transfer for his own debt is not within the statute of frauds. *Brown v. Curtiss*, 2, 225.

On the back of a promissory note is not an indorsement. *Id.*

When is continuing. *Rindge v. Judson*, 24, 64; *Gates v. McKee*, 13, 232; *White's Bank of Buffalo v. Myles*, 73, 335; 29 Am. Rep. 157.

When not. *Strong v. Lyon*, 63, 172.

Of mortgage — construction. *Maharive Bank v. Culver*, 30, 313.

Of collection of mortgage — carried by assignment of mortgage — construction of — reasonable diligence — insolvency does not excuse neglect to prosecute. *Craig v. Parkis*, 40, 181.

To pay interest — construction of. *Hamilton v. Van Rensselaer*, 43, 244.

To pay mortgage described as of \$150 per acre, cannot be held for its real excess over that amount. *Skinner v. Valentine*, 59, 473.

When agreement indorsed on bond to be regarded as guaranty. *Brown v. Champney*, 66, 214.

When parol evidence competent to explain — when continuing — construction

— notice of termination. *White's Bank of Buffalo v. Myles*, 73, 335; 29 Am. Rep. 157.

Construction and effect of guaranty of collection of mortgage. *Vanderbilt v. Schreyer*, 91, 392.

## II. Consideration.

A guaranty indorsed on a promissory note given for the maker's debt is not within the statute of frauds although it expresses no consideration. *Durham v. Manrow*, 2, 533. Contra: *Hall v. Farmer*, 2, 553.

When continuing and expressing consideration. *Gates v. McKee*, 13, 232.

"For value received" sufficiently expresses consideration — guarantor of collection liable for costs of action to collect. *Mosher v. Hotchkiss*, 2 Keyes, 589; 3 id. 161.

"For value received" sufficient expression of consideration. *Miller v. Cook*, 23, 495.

Must express consideration. *Draper v. Snow*, 20, 331.

Written below a promissory note, and expressing no consideration, is void, and parol evidence is incompetent to prove the consideration. *Brewster v. Silence*, 8, 207.

When consideration sufficiently expressed. *Church v. Brown*, 21, 315.

By corporation, of interest coupons of another — transfer of coupons and guaranties — statement of consideration immaterial. *Arnot v. Erie Ry. Co.*, 67, 315.

Consideration — continuing — notice of acceptance — when by firm, determined by dissolution and notice — limitation — discharge by extension. *City Nat. Bank of Poughkeepsie v. Phelps*, 86, 484.

## III. Liability of guarantor.

A guarantor of payment for goods to be paid for January 1, 1840, is not bound where the plaintiff took a note from the debtor payable December 25, 1839. *Walworth v. Thompson*, 2, 185.

General letter of credit creates contract with any one acting on it and without notice — consideration — statute of frauds. *Union Bank v. Coster's Executors*, 3, 203.

Guarantor not bound unless terms of guaranty are strictly fulfilled — evidence — presumption. *Leeds v. Dunn*, 10, 469.

"All liability" imports a continuing guaranty. *Agawam Bank v. Strever*, 18, 502.

Of mortgage — does not extend beyond maturity. *Melick v. Knox*, 44, 676.

Guarantor that factor shall account for goods of A., not liable for goods of A. and B. *Barns v. Barrow*, 61, 39; 19 Am. Rep. 247.

To pay deficiency on mortgage is not guaranty of payment, but of collection, and laches in foreclosure discharges. *McMurray v. Noyes*, 72, 523; 28 Am. Rep. 180.

Of chattel note, when construed for payment and not for collection. *Curdell v. McNeil*, 21, 336.

Joint — liability not extinguished by death, when individual benefit secured. *Richardson v. Draper*, 87, 337.

Liability on, not released by neglect of creditor to institute proceedings to collect after notice. *Newcomb v. Hale*, 90, 326; 43 Am. Rep. 173.

## IV. Rights of guarantor.

Of lease — surrender — fire insurance. *Kingsbury v. Westfall*, 61, 356.

Of performance of award, when binding. *Wood v. Tunnicliff*, 74, 38.

Of collection — laches — waiver. *Northern Ins. Co. v. Wright*, 76, 445.

Where only against diversion and not of existence of pledge — evidence. *Farmers', etc., Nat. Bank v. Lang*, 87, 209.

Special guaranty gives a right only to the person addressed — its terms must be strictly complied with and it must be supported by a consideration from the principal to the guarantor or by the promisee according to its terms. *Evansville Nat. Bank v. Kaufman*, 93, 273; 45 Am. Rep. 204.

V. *Action against guarantor.*

Goes with principal obligation — when right of action on, not extinguished. *Clafkin v. Ostrom*, 54, 581.

Notice of default or demand of payment not condition precedent to bringing action against guarantor. *Howe Machine Co. v. Farrington*, 82, 121.

VI. *Avoidance of contract of.*

Mere neglect of the holder to sue the maker of a note does not discharge guarantor. *Brown v. Curtiss*, 2, 225.

Taking collateral with longer time to run does not discharge guarantor. *Remsen v. Graves*, 41, 471.

Concealment to avoid must be fraudulent. *Howe Machine v. Farrington*, 82, 121.

See CONTRACT; NEGOTIABLE INSTRUMENT; STATUTE OF FRAUDS; SURETY.

**GUARDIAN AND WARD.**

Guardian may discharge mortgage before due. *Chapman v. Tibbits*, 33, 289. See *Swarthout v. Curtis*, 5, 301.

Guardian in socage may lease for any term within minority, subject to defeat by appointment of another and his election to avoid. *Emerson v. Spicer*, 46, 594.

When guardian's contract will be specifically performed. *Sherman v. Wright*, 49, 227.

Ward not estopped by fraudulent representations of one assuming without authority to act as guardian. *Id.*

Guardian may discharge right of action for trespass on ward's lands for value. *Torry v. Black*, 58, 185.

Mortgage by guardian to himself, when valid. *Lyon v. Lyon*, 67, 250.

Purchase by guardian at surrogate's sale of land devised to ward — affirmation by laches. *Bostwick v. Atkins*, 3, 53.

Right of mother as guardian in socage to maintain ejectment. *Cagger v. Lansing*, 64, 417.

Special guardian selling invalid claim against infant's land, and thus subjecting lawful claimant to expense, liable in damages. *Matter of Petition of Spelman v. Terry*, 74, 448.

Court may take minor from guardian appointed by surrogate on death of father, and intrust to mother. *Wilcox v. Wilcox*, 14, 575.

Loan of ward's funds when guardian receives bonus not usurious. *Fellows v. Longyor*, 91, 324.

Guardian cannot have compensation as attorney — interest — commissions. *Morgan v. Hannas*, 49, 667.

See INFANCY; PARENT AND CHILD.

**Gunpowder.**

See NUISANCE.

**H.****HABEAS CORPUS.**

Does not lie to review amount of fine for contempt. *People v. Jacobs*, 66, 8.

When lies to determine jurisdiction of court to render particular judgment. *People v. Liscomb*, 60, 559; 19 Am. Rep. 211.

Refusal to discharge does not bar a new writ. *People v. Brady*, 56, 182.

Order quashing, reviewable only by appeal. *People v. Conner*, 64, 481.

Jurisdiction — no power to remand conditionally or to jail liberties. *People v. Cowles*, 4 Keyes, 38.

Sufficiency of return to, by keeper of penitentiary — rights of prisoner whose sentence is excessive. *People v. Baker*, 89, 460.

See CONTEMPT; CRIMINAL LAW.



**Handwriting.**

See EVIDENCE.

**Health.**

See NUISANCE.

**HEIRS AND NEXT OF KIN.**

Requisites of suit to charge, in respect to land descended. *Mersereau v. Ryerss*, 3, 261.

Requisites to action to hold for debt of decedent — presenting claim — limitation — rejection. *Selover v. Coe*, 63, 438.

See DESCENT; EXECUTOR AND ADMINISTRATOR; WILL.

**HIGHWAYS.**

- I. *Highway laws.*
- II. *Opening of highways.*
- III. *Dedication of.*
- IV. *Obstruction of.*
- V. *Powers and duties of commissioners.*
- VI. *Practice.*
- VII. *Generally.*

I. *Highway laws.*

The statute requiring vehicles on meeting to turn to the right does not apply to street railway cars and common vehicles. *Hegan v. Eighth Ave. R. Co.*, 15, 380.

Construction of Laws of 1861, chapter 311, as to abandonment. *Amsbry v. Hinds*, 48, 57.

II. *Opening of highways.*

Failure to open to full width for thirty years does not extinguish public rights in unopened part. *Walker v. Claywood*, 31, 51.

Application for laying out — one or two highways — including old — description. *People v. Commissioners*, 37, 360.

Regularity of proceedings to widen Union avenue in Saratoga Springs. *People v. McDonald*, 69, 362.

Cannot be laid out across railroad depot grounds. *Prospect Park, etc., R. Co. v. Williamson*, 91, 552.

Laying out — constitutionality of act of 1878, chapter 410 — motion to vacate appointment of commissioners — laches — waiver — joinder. *Matter of Application of Woolsey*, 95, 135.

III. *Dedication.*

A road having no outlet or terminating in a private way may be dedicated as a public highway. *People v. Van Alstyne*, 3 Abb. 575; 3 Keyes, 35.

Lands dedicated for streets do not become such until acceptance by the public authorities. *City of Oswego v. Oswego Canal Co.*, 6, 257.

Dedication of land for, does not authorize railroad company to appropriate, without compensation. *Williams v. New York Cent. R. Co.*, 16, 97.

Dedication — acceptance — revocation — adverse possession. *Bridges v. Wyckoff*, 67, 130.

Dedication — when properly found by commissioners to appraise compensation. *Matter of Application of City of Brooklyn*, 73, 179.

When dedicator of street may restrain unauthorized use by railway — damages — depreciation of lots. *Henderson v. New York Cent., etc., R. Co.*, 78, 423.

IV. *Obstruction of.*

Action for obstructing — raising question of title — boundaries. *Little v. Denn*, 1 Keyes, 235.

Estoppel by acts as highway officer — loss of order refusing to lay out — evidence — objection — obstruction — compensation. *Chapman v. Gates*, 54, 132.

Adjoining owner entitled to damages for unreasonable use of street by railroad company. *Mahady v. Bushwick R. Co.*, 91, 148; 43 Am. Rep. 661.

V. *Powers and duties of commissioners.*

Order of two commissioners void unless it shows notice to third or that there were

only two — when two commissioners presumed legal number. *Simmons v. Sines*, 4 Abb. 246; 4 Keyes, 153.

Order laying out, through improved lands signed by only two commissioners and not reciting that the other participated, is void. *People v. Hynds*, 30, 470.

Powers of referees on appeal from commissioners. *People v. Commissioners of Highways*, 8, 476.

Powers of commissioners in laying out — vacancies, how filled — assessment of damages. *People v. Supervisors of Richmond Co.*, 20, 252.

Order laying out signed by two commissioners, when valid — requisites of application — opening and working — owner's consent not revocable after buying out. *Marble v. Whitney*, 28, 297.

Commissioners not bound to repair unless they have funds — may use funds in their discretion — not liable to private action for neglect or omission. *Garlinghouse v. Jacobs*, 29, 297.

Order by two commissioners must show participation or notification of third. *People v. Williams*, 36, 441.

Effect on adjoining owner's rights of altering by canal commissioners. *Higgins v. Reynolds*, 31, 151.

Commissioner has no power to borrow money. *Van Alstyne v. Freday*, 41, 174.

Commissioners may discontinue of their own motion any road or portion thereof — referees — bar — burden of proof. *People v. Nichols*, 51, 470.

When commissioners have no authority over bridge to be maintained at public expense. *Phelps v. Hawley*, 52, 23.

Omission of commissioner to file bond does not render him liable as trespasser — may act in laying out over his own land. *Foot v. Stiles*, 57, 399.

Protection of garden — disability of county judge to hear appeal from commissioners — judge has no right to designate justice to appoint referees. *People v. Commissioners of Highways*, 57, 549.

Commissioners may summarily remove obstructions. *Cook v. Harris*, 61, 448.

Liability of commissioners of two towns — presumption of continuance of highway. *Beckwith v. Whalen*, 65, 322.

Commissioners' return on laying out is conclusive as to who is owner and occupant — waiver of notice by approving — order of referees need not show that all meet. *People v. Burton*, 65, 452.

Commissioners not liable for negligence of predecessors. *Gould v. Booth*, 66, 62.

Appeal from commissioners — notice. Action against referees for false return to certiorari — complaint — appeal. *Rector v. Clark*, 78, 21.

Commissioners have authority to contract for rebuilding bridge carried away by flood, act 1865, chapter 442 — to contract to pay for on completion although no money — to borrow on credit of town — when that consent of town auditors properly made assumed. *Boots v. Washburn*, 79, 207.

Liability for negligence in not protecting bridge with railing. *Morrell v. Peck*, 88, 398.

When personally liable for neglect to repair. *Hover v. Barkhoof*, 44, 113.

## VI. Practice.

Parol consent to lay out, through a building, is revoked by sale and conveyance prior to the laying out, although pending appeal. *People v. Goodwin*, 5, 568.

Referees appointed to hear appeal in laying-out proceedings, decide on the facts existing at time of their hearing. *Id.*

Cul de sac may be laid out — appeal to county judge, regular — jurisdiction of referees — freeholder's certificate and order of reference conclusive — costs on certiorari. *People v. Van Alstyne*, 3 Keyes, 35.

May not be laid out over lands acquired by railroad company for engine-house. *Albany Northern R. Co. v. Brownell*, 24 345.

Adjacent piling ground is not part of mill-yard — ditch or canal is not building fixture or erection — cul de sac is high-

way. *People v. Kingman*, 24, 559. But see *Holdane v. Trustees of Cold Spring*, 21, 474.

Supervisors can only audit damages for taking land, and no more can be collected of town. *People v. Supervisors of Richmond*, 28, 112.

Order for road two rods in width on bed of old road, when may be valid — orchard. *Snyder v. Plass*, 28, 465.

Laying out new road — reaffirming. *Id.*; *Snyder v. Trumbour*, 38, 355.

Proceedings of referees to review order for laying out — powers — evidence — notice. *People v. Kniskern*, 54, 52.

When record of laying out invalid for not showing consent of owners to exchange of roads. *Miller v. Brown*, 56, 383.

Reassessment by jury of damages for laying out void when notice not served on town clerk within twenty days of filing of commissioners' assessment. *People v. Mott*, 60, 649.

Referees on appeal from commissioners cannot inquire into jurisdiction. *People v. Harris*, 63, 391.

New road cannot be discontinued as an old one before opening and use. *People v. Griswold*, 67, 59.

Decision of referees refusing to lay out may be changed within four years — certificate of freeholders not essential where owner consents — alteration when is not laying out. *People v. Jones*, 63, 306.

Proceedings to borrow money for repairs. *People v. Tompkins*, 64, 53.

#### VII. Generally.

Penalty for encroaching does not apply to one established by prescription. *Doughty v. Brill*, 3 Keyes, 612.

In proceedings for encroachment on road not laid out, the boundaries must be determined by commissioners by public use — act of February 20, 1830. *Talmage v. Hunting*, 29, 447.

Adjoining owner not entitled to compensation, when land was reserved by his grantors. *Baldwin v. City of Buffalo*, 35, 375.

Towns equally bound for expense of bridges between. *Lapham v. Rice*, 55, 472.

Overseer has no right to turn stream of water from his own land on highway to its detriment. *Kellogg v. Thompson*, 66, 88.

Town not liable to reimburse owner for damages recovered against him for removing obstructions at direction of commissioner. *People v. Board of Town Auditors of Esopus*, 74, 310.

Town not liable for judgment against commissioners of highways for injury by neglect to repair. *People v. Board of Town Auditors of Little Valley*, 75, 316.

Town not liable for contracts by commissioners of highways without its authority. *People v. Supervisors of Ulster*, 93, 397.

See MUNICIPAL CORPORATION; NEGLIGENCE; NUISANCE.

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#### Homicide.

See CRIMINAL LAW.

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#### Husband and Wife.

See CONTRACT; GIFT; INSURANCE; MARRIAGE; MORTGAGE; TRUSTS; WILL.

## I.

**ICE.**

Failure to remove from sidewalk does not give action against lot-owner by one injured. *Moore v. Gadsden*, 93, 12.

See MUNICIPAL CORPORATION; NEGLIGENCE.

**IMPRISONMENT.**

In county penitentiary, does not suspend civil rights. *Bowles v. Hubermann*, 95, 246.

Legislature may direct, for misdemeanors, to be made in any county. *Brown v. People*, 75, 437.

See FALSE IMPRISONMENT; INSOLVENCY.

**IMPROVEMENTS.**

One who buys and improves lands, knowing of a pending suit to reach a debtor's interest in them, cannot have allowance for the improvements as against the decree. *Patterson v. Brown*, 32, 81.

See FIXTURES; LANDLORD AND TENANT; PARTITION; TENANCY; VENDOR AND PURCHASER.

**Indemnity.**

See GUARANTY; SHERIFF; SURETY.

**INDIANS.**

Judgment on contract with Indian, without appearance, void. *Hastings v. Farmer*, 4, 293.

Taxation for roads through reservations when valid. *Fellows v. Denniston*, 23, 420.

Concerning intrusion on lands of. *People v. Dibble*, 16, 203. Affirmed, 21 How. (U. S.) 366.

Determination of value of improvements is a condition precedent to extinction of Indian title. *Blacksmith v. Fellows*, 7, 401.

When forcible prevention of entry of appraisers does not dispense with appraisal. *Id.*

In Ogden and Fellows' treaties the United States assumed no obligations *McKeon v. Tillotson*, 1 Keyes, 161; 3 Abb. 110.

Requisites of jurisdiction under Laws of 1821, chapter 204. *People v. Soper*, 7, 428.

Cannot dispose of soil except to government or pre-emptor. *Howard v. Moot*, 64, 262.

**Indictment.**

See CRIMINAL LAW.

**Indorsement.**

See NEGOTIABLE INSTRUMENT.

**INFANCY.**

Warranty of genuineness of note not broken by infancy of maker of note. *Baldwin v. Van Deusen*, 37, 487.

Assignment for creditors by copartners, one of whom is an infant, is not void. *Yates v. Lyon*, 61, 344.

When infant will be protected against fraudulent judicial sale. *Howell v. Mills*, 53, 322.

May maintain action for moneys belonging to him in hands of defendant. *Segelken v. Meyer*, 94, 473.

A promise to pay for necessary support of a minor beyond wages cannot be enforced without proof of the necessity. *Merritt v. Seaman*, 6, 168.

Infant not liable on his contract, although he represented himself of age. *Studwell v. Shapter*, 54, 249.

Infant not estopped by signing mother's name to deed at her request. *Spencer v. Carr*, 45, 406; 6 Am. Rep. 112.

Ratification of contract made in infancy. *Henry v. Root*, 33, 526.

Retention of proceeds of sale after majority, not affirmation. *Walsh v. Powers*, 43, 23; 3 Am. Rep. 654.

One after majority continuing in possession of and exercising acts of ownership over real estate purchased in infancy, ratifies purchase. *Henry v. Root*, 33, 526.

Where a minor submitted a claim to arbitration and after majority accepted the amount of the award, this affirms the submission. *Jones v. Phoenix Bank*, 8, 228.

Bound by judgment of which he accepts the fruits after becoming of age. *Mills v. Hoffman*, 92, 181.

Disaffirmance—infant may disaffirm his deed, even after three years after majority, without restoring consideration, if he has no property. *Green v. Green*, 69, 553; 25 Am. Rep. 233.

Chattel mortgage executed by a minor is avoided by his executing a bill of sale to another after majority. *Chapin v. Shafer*, 49, 407.

Negligence—infant only bound to use care reasonable for one of his age. *Byrne v. New York Cent., etc., R. Co.*, 83, 620.

Running in front of moving train negligent. *Wendell v. New York Cent., etc., R. Co.*, 91, 420.

When child chargeable with parent's contributory negligence. *Morrison v. Erie Ry. Co.*, 56, 302.

County not liable to, for funds of, deposited with its treasurer and misappropriated. *Gray v. Supervisors of Tompkins*, 93, 603.

Transfer of minor's title to lands in village of Brooklyn can only be made under the Revised Statutes proceedings. *Battell v. Burrill*, 50, 13.

Judgment against infant without guardian voidable only. *McMurray v. McMurray*, 66, 175.

Appearance of guardian ad litem for infant not served with summons gives no jurisdiction. *Ingersoll v. Mangam*, 84, 622.

Custody of minors is discretionary in court below. *Matter of Application of Welch*, 74, 299.

Mortgage of infant's real estate void unless confirmed by court. *Battell v. Torrey*, 65, 294.

Power of court over infant's equitable estate. *Anderson v. Mather*, 44, 249.

When legacy to, until twenty-one, carries interest from death of testator. *Brown v. Knapp*, 79, 136.

Need not join in petition for sale of real estate—what sufficient execution of deed by special guardian. *Cole v. Gourlay*, 79, 527.

Bond and mortgage taken by guardian on sale of minor's real estate become personal property on his settlement with the guardian after majority. *Forman v. Marsh*, 11, 544.

Deed by infants and by their guardian described only in his individual character conveys no title. *Hyatt v. Seeley*, 11, 52.

Infant may rescind partnership and recover capital paid. *Sparman v. Keim*, 83, 245.

Rights of infants cannot be waived on sale of decedent's property. *Stillwell v. Swarthout*, 81, 109.

Legislature may specially order sale of infant's real estate. *Brevoort v. Grace*, 53, 245.

Infant is ward of court. *Matter of Price*, 67, 231.

See CONTRACT; GUARDIAN AND WARD; MASTER AND SERVANT; NEGLIGENCE; PARENT AND CHILD; MARRIAGE.

## INJUNCTION.

May not be granted, revived or continued after judgment against plaintiff, and pending appeal. *Spears v. Matthews*, 66, 127.

Supreme Court may enjoin suit in that court—contempt. *Erie Ry. Co. v. Ramsey*, 45, 637.

When improper to restrain prosecution of another action. *Wood v. Swift*, 81, 31.

Lies to restrain multiplicity of suits. *Third Ave. R. Co. v. Mayor, etc.*, 54, 159.

When does not lie to prevent multiplicity of actions based on illegal assessment. *Howell v. City of Buffalo*, 2 Abb. 412.

When brick burning may be enjoined as nuisance. *Campbell v. Seaman*, 63, 568; 20 Am. Rep. 567.

Preliminary, issues to protect mines, quarries and timber. *West Point Iron Co. v. Reymert*, 45, 703.

Will lie to prevent gas-light company from using pipes in street of another company. *Poughkeepsie Gas Co. v. Citizens' Gas Co.*, 89, 493.

When will issue to restrain enforcement of judgment—costs, *New York & Harlem R. Co. v. Haws*, 56, 175.

Lies to restrain continuous unlawful use of land by railway. *Murdock v. Prospect Park, etc., R. Co.*, 73, 579.

When dedicator of street may restrain unauthorized use by railway. *Henderson v. New York Cent., etc., R. Co.*, 78, 423.

Evasion of—trade-mark. *Devlin v. Devlin*, 69, 212; 25 Am. Rep. 173.

To restrain violation of trade-mark. *Low v. Hart*, 90, 457.

Will not issue to stay landlord's proceeding for removal of tenant, unless without jurisdiction or fraudulent. *Sherman v. Wright*, 49, 227.

Will not issue at suit of theater manager to restrain Society for Reformation of Juvenile Delinquents from suing for penalty for not obtaining license. *Wallack v. Society for Reformation of Juvenile Delinquents*, 67, 23.

When does not lie to restrain action—estoppel. *Savage v. Allen*, 54, 458.

When will not issue to restrain canal board. *People v. Canal Board*, 55, 390.

Tax payer cannot restrain commissioner from paying railroad aid bonds alleged to be void. *Kilbourne v. St. John*, 59, 21; 17 Am. Rep. 291.

Will not issue to restrain commissioners of highway from removing encroachment. *Hyatt v. Bates*, 40, 164.

Threatened violation of legal right alone will not authorize—complaint must show facts authorizing if it is final relief sought. *McHenry v. Jewett*, 90, 58.

Does not lie to restrain assessment of tax. *Western R. Co. v. Nolan*, 48, 513.

Mandamus or certiorari the proper remedy. *Mut. Ben. Life Ins. Co. v. Supervisors of New York*, 3 Abb. 344.

When does not lie to restrain suit on undertaking to discharge attachment. *Kelly v. Christal*, 81, 619.

Violation by common council—contempt. *People v. Sturtevant*, 9, 263; *People v. Dwyer*, 90, 402.

Temporary, abrogated by judgment not providing for continuance. *Gardner v. Gardner*, 87, 14.

Of prosecution, when does not restrain collection of costs. *German Savings Bank v. Habel*, 80, 273.

Damages—defendant cannot assess pending appeal by plaintiff. *Musgrave v. Sherwood*, 76, 194.

Reference to ascertain damages cannot be granted until plaintiff decided not entitled to injunction. *Benedict v. Benedict*, 76, 600.

Ex parte discontinuance of action—when entitles defendant to order of reference to compute damages. *Pacific Mail Steamship Co. v. Toel*, 85, 646.

Order of reference as to damages—limit of undertaking—costs. *Lanlon v. Green*, 64, 326.

What are proper items of damage on vacating—reference—adopting evidence taken on prior reference. *Roberts v. White*, 73, 375.

Reference to ascertain damages—improperly granted where action abates and does not survive. *Johnson v. Elwood*, 82, 362.

Assessment of damages on—notice to sureties—evidence of fraud. *Jordan v. Volkennning*, 72, 300.

Damages on dissolving. *Andrews v. Glenville Woolen Co.*, 50, 282.

When question of damages not raised by stipulation on injunction of judgment—deposit does not measure damages. *Packer v. Nevin*, 67, 550.

When counsel fees recoverable as damages. *Hovey v. Rubber Tip Pencil Co.*, 50, 335.

When leave to discontinue does not give right of action on undertaking. *Palmer v. Foley*, 71, 106.

Order punishing contempt for violation of, how reviewed. *Watrous v. Kearney*, 79, 496.

Abetting disobedience of—review of order—interrogatories. *People v. Pendleton*, 64, 622.

See APPEAL; ASSESSMENT; CONTEMPT; CORPORATION; NUISANCE; TAXATION; TRADE-MARK.

### INNKEEPER.

Boarding horse and man in charge under contract at special rates does not render innkeeper liable as such. *Mowers v. Fethers*, 61, 34; 19 Am. Rep. 244.

Liable for loss of goods of army officer's wife stopping at hotel at agreed terms. *Hancock v. Rand*, 94, 1; 46 Am. Rep. 112.

Liable for loss of guests' goods by fire. *Hulett v. Swift*, 33, 571.

Not liable for loss by fire of horse of one neither lodger nor guest, unless negligent. *Ingallsbee v. Wood*, 33, 577.

Exemption from liability for loss by fire—evidence of negligence—evidence. *Fawcett v. Nichols*, 64, 377.

Not liable for loss of any valuables not deposited in safe when he has posted notice. *Hyatt v. Taylor*, 42, 258.

Guest bound to deposit all his money, etc., in safe to impose liability. *Rosenplaenter v. Roessle*, 54, 262.

Liable for any amount of money deposited in safe. *Wilkins v. Earle*, 44, 172; 4 Am. Rep. 655.

Liable for loss of guest's watch not deposited in safe—not "jewel or ornament." *Ramaley v. Lealand*, 43, 539; 3 Am. Rep. 128.

Liable for loss of goods not deposited in safe if the failure did not cause the loss. *Benetson v. French*, 46, 266.

Personal notice of safe to guest equivalent to posting notice in room under statute. *Purvis v. Coleman*, 21, 111.

When guest guilty of negligence after such notice. *Id.*

### INSANITY.

A mortgage executed by a lunatic is voidable only. *Ingraham v. Baldwin*, 9, 45.

Deed of one non compos mentis void. *Van Deusen v. Sweet*, 51, 378.

Case of, of grantor. *Haviland v. Hayes*, 37, 25.

When money loaned to insane person may be recovered. *Mutual Life Ins. Co. v. Hunt*, 79, 541.

When contract with insane person may be rescinded. *Riggs v. American Tract Society*, 84, 330.

Gift to prejudice of donor's wife and children, under insane delusion that they were contriving to injure him, set aside. *Riggs v. American Tract Society*, 95, 503.

Proceedings to sell land—omission to refer petition is fatal—purchaser may move to have committee amend or refund. *Matter of Valentine*, 72, 184.

Does not warrant discharge from civil arrest or imprisonment. *Bush v. Pettibone*, 4, 300.

Construction of section 33 of act to organize State lunatic asylum. *Id.*

Estate of, liable to supervisors for expense of maintenance as insane murderer. *Supervisors of Onondaga Co. v. Morgan*, 2 Keyes, 277; 4 Abb. 335.

Test of, in regard to testamentary capacity. *Seaman's Friend Society v. Hopper*, 33, 619.

Inquisition only presumptive evidence of prior insanity. *Banker v. Banker*, 63 409.

See CONTRACT; CRIMINAL LAW; WILL.

### INSOLVENCY.

I. *Non-imprisonment act.*

II. *Two-thirds act.*

I. *Non-imprisonment act.*

Does not abrogate contract. *New Eng. Iron Co. v. Gilbert, etc., R Co.*, 91, 153.

Warrant of arrest cannot issue on judgment in tort. *People v. Speir*, 77, 144.

Provisions not superseded by Code of Procedure. *People v. O'Brien*, 3 Abb. 552.

Requisites of petition for discharge. *People v. Bancker*, 5, 106.

Petition for discharge not naming all parties defective—sufficiency of service—action on contract—body execution illegal—invalidity not waived by remaining in custody. *Goodwin v. Griffiths*, 88, 629.

Requisites of assignment under 2 R. S. 16—intent to create statutory trust. *Rockwell v. McGovern*, 69, 294.

Prosecuting attorney may demand assignment of judgment debtor's choses in action. *Steward v. Biddlecum*, 2, 103.

Demand need not specify the particular choses in action. *Id.*

Where debtor has refused to execute assignment, he cannot afterward object that no one was present to receive the property. *Id.*

If a plaintiff joins contract and tort and fails he may be imprisoned for the costs. *Miller v. Scherden*, 2, 262.

Jurisdiction to issue warrant—bond under section 10, subdivision 4, not void as wager. *Wheaton v. Fay*, 62, 275.

Disability of county judge—death of prosecuting creditor. *Cobb v. Harmon*, 23, 148.

"Successor in office." *Matter of Roberts*, 70, 5.

Moving creditor may appropriate assets to exclusion of others. *Hall v. Kellogg*, 12, 325.

Assignment by debtor is for benefit of pursuing creditor and cannot be defeated by voluntary general assignment. *Spear v. Wardell*, 1, 144.

Preferential assignment is a bar to a discharge under insolvent law. *Morewood v. Hollister*, 6, 309.

When imprisoned debtor's discharge defeated by fraudulent disposition. *Matter of Brady*, 69, 215.

Discharge does not affect citizens of another State. *Pratt v. Chase*, 44, 597; 4 Am. Rep. 517.

Discharge from imprisonment on execution under 2 R. S. 28—recitals—proofs—repeal—fraud—presumption. *Develin v. Cooper*, 84, 410.

Non-resident creditor not affected by discharge. *Soule v. Chase*, 39, 342.

Discharge does not protect sheriff unless it recites jurisdictional facts—what is requisite. *Bulymore v. Cooper*, 46, 236.

A new conditional promise to revive a discharged debt can only be enforced by showing performance of the condition. *Wakeman v. Sherman*, 9, 85.

II. *Two-thirds act.*

In two-third proceedings discharge is rendered void by omission to state amount due to one creditor in schedule. *Stanton v. Ellis*, 12, 575.

"Benefit of myself or family" not equivalent to "and family"—discharge may be impeached by sheriff and judgment creditors. *Hale v. Sweet*, 40, 97.

Sufficiency of affidavit and proceedings. *People v. Sutherland*, 81, 1.

Affidavit to petition not sworn to, fatal error. *Ely v. Cooke*, 28, 365; 2 Abb. 14.

Signing petition of one judgment debtor does not transfer claim against other. *Elsworth v. Caldwell*, 48, 680.

Where schedule annexed to petition shows that the creditors do not own two-thirds of the debts due to citizens of the United States, discharge is void. *Morrow v. Freeman*, 61, 515.

## INSURANCE.

I. *Fire insurance.*

1. *Insurable interest.*
2. *Agreement to insure.*
3. *Conditions of policy.*
4. *Construction of policy.*
5. *Premiums.*
6. *Powers and duties of agent.*
7. *Rights and liabilities of insured.*



8. *Rights and liabilities of insurer.*
9. *Statement in policy constituting warranty.*
10. *What will avoid policy.*
11. *Ratification and waiver.*
12. *Action to reform or cancel policy.*
13. *Actions against companies.*
14. *Mistakes.*
15. *Contribution between companies.*
16. *Other insurance.*
17. *Change of title.*
18. *Evidence.*
19. *Assignment of policy.*
20. *Loss.*
21. *Mutual companies.*
22. *Foreign companies.*
23. *Insolvent companies.*
24. *Renewals.*

## II. *Marine insurance.*

1. *Generally.*
2. *Construction of policy.*
3. *Warranty.*
4. *Deviation.*
5. *Damage and delay from ice.*
6. *Loss.*

## III. *Life insurance.*

1. *Generally.*
2. *Construction of policy.*
3. *Warranties and representations.*
4. *Premiums.*
5. *Assignment of policy.*
6. *Proof of death.*
7. *Suicide.*
8. *Evidence.*
9. *Waiver.*
10. *Receivers and insolvency.*

## IV. *Accident and other insurance.*

### V. *General matters.*

#### I. *Fire insurance.*

##### 1. *Insurable interest.*

Owner of premises sold on execution has insurable interest during time for redemption. *Cone v. Niagara Falls Ins. Co.*, 60, 619.

Seller of chattels retaining title till payment has insurable interest—mortgage by buyer and other insurance by mort-

gagee. *Tallman v. Atlantic F. & M. Ins. Co.*, 4 Abb. 345; 3 Keyes, 87.

Mortgagor has no insurable interest after foreclosure sale but before enrollment of decree and execution of deed. *McLaren v. Hartford Fire Ins. Co.*, 5, 151.

Application for consent to assignment is notice that applicant has or is about to acquire interest in property insured. *Hooper v. Hudson River F. Ins. Co.*, 17, 424.

Carrier by contract may secure owner's insurance on goods in transit. *Mercantile Mut. Ins. Co. v. Calebs*, 20, 173.

Carrier may insure—measure of damages is value of goods at time and place of loss. *Savage v. Corn Ex. Ins. Co.*, 36, 655.

And carrier may abandon to insurers thereunder. *Id.*

Sheriff has insurable interest. *White v. Madison*, 26, 117.

On death of insured interest devolves on heirs at law as realty, subject to dower and judgment liens. *Wyman v. Wyman*, 26, 253.

Administrator of insolvent estate has insurable interest in buildings for benefit of creditors—when deemed made for administrator and not for heirs. *Herkimer v. Rice*, 27, 163.

Policy to heirs and representatives inures to trustee holding title for their benefit. *Savage v. Howard Ins. Co.*, 52, 502; 11 Am. Rep. 741.

Insurance by lessee—assignment to lessor—other insurance. *Hand v. Williamsburgh City Fire Ins. Co.*, 57, 41.

One purchasing in his own name for another may insure in his own name. *Bicknell v. Lancaster City and County Fire Ins. Co.*, 58, 677.

One joint owner or owner in common may insure his interest separately. *Harvey v. Cherry*, 76, 436.

Warehousemen have insurable interest in goods in their hands. *Richmond v. Niagara Fire Ins. Co.*, 79, 230.

Right of mortgagee to insurance under contract with owner of fee. *Reid v. McCrum*, 91, 412.

2. *Agreement to insure.*

Contract may be oral. *Trustees of First Baptist Church v. Brooklyn F. Ins. Co.*, 19, 305.

When oral complete and valid—evidence. *Audubon v. Excelsior Ins. Co.*, 27, 216.

Substitution of new parol arrangement as to payment of premiums does away with all incidents of the old. *Baptist Church v. Brooklyn Fire Ins. Co.*, 28, 153.

Oral contract valid—where insured mortgagee becomes owner no new consideration necessary to agreement to change insurance. *Fish v. Cottenet*, 44, 538; 4 Am. Rep. 715.

Oral agreement for a policy, by agent authorized to issue policies, binds company. *Ellis v. Albany City Fire Ins. Co.*, 50, 402; 10 Am. Rep. 495.

Parol agreement by town company to issue policy renders it liable for loss. *Van Loan v. Farmers', etc., Ins. Assn.*, 90, 280.

3. *Conditions of policy.*

Conditions annexed to and delivered with policy are prima facie part of it, although not referred to. *Murdock v. Chango Co. M. Ins. Co.*, 2, 210.

The application is deemed part of the contract when expressly so referred to in the policy. *Id.*

Election to rebuild—effect of—damages. *Morrell v. Irving Fire Ins. Co.*, 33, 429.

Condition against sale does not apply to goods kept for sale—assignment from husband to wife—when insurer estopped to controvert. *Wolfe v. Security Fire Ins. Co.*, 39, 49.

When contract unqualified and not to be limited by private instructions to agent. *Fried v. Royal Ins. Co.*, 50, 243.

Conditions as to increase of risk. *Williams v. People's Fire Ins. Co.*, 57, 274.

Prohibition of kerosene—sale of property—consent of insurer. *Buchanan v. Exchange Fire Ins. Co.*, 61, 26,

When application not part of policy—diagram, presumption as to drawing of. *Vilas v. New York Cent. Ins. Co.*, 72, 587; 28 Am. Rep. 186.

Loss payable to mortgagee—insurer exercising option to rebuild—mortgagee cannot recover for loss. *Heilmann v. Westchester Fire Ins. Co.*, 75, 7.

4. *Construction of policy.*

Construction of warranty as to neighboring buildings. *Gates v. Madison Co. M. Ins. Co.*, 2, 43.

Reinsurance, construction of policy of. *Mutual Safety Ins. Co. v. Hone*, 2, 235; *Blackstone v. Alemania Fire Ins. Co.*, 56, 104.

What is not reinsurance. *Excelsior Fire Ins. Co. v. Royal Ins. Co. of Liverpool*, 55, 343; 14 Am. Rep. 271.

Evidence of local custom not competent to control such contract. *Id.*

Prostration and destruction by lightning is not a loss by fire. *Babcock v. Montgomery Co. Mutual Ins. Co.*, 4, 326.

Loss by fire communicated by explosion is not “loss by explosion.” *St. John v. American, etc., Ins. Co.*, 11, 516.

Condition against storing or keeping hazardous articles not broken by temporary or casual deposit. *Hynds v. Schenectady Co. M. Ins. Co.*, 11, 554.

Condition against storing of hazardous articles not broken by use of oil and turpentine and repairs. *O'Neil v. Buffalo Fire Ins. Co.*, 3, 122.

Prohibition of kerosene—use on single occasion causing loss forfeits policy—upsetting lamp by accident does not excuse. *Matson v. Farm Buildings' Ins. Co.*, 73, 310; 29 Am. Rep. 149.

Turpentine and alcohol although extra hazardous may be kept as stock in trade of manufacturer of brass clocks. *Bryant v. Poughkeepsie Mut. Ins. Co.*, 17, 200.

“Stone dwelling-house” includes wooden kitchen attached. *Chase v. Humilton Ins. Co.*, 20, 52.

“For the bursting” construed to mean “on account of.” *Strong v. Sun Mutual Ins. Co.*, 31, 103.

Stock of goods such as is usually kept in country stores may embrace articles generally prohibited except at special rates. *Pindar v. Kings Co. Ins. Co.*, 36, 648.

Policy prohibiting extra-hazardous goods cannot be made to cover such, by evidence of prior negotiations. *Pindar v. Resolute Fire Ins. Co.*, 47, 114.

"Extra-hazardous purposes" means purposes of the same class before specified. *Reynolds v. Commerce Fire Ins. Co.*, 47, 597.

Limitation of time for suit — "after loss or damage" means after loss or damage is adjusted or ascertained. *Mayor, etc., v. Hamilton Fire Ins. Co.*, 39, 45.

In anticipation of removal of insured goods policy indorsed "transferred to cover similar property in new building" — company liable for destruction the next day before removal. *Kunze v. American Ex. Fire Ins. Co.*, 41, 412.

When property under contract of sale is not held as collateral security. *Wood v. North-western Ins. Co.*, 46, 421.

Floating policy — construction of conditions as to specific insurances. *Fairchild v. Liverpool & London Fire and Life Ins. Co.*, 51, 65.

When "fire-works" prohibited. *Jones v. Fireman's Fund Ins. Co.*, 51, 318.

Policy on articles in line of business, with special privilege for fire-crackers, covers fire-works, if in line of business, although classed among prohibited hazards. *Steinbach v. LaFayette Fire Ins. Co.*, 54, 90.

Policy on cabinet ware does not permit the partial manufacture of it on the premises. *Appleby v. Astor Fire Ins. Co.*, 54, 253.

Having a small quantity of a prohibited article for use as medicine is not "storing or keeping." *Williams v. Fireman's Fund Ins. Co.*, 54, 569; 13 Am. Rep. 620.

"Foreclosure proceedings or levy of execution" do not embrace mechanic's lien proceedings or execution thereunder. *Colt v. Phoenix Fire Ins. Co.*, 54, 595.

Policy on materials used in business includes such, although they are prohibited by printed clauses. *Hall v. Ins. Co.*

*of North America*, 58, 292; 17 Am. Rep. 255.

"Change in the risk" means change increasing the risk. *Parker v. Arctic Fire Ins. Co.*, 59, 1.

What are "incidental repairs." *Rann v. Home Ins. Co.*, 59, 387.

Agreement to produce copies of lost bills and invoices is binding. *O'Brien v. Commercial Fire Ins. Co.*, 63, 108.

"As interest may appear" — by agent for principal — other insurance to tenant in common — authority of agent to waive condition — transfer of interest. *Pitney v. Glens Falls Ins. Co.*, 65, 6.

Construction of "as interest may appear." *Dakin v. Liverpool, etc., Ins. Co.*, 77, 600.

"Contiguous" means in actual contact. *Arkell v. Commerce Ins. Co.*, 69, 191.

When saw-mill not "vacant or unoccupied" — increase of risk. *Whitney v. Black River Ins. Co.*, 72, 117; 28 Am. Rep. 116.

Vacancy — summer residence — increase of risk by vacancy. *Herrman v. Merchants' Ins. Co.*, 81, 184; 37 Am. Rep. 488.

"Vacant or unoccupied" — summer residence — knowledge of insurer — occupation of outbuildings. *Herrman v. Adriatic Fire Ins. Co.*, 85, 162; 39 Am. Rep. 634.

Question of increase one of fact — testimony of experts competent. *Cornish v. Farm Buildings Fire Ins. Co.*, 74, 295.

Notice of loss — "forthwith" — when delay a question of fact. *O'Brien v. Phoenix Ins. Co.*, 76, 459.

A judgment is not an "incumbrance." *Baley v. Homestead Fire Ins. Co.*, 80, 21; 36 Am. Rep. 570.

Policy on hop-house, while drying hops, between given dates — no recovery for loss after ceasing of drying, although between those dates. *Langworthy v. Oswego, etc., Ins. Co.*, 85, 632.

Construction of policy as to limitation of action, vacancy and title conditions — waiver of condition by parol. *Steen v. Niagara F. Ins. Co.*, 89, 315; 42 Am. Rep. 297.

5. *Premiums.*

Note for premiums valid even for excess. *Deraimes v. Merch. M. Ins. Co.*, 1, 371.

Assessment of premium notes by receiver — evidence. *Sands v. Shoemaker*, 2 Keyes, 268.

A company authorized to take premium notes in advance and negotiate them in the course of its business may transfer them in payment for losses. *Howland v. Myer*, 3, 290.

And this may be done by the president, without resolution of the directors, he being authorized by by-laws to make contracts and do ordinary business. *Id.*

Where a company authorized to receive notes in advance for premiums, received a note to be paid by procuring policies, and it was thus paid and surrendered, neither the company nor its receiver can repudiate the agreement. *Emmet v. Reed*, 8, 312.

Acknowledgment of receipt of premium in fire policy not conclusive. *Sheldon v. Atlantic F. and M. Ins. Co.*, 26, 460.

Condition of prepayment of premium may be waived by general agent. *Id.*

Particular charter construed in reference to premium notes — form of notes. *Wood v. Wellington*, 30, 218.

Evidence of losses making assessment proper must be shown in action on premium note — what sufficient — assessment proper for losses to members paying premiums in advance. *Jackson v. Roberts*, 31, 304.

What is premium note — statute of limitations suspended during injunction of receiver. *Sands v. Campbell*, 31, 345.

Prepayment of premium — waiver. *Howell v. Knickerbocker Life Ins. Co.*, 44, 276; 4 Am. Rep. 675.

When demand of premium note necessary. *Sands v. Lilienthal*, 46, 541.

Payment of premiums by agent — mortgagee's interest, extent and effect of insurance on. *Excelsior Fire Ins. Co. v. Royal Ins. Co. of Liverpool*, 55, 343; 14 Am. Rep. 271.

Assessment of premium notes by mutual company. *Sands v. Graves*, 58, 94.

When liability on advance notes for premiums not discharged by change in company's mode of business. *Osgood v. Toole*, 60, 475.

Receipt for premium without issue of policy — implies insurance on usual conditions — sufficiency of answer. *De Grove v. Metropolitan Ins. Co.*, 61, 594; 19 Am. Rep. 305.

Usage to give credit for premiums — cancellation — reviving. *Train v. Holland Purchase Ins. Co.*, 62, 598.

When credit for premium a question of fact. *Church v. La Fayette Fire Ins. Co.*, 66, 222.

6. *Powers and duties of agent.*

Agent of foreign company must give bond for annual accounting to fire department and payment of two per cent premiums. *Fire Department of Troy v. Bacon*, 2 Abb. 127.

What is time policy — general agent may extend policy. *Leeds v. Mechanics' Ins. Co.*, 8, 351.

Agent to take applications cannot approve of subsequent insurance. *Wilson v. Genesee Mut. Ins. Co.*, 14, 418.

General agent may not insure property burned while application was on its way. *Bentley v. Columbia Ins. Co.*, 17, 421.

Knowledge of agent of facts not stated is immaterial where policy requires statement. *Chase v. Hamilton Ins. Co.*, 20, 52.

Agent to take applications — insurer bound by his mistake in filling up blank. *Rowley v. Empire Ins. Co.*, 36, 550.

Agent to negotiate and deliver policies may bind company by parol contract for policy — prepayment not essential — damages. *Angell v. Hartford Fire Ins. Co.*, 59, 171.

Agent to receive applications and countersign and deliver policies may not waive condition for proofs of loss. *Bush v. Westchester Fire Ins. Co.*, 63, 531.

Acts of broker in procuring insurance binding on principal — evidence — custom — entries. *Standard Oil Co. v. Triumph Ins. Co.*, 64, 85.

What not sufficient to constitute a general agent, competent to waive conditions. *Mersereau v. Phoenix Mut. Life Ins. Co.*, 66, 274.

When insurer bound by acts and knowledge of sub-agent. *Van Schoick v. Niagara Fire Ins. Co.*, 68, 434.

What constitutes adoption of agency in procuring risk. *Mowry v. Rosendale*, 74, 360.

#### 7. Rights and liabilities of insured.

When the books and vouchers of the insured are destroyed by the fire he is not bound to furnish particulars of loss from them. *Bumstead v. Dividend Mut. Ins. Co.*, 12, 81.

Evidence that insurer had insured the property for years and knew what it was used for—when competent. *Mayor, etc., v. Exchange Fire Ins. Co.*, 3 Keyes, 436.

Policy assignable after loss. *Mellen v. Hamilton Fire Ins. Co.*, 17, 609.

Subsequent insurance—delay to notify of—what is notice of. *Id.*

When insured not bound to give notice of neighboring erections subsequent to policy—waiver. *Liddle v. Market Ins. Co.*, 29, 184.

Insured need not be named in policy—filing survey—contract of sale, when does not avoid. *Clinton v. Hope Ins. Co.*, 45, 454.

#### 8. Rights and liabilities of insurer.

Company may borrow money and pledge its assets as security. *Nelson v. Eaton*, 26, 410.

Option to rebuild—when may be exercised. *Beals v. Home Ins. Co.*, 36, 522.

Power to buy and enforce another policy. *Excelsior Fire Ins. Co. v. Royal Ins. Co. of Liverpool*, 55, 343; 14 Am. Rep. 271.

Interest under parol agreement to grant a life estate—what is not release of insurer's liability. *Redfield v. Holland Purchase Ins. Co.*, 56, 354; 15 Am. Rep. 424.

Company cannot take notes from stockholders to make up deficiency of stock—transfer without authority of board of

directors valid. *Black River Ins. Co. v. New York State Loan and Trust Co.*, 73, 282.

When insurer can recover against wrongdoer causing the loss. *Connecticut Fire Ins. Co. v. Erie Ry. Co.*, 73, 399; 29 Am. Rep. 171.

Liability of stockholders—payment of capital—when comptroller bound to give certificate—can give but one. *Chase v. Lord*, 77, 1.

When company not liable on contract of one acting as agent for it and others. *Sargent v. Nat. Fire Ins. Co.*, 86, 626.

Taxation of other State insurance companies dependent on taxation of New York companies by such State constitutional. *People v. Fire Association, etc.*, 92, 311; 44 Am. Rep. 380, note.

#### 9. Statements in policy constituting warranty.

Breach of warranty of immaterial facts avoids policy, but not so of suppression of immaterial facts where there is no warranty. *Gates v. Madison Co. Mut. Ins. Co.*, 2, 43.

What amounts to warranty that a chimney shall be built. *Murdock v. Chenango Co. Mut. Ins. Co.*, 2, 210.

Description of occupancy does not warrant continuance. *O'Neil v. Buffalo Fire Ins. Co.*, 3, 122.

Description of present use of premises is not warranty of continued use. *Smith v. Mechanics and Traders' Ins. Co.*, 32, 399.

Misrepresentation as to situation of premises and neighboring buildings—change of tenants and of use. *Gates v. Madison Co. Mut. Ins. Co.*, 5, 469.

Description of premises is warranty. *Wall v. East River Mut. Ins. Co.*, 7, 370.

What constitutes warranty as to neighboring buildings. *Chaffee v. Cattaraugus Co. Mut. Ins. Co.*, 18, 376; *Brown v. Same*, 18, 385.

Survey is warranty when so declared—breach of, avoids policy. *Le Roy v. Market Fire Ins. Co.*, 39, 90.

Warranty of keeping watchman—when broken. *Ripley v. Aetna Ins. Co.*, 30, 136;

*First Nat. Bk. of Ballston Spa v. Insurance Co. of N. A.*, 50, 45.

Insured not estopped by statement in proofs of loss from showing that warranty was not broken. *Parmelee v. Hoffman Fire Ins. Co.*, 54, 193.

Description of place of deposit of personal property, when warranty. *Bryce v. Lorillard Fire Ins. Co.*, 55, 240; 14 Am. Rep. 249.

When policy does not adopt application as a warranty. *Owens v. Holland Purchase Ins. Co.*, 56, 565.

Warranty of ownership — "held by contract." *McCulloch v. Norwood*, 58, 562.

Insurance of equitable lien on land — what not warranty of ownership — knowledge of agent. *Rohrback v. Germania Fire Ins. Co.*, 62, 47; 20 Am. Rep. 451.

"Occupied as dwelling" is warranty of present occupancy — knowledge of agent immaterial. *Alexander v. Germania Fire Ins. Co.*, 66, 464; 23 Am. Rep. 76, note.

Description as "dwelling-house," when not warranty of occupancy — omission to disclose facts not inquired about — declarations of owner after loss not competent in action by mortgagee — executory contract of sale without change of possession not breach of condition as to transfer. *Browning v. Home Ins. Co.*, 71, 508; 27 Am. Rep. 86.

"Deed" is not warranty of a freehold — paid mortgage not discharged of record is not an incumbrance — when policy is severable. *Merrill v. Agricultural Ins. Co.*, 73, 452; 29 Am. Rep. 184.

Warranty — "dwelling," question of vacancy. Waiver. Opinion of value. *Woodruff v. Imperial Fire Ins. Co.*, 83, 133.

Statement in policy that building is detached a certain distance is a warranty, but warranty not broken by existence of small office within distance. *Burleigh v. Gebhard Fire Ins. Co.*, 90, 220.

#### 10. What will avoid policy.

When insurance avoided by increase of risk. *Murdock v. Chenango Co. M. Ins. Co.*, 2, 210.

When misstatement as to other buildings avoids policy on goods. *Wilson v. Herkimer Co. Mutual Ins. Co.*, 6, 53.

Where use of camphene is prohibited, and that condition is violated, the policy is avoided, and the removal of the camphene will not restore its validity. *Mead v. North-western Ins. Co.*, 7, 530.

When use of camphene subject to special rate, its use to light the premises is so subject. *Westfall v. Hudson R. Fire Ins. Co.*, 12, 289.

Policy avoided by alteration by insurer's agent — insurer adjudged to issue new policy and pay loss. *Bunten v. Orient Mut. Ins. Co.*, 2 Keyes, 667.

Use of camphene for cleaning type not violation of condition against use of camphene, spirit gas or burning fluid. *Harper v. Albany Mut. Ins. Co.*, 17, 194.

In policy on printing office and bindery a condition prohibiting camphene is not broken by its necessary use in printing. *Harper v. New York City Ins. Co.*, 22, 441.

Increase of risk by necessary repairs does not avoid policy, unless so provided. Repairing is not a way of "occupying." *Townsend v. North-western Ins. Co.*, 18, 168.

When conditioned to be void for subsequent insurance policy, is avoided by subsequent voidable policy. *Bigler v. New York Cent. Ins. Co.*, 22, 402.

Retirement of partner does not vitiate insurance on fluctuating stock of goods as to future acquisitions. *Hoffman v. Aetna Fire Ins. Co.*, 32, 405.

When policy avoided by failure to pay premium note — waiver. *Wall v. Home Ins. Co.*, 36, 157.

A policy covering only "hazardous" goods is avoided by keeping "extra-hazardous" goods. *Pindar v. Continental Ins. Co.*, 38, 364.

How insurer may cancel policy. *Van Valkenburgh v. Lenox Fire Ins. Co.*, 51, 465.

When survey is made part of policy and is incorrect, it is fatal, although insured did not understand the one in question to be that mentioned in policy. *LeRoy v. Market F. Ins. Co.*, 45, 80.

Temporary vacancy not fatal. *Cummins v. Agricultural Ins. Co.*, 67, 260; 23 Am. Rep. 111.

"False swearing." *Maher v. Hibernia Ins. Co.*, 67, 283.

When policy to vendee in default not void. *Pelton v. Westchester Fire Ins. Co.*, 77, 605.

Limitation—when not avoided by former action and company's acceptance of cost or its attorney's extending time for making case therein. *Arthur v. Homestead Fire Ins. Co.*, 78, 462; 34 Am. Rep. 550.

Prohibition of use of "refined coal or earth oils"—use of kerosene for lighting, to agent's knowledge, does not avoid policy. *Bennett v. North British, etc., Ins. Co.*, 81, 273; 37 Am. Rep. 501.

Condition as to incumbrances—only relates to those created by or with assent of insured—mechanic's lien does not avoid policy. *Green v. Homestead Ins. Co.*, 82, 517.

Condition for avoidance if interest is not truly stated, when broken—"as interest may appear." *Lasher v. St. Joseph, etc., Ins. Co.*, 86, 423.

Condition as to vacancy violated by vacancy when policy taken, but waived by knowledge of company. *Short v. Home Ins. Co.*, 90, 16; 43 Am. Rep. 138.

Over-statement of amount of insurance material misrepresentation. *Armour v. Transatlantic Ins. Co.*, 90, 450.

Policy forfeited by change of interest by death of insured—insolvency of company and receivership does not excuse requirement of consent to change. *Matter of Hine v. Woolworth*, 93, 75; 45 Am. Rep. 176.

#### 11. Ratification and waiver.

Receipt by insurers by a general agent of renewal premiums, when a waiver of conditions of a policy forbidding other insurance. *Carroll v. Charter Oak Co.*, 1 Abb. 316.

Proofs of loss must be timely objected to or objection is waived. *Bodle v. Chenango Co. M. Ins. Co.*, 2, 53.

Objection to proofs of loss on specific grounds waives others. *O'Neil v. Buffalo Fire Ins. Co.*, 3, 122.

Defects in proofs of loss waived by failure to object. *Bumstead v. Dividend Mutual Ins. Co.*, 12, 81.

What does not amount to waiver of warranty. *Murdock v. Chenango Co. M. Ins. Co.*, 2, 210.

Insurer estopped by representation of authorized agent that survey and measurements were correct. *Plumb v. Cattaraugus Co. Mut. Ins. Co.*, 18, 392.

When objection to proofs of loss waived—evidence that mortgagee should insure and mortgagor pay premiums competent—insurance of mortgagee's interest is of property and not of debt—subrogation. *Kernochan v. New York Bowery F. Ins. Co.*, 17, 428.

Limitation of time for suing valid—how waived. *Ripley v. Aetna Ins. Co.*, 30, 136; *DeGrove v. Metropolitan Ins. Co.*, 61, 594; 19 Am. Rep. 305; *Steen v. Niagara Fire Ins. Co.*, 89, 315; 42 Am. Rep. 297.

Prepayment of premium may be waived—by delivery. *Boehen v. Williamsburgh Ins. Co.*, 35, 131.

Indorsement of "privilege for \$4,500 additional insurance" waives printed condition against additional insurance. *Benedict v. Ocean Ins. Co.*, 31, 389.

What is not waiver of prepayment of premium by general agent. *Wood v. Poughkeepsie Ins. Co.*, 32, 619.

When prepayment of premium waived—parol evidence to identify location of property. *Bowman v. Agricultural Ins. Co.*, 59, 521.

Waiver of prepayment of premium. *Washoe Tool Manfg. Co. v. Hibernia Fire Ins. Co.*, 66, 613.

Insurance of consignment by invoice and bill of lading—assignment—custom—ratification. *Block v. Columbian Ins. Co.*, 42, 393.

Renewal waives forfeiture and revives original policy. *Shearman v. Niagara Fire Ins. Co.*, 46, 526; 7 Am. Rep. 380.

Condition that policy shall not be binding until payment of premium may be

waived by agent by parol. *Bodine v. Exchange Fire Ins. Co.*, 51, 117; 10 Am. Rep. 566.

When condition for delivery of account of loss not waived as matter of law. *Underwood v. Farmers' Joint-Stock Co.*, 57, 500.

When proofs of loss not waived. *Blossom v. Lycoming Fire Ins. Co.*, 64, 162.

Local agent has no authority to waive provision that waiver of condition must be in writing subscribed by officer. *Van Allen v. Farmers' Joint-Stock Ins. Co.*, 64, 469.

"Forthwith"—waiver of notice. *Bennett v. Lycoming Co. Mut. Ins. Co.*, 67, 274.

Knowledge of agent receiving application waives condition for specific representation and statement in policy as to leased land. *Van Schoick v. Niagara Fire Ins. Co.*, 68, 434.

Waiver of condition by agent invalid when not indicated as prescribed by policy. *Walsh v. Hartford Fire Ins. Co.*, 73, 5.

When company bound by waiver by agent. *Whited v. Germania Fire Ins. Co.*, 76, 415; 30 Am. Rep. 330.

Condition as to intent of insured being other than represented what not breach—waiver of condition—other insurance affected—knowledge of agent—written consent—waiver. *Richmond v. Niagara Fire Ins. Co.*, 79, 230.

Incumbrances—mortgage, judgment—renewal—other insurance—proofs—foreclosure—waiver of forfeiture—evidence—fraud. *Titus v. Glens Falls Ins. Co.*, 81, 410.

Waiver of condition as to vacancy. *Short v. Home Ins. Co.*, 90, 16; 43 Am. Rep. 138; *Woodruff v. Imperial Fire Ins. Co.*, 83, 133; *Steen v. Niagara Falls Ins. Co.*, 89, 315.

Condition as to non-occupancy of premises held waived by knowledge of agent and retention of premium—sale under foreclosure does not transfer interest until deed executed. *Haight v. Continental Ins. Co.*, 92, 51.

Written application not made by insured does not bind him—forfeiture held

waived by assent by agent authorized to waive subsequent assignment of policy though he had no authority to waive forfeiture—ratification by failure to object after notice. *Benninghoff v. Agricultural Ins. Co.*, 93, 495.

## 12. Actions to reform or cancel policy.

Action to reform policy may be brought after loss—evidence. *Van Tuyl v. Westchester Fire Ins. Co.*, 55, 657.

When policy not reformable for mistake—proof must be clear. *Mead v. Westchester Fire Ins. Co.*, 64, 453.

When insurer may cancel—motive not inquired into. *International Life Ins. and Trust Co. v. Franklin Fire Ins. and Trust Co.*, 66, 119.

Judgment in action on policy against insured is bar to action to reform the policy. *Steinbach v. Relief Fire Ins. Co.*, 77, 498; 33 Am. Rep. 655.

## 13. Actions against companies.

Insured cannot maintain action if he has parted with his interest before loss. *Murdock v. Chenango Co. M. Ins. Co.*, 2, 210.

Limitation of time for suing is valid. *Roach v. New York & Erie Ins. Co.*, 30, 546; *Ripley v. Aetna Ins. Co.*, 30, 136.

Limitation of time for bringing action, when waived. *Ames v. N. Y. Ins. Co.*, 14, 253; *Steen v. Niagara Fire Ins. Co.*, 89, 315; *Ripley v. Aetna Ins. Co.*, 30, 136.

Limitation of time to sue—parties may provide for shorter than that fixed by law—when time not extended by pendency of injunction against company. *Wilkinson v. First Nat. Fire Ins. Co.*, 72, 499; 28 Am. Rep. 166.

Insurance on goods "sold but not delivered"—action maintainable by insurer as trustee. *Waring v. Indemnity Fire Ins. Co.*, 45, 606; 6 Am. Rep. 146.

Refusal by insured to arbitrate after election of company to repair not defense to action for loss. *Wynkoop v. Niagara Fire Ins. Co.*, 91, 478; 43 Am. Rep. 686.



14. *Mistake.*

Mistake in naming as insured one who has no interest, cured by secretary's indorsement that loss shall be payable to mortgagee. *Solm v. Rutgers' Fire Ins. Co.*, 4 Abb. 279; 3 Keyes, 416; 2 Trans. App. 227.

Misrepresentation — stating owner to be a widow, when she is really only three years old, material — act of owner. *Graham v. Fireman's Ins. Co.*, 87, 69; 41 Am. Rep. 349.

Company bound by contract made by agent under mistake as to meaning of equivocal word. *Winne v. Niagara, etc., Ins. Co.*, 91, 185.

15. *Contribution between companies.*

Contribution as between different policies — what must appear — evidence to show general and not contributory policies. *Lowell Manuf., etc. v. Safeguard Fire Ins. Co.*, 88, 591.

16. *Other insurance.*

Other insurance — knowledge of company — notice to agent — mistake of agent in filling up application does not avoid. *Rowley v. Empire Ins. Co.*, 4 Abb. 131.

Incumbrances and other insurance — when conditions waived. *Ames v. N. Y. Ins. Co.*, 14, 253.

What is other insurance as to apportionment — how amount ascertained. *Ogden v. East River Ins. Co.*, 50, 388; 10 Am. Rep. 492.

Insured not estopped by statement in proofs of loss that there was other insurance. *McMaster v. President, etc., of Ins. Co. of N. A.*, 55, 222; 14 Am. Rep. 239.

Evidence of waiver of condition by agent. *Pechner v. Phoenix Ins. Co.*, 65, 195.

Agreement between mortgagee and insurer for independent insurance — surplus moneys. *Ulster Co. Sav. Inst. v. Leake*, 73, 161; 29 Am. Rep. 115.

“Mortgage clause” — effect of, as to other insurance — change of ownership —

interest. *Hasting v. Westchester Fire Ins. Co.*, 73, 141.

Surrender and reinsurance — agent of minor acting for insured — authority of agent. *Train v. Holland Purchase Ins. Co.*, 68, 208.

Mistake of agent in filling up application. *Sprague v. Holland Purchase Ins. Co.*, 69, 128.

Other insurance simply voidable avoids policy at election of insurer. *Bigler v. New York Cent. Ins. Co.*, 22, 402; *Landers v. Watertown Fire Ins. Co.*, 86, 414; 40 Am. Rep. 554.

When renewal is other insurance. *Doran v. Franklin Fire Ins. Co.*, 86, 635.

17. *Change of title.*

Mortgage is not alienation. *Conover v. Ins. Co.*, 1, 290.

Alienee of property insured in mutual company, with consent that policy “remain good,” the policy not being assigned, cannot recover at law, nor can the insured, or both. *Bodde v. Chenango Co. M. Ins. Co.*, 2, 53.

Alienation by one partner of his interest to his copartners does not affect previous assignment of policy by the firm. *Tillou v. Kingston Mutual Ins. Co.*, 5, 405.

When consent that policy shall remain valid notwithstanding change in title is equivalent to new policy on perfecting of title. *Benjamin v. Saratoga Co. M. F. Ins. Co.*, 17, 415.

Conveyance and mortgage back for purchase-money constitutes change of title — authorities on transfer collated. *Savage v. Howard Ins. Co.*, 52, 502; 11 Am. Rep. 741.

Insured mortgagee buying premises — parol consent to change. *Pratt v. New York Cent. Ins. Co.*, 55, 505; 14 Am. Rep. 304.

Owner of premises sold on execution has insurable interest during time for redemption — if loss payable to incumbrancer, insurer not entitled to subrogation to his securities — incumbrancer may sue alone. *Cone v. Niagara Falls Fire Ins. Co.*, 60, 619.

Assignment in bankruptcy is change of title avoiding policy, although loss payable to mortgagee. *Perry v. Lorillard Fire Ins. Co.*, 61, 214; 19 Am. Rep. 272.

Appointment of partner as receiver is not change of title — acceptance of proofs — warranty as to character of business. *Keeney v. Home Ins. Co.*, 71, 396; 27 Am. Rep. 60.

Death of insured, leaving will disposing of his estate, works a "change of interest." *Sherwood v. Agricultural Ins. Co.*, 73, 447; 29 Am. Rep. 180, note.

### 18. Evidence.

Oral representations not embodied in policy — evidence of, incompetent. *Mayor, etc. v. Brooklyn Fire Ins. Co.*, 4 Keyes, 465; 3 Abb. 251.

Authority of secretary to consent to assignment — how provable. *Conover v. Mut. Insurance Co.*, 1, 290.

Admissions of secretary. *Baptist Church v. Brooklyn Fire Ins. Co.*, 28, 153.

When course of dealing may be shown. *Fabbri v. Phoenix Ins. Co.*, 55, 129.

### 19. Assignment of policy.

Agent to receive applications and premiums on renewals has no implied authority to consent to assignment. *Stringham v. St. Nicholas' Ins. Co.*, 4 Abb. 315; 3 Keyes, 280.

Assignee of vendor's interest in contract of sale of lands is entitled to insurance effected by vendee in pursuance thereof, although paid to vendee after notice of assignment. *Cromwell v. Brooklyn F. Ins. Co.*, 44, 42; 4 Am. Rep. 641.

What amounts to assignment of insurance policy. *Greene v. Republic Fire Ins. Co.*, 84, 572.

### 20. Loss.

Exemption for loss by explosion extends to explosion of boiler insured — repugnancy. *Hayward v. Liverpool, etc., Ins. Co.*, 2 Abb. 349; 3 Keyes, 456.

Exemption for loss by explosion. *Briggs v. North American, etc., Ins. Co.*, 53, 446.

When mortgagor is insured, "loss payable to mortgagee," the latter cannot recover if former has made breach of conditions. *Grosvenor v. Atlantic Fire Ins. Co.*, 17, 391.

So when policy is assigned to mortgagee with consent of insurer. *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17, 401.

Loss payable to mortgagee — payment by insurer when not payment on mortgage. *Springfield Fire and Marine Ins. Co. v. Allen*, 43, 389; 3 Am. Rep. 711.

Policy in goods held on bailment construed — measure of recovery. *Stillwell v. Staples*, 19, 401.

Proofs of loss — when sufficient by mortgagee. *Pratt v. New York Cent. Ins. Co.*, 55, 505; 14 Am. Rep. 304.

Adjustment of claim and agreement to pay is conclusive. *Smith v. Glens Falls Ins. Co.*, 62, 85.

When mortgagee cannot compel insured to make proofs of loss. *Graham v. Phoenix Ins. Co.*, 77, 171.

Proofs of loss — diligence in furnishing — waiver of forfeiture by failure to object — objection on specific ground waives others. *Brink v. Hanover Fire Ins. Co.*, 80, 108.

Title to moneys from loss as between mortgagees under covenants for insurance. *Dunlop v. Avery*, 89, 592.

### 21. Mutual companies.

Mutual company may divide risks into classes — but all assets are applicable if necessary to pay losses in either class. *White v. Ross*, 4 Abb. 589.

Maker of premium note to mutual company liable to assessment for losses whether on cash or note policies, the cash premiums being exhausted. *White v. Havens*, 4 Abb. 582.

Assessment by mutual company — publication — report of referee in creditor's action — objection. *Sands v. Shoemaker*, 4 Abb. 149.

Subscription notes given to company, to be in advance for premiums on policies agreed to be taken, are valid. *Brown v. Crooke*, 4, 51.

Surrender of deposit note by mutual company cut off subsequent right to assess for previous losses unadjusted at time of surrender. *Hyde v. Lynde*, 4, 387.

Mutual company may insure property in Canada. *Western v. Genesee Mutual Ins. Co.*, 12, 258.

Member of mutual company is liable on his deposit note in proportion of his note to whole amount of notes collectible and legally assessable. *Bangs v. Gray*, 12, 477.

A mutual company, authorized to take notes of members for premiums, may not take notes of others than the party insured. *Mutual Benefit Life Ins. Co. v. Davis*, 12, 569.

A promissory note executed as part of capital stock of an insurance company may be transferred by indorsement. *White v. Haight*, 16, 310.

One insured in mutual company liable to assessment during term of policy, even after destruction of his insured property by fire. *Bangs v. Skidmore*, 21, 136.

Mutual company may insure without providing for contingent liability of insured. *Mygatt v. N. Y. Protection Ins. Co.*, 21, 52.

When note to mutual company not deemed payable absolutely. *Dana v. Munson*, 23, 564.

Capital note to mutual company is legally payable at its date. No demand necessary. *Howland v. Edmonds*, 24, 307.

Mutual company may classify its risks, pledging the premiums primarily for losses in their respective departments. *Sands v. Boutwell*, 26, 233.

When mutual company may transfer premium notes. *Brookman v. Metcalf*, 32, 591.

Capital note fraudulently given — maker liable on, although destroyed. *Tuckerman v. Brown*, 33, 297.

Policy of mutual company payable in gold — dividends need not be paid in gold. *Luling v. Atlantic Mutual Ins. Co.*, 51, 207.

Note given to mutual company before organization may be deemed a stock note. *Jackson v. Van Slyke*, 52, 645.

## 22. Foreign companies.

Foreign companies may enforce note of trustee taken as part of guaranty fund in this State, although other security required in State of residence — estoppel — evidence — statute of limitations. *Hope Mutual Ins. Co. v. Perkins*, 2 Abb. 383.

Place of contract — company in this State, application to agent in Ohio. *Hyde v. Goodnow*, 3, 266.

Taxation of foreign insurance company. *Fire Department of Troy v. Bacon*, 3 Keyes, 402.

How action commenced against foreign company. *Gibbs v. Queen Ins. Co.*, 63, 114; 20 Am. Rep. 513.

## 23. Insolvent companies.

Receiver may recover dividends paid when company was insolvent — creditors may be made parties in order to be enjoined from proceeding individually. *Osgood v. Laytin*, 3 Keyes, 521; 3 Abb. 418.

In action by receiver for dividend paid after insolvency, defendant cannot set off claims for return of premiums and for losses. *Osgood v. Ogden*, 4 Keyes, 70.

Requisites and validity of assessment. *Sands v. Sanders*, 28, 416.

## 24. Renewals.

Renewal of policy is not making another insurance. *Brown v. Cattaraugus Co. Mut. Ins. Co.*, 18, 385.

When renewal is other insurance. *Doran v. Franklin Fire Ins. Co.*, 86, 635.

Renewal on change of location of property notified to insurer; construed to apply to the new location. *Ludwig v. Jersey City Ins. Co.*, 48, 379; 8 Am. Rep. 536.

Agreement to renew, implies renewal on former terms — limitation, construction of. *Hay v. Star Fire Ins. Co.*, 77, 235; 33 Am. Rep. 607.

II. *Marine insurance.*1. *Generally.*

Insurers against peril of sea or lakes are not liable to indemnify the owners of a vessel which has been condemned for a collision produced solely by the negligence of its master and mariners. *Mathews v. Howard Ins. Co.*, 11, 9.

General average—how long liability continues. *Nelson v. Belmont*, 21, 36.

Sale and taking back mortgage of vessel is not assignment of the insured's interest. *Hitchcock v. North-western Ins. Co.*, 26, 68.

Permission for voyage to forbidden port—deviation nullifies, although necessitated by commercial regulations. *Stevens v. Commercial Mut. Ins. Co.*, 26, 397.

Seaworthiness—presumption—on "account of whom it may concern"—proofs—evidence of navigators. *Walsh v. Washington Marine Ins. Co.*, 32, 427.

Insurance of passenger passage money—rules governing. *Ogden v. Mutual Ins. Co.*, 35, 418.

Insurer bound to know customs of place of business and held to contract with reference thereto. *Hartshorne v. Union Mut. Ins. Co.*, 36, 172.

Evidence of agent as to reasons for refusal to insure inadmissible to show dangerous character. *Atlantic Dock Co. v. Libby*, 45, 499.

Marine "suing and laboring" clause. *Alexandre v. Sun Mutual Ins. Co.*, 51, 253.

Mistake as to identity of vessel avoids, although underwriter negligent. *Hughes v. Mercantile Mut. Ins. Co.*, 55, 265; 14 Am. Rep. 254.

Interest—over-valuation of valued policy—negligence. *Sturm v. Atlantic Mut. Ins. Co.*, 63, 77.

Barratry may be insured against—authorities collated—evidence. *Atkinson v. Great Western Ins. Co.*, 65, 531.

"Port risk"—meaning and effect of—evidence of usage. *Nelson v. Sun Mut. Ins. Co.*, 71, 453.

Inconsistent conditions—waiver. *Allen v. St. Louis Ins. Co.*, 85, 473.

Insurers liable for extra expense of wreckers in floating stranded vessel—value of vessel declared in policy conclusive. *Providence, etc., Co. v. Phoenix Ins. Co.*, 89, 559.

Vessel on beach unoccupied and with furniture removed "not at anchor" and "vacant" within the conditions of policy. *Reid v. Lancaster F. Ins. Co.*, 90, 382.

2. *Construction of policy.*

When policy covers consignment of cargo for sale. *Rolker v. Great Western Ins. Co.*, 3 Keyes, 17.

Construction of policy—"consigned"—open policy—rates—vessel out of time. *Rolker v. Great Western Ins. Co.*, 4 Abb. 76.

When insurance to vessel foundering at sea becomes fixed and certain. *Duncan v. Great Western Ins. Co.*, 1 Abb. 562.

Insurance of ship on stocks does not cover timber intended for it but not joined to it. *Hood v. Manhattan Ins. Co.*, 11, 532.

3. *Warranty.*

Warranty against subsequent insurance broken by subsequent insurance by part of owners conditioned to be void if other insurance were made. *Mussey v. Atlas Mut. Ins. Co.*, 14, 79.

Warranty of sea-worthiness not broken by registry of one as master who acted only as supercargo. *Draper v. Commercial Ins. Co.*, 21, 378.

Act of congress as to registry of vessels has no effect as contract of insurance. *Id.*

Mortgage on vessel no breach of warranty on marine policy upon tackle that "property is free from liens" *Bidwell v. North-western Ins. Co.*, 24, 302.

Capture by Confederates is within warranty against capture or seizure. *Swinerton v. Columbian Ins. Co.*, 37, 174.

Warranty not to use port means not to enter it. *Snow v. Columbian Ins. Co.*, 48, 624; 8 Am. Rep. 578.

Warranty of stowage in customary manner is implied—evidence of under-

writers admissible. *Leitch v. Atlantic Mut. Ins. Co.*, 66, 100.

Marine broker not agent — breach of warranty for laying up in winter — waiver. *Devens v. Mechanics and Traders' Ins. Co.*, 83, 168.

#### 4. Deviation.

Deviation — when perishable articles deemed lost. *DePeyster v. Sun Mut. Ins. Co.*, 19, 272.

Insurance for voyage from port to port avoided by a preliminary voyage to test machinery and get coal. *Fernandez v. Great Western Ins. Co.*, 48, 571; 8 Am. Rep. 571.

Least designed and unnecessary deviation is fatal. *Audenreid v. Mercantile Mut. Ins. Co.*, 60, 482; 19 Am. Rep. 204.

What is — “at and from.” *Snyder v. Atlantic Mut. Ins. Co.*, 95, 196.

Open policy — correction of erroneous declaration — deviation — delay. *Arnold v. Pacific Mutual Ins. Co.*, 78, 7.

#### 5. Damage and delay from ice.

Exception from liability for damage by ice not limited to season of navigation — proximate cause. *Allison v. Corn Ex. Ins. Co.*, 57, 87.

“Prevented or detained by ice” means in ordinary course of navigation. *Brown v. St. Nicholas' Ins. Co.*, 61, 332.

Stoppage of voyage by ice — construction of condition. *Sherwood v. Mercantile Mut. Ins. Co.*, 66, 630.

#### 6. Loss.

Loss occurs when vessel becomes disabled although kept afloat some time afterward. *Duncan v. Great Western Ins. Co.*, 3 Keyes, 394; 2 Trans. App. 130.

Loss payable to mortgagee — prior mortgage constitutes breach of warranty as to liens. *Bidwell v. North-western Ins. Co.*, 19, 179.

Mortgagor of vessel covenanting to pay and to insure for mortgagee has insurable interest not destroyed by forfeiture under

act of congress of 1831. *Wilkes v. People's F. Ins. Co.*, 19, 184.

Member of insolvent mutual marine insurance company cannot set off his loss against his indebtedness for premiums. *Lawrence v. Nelson*, 21, 158.

Requisites of notice of abandonment to support claim for constructive total loss. *McConochie v. Sun Mut. Ins. Co.*, 26, 477.

Acceptance of abandonment justifies recovery for full freight for entire voyage. *Buffalo City Bank v. North-western Ins. Co.*, 30, 251.

Measure of recovery on premium note after bankruptcy of company and loss. *Osgood v. DeGroot*, 36, 348.

What is not “loss in consequence of bursting” of boilers. *Evans v. Columbian Ins. Co.*, 44, 146; 4 Am. Rep. 650.

Insured may recover for total loss if he has abandoned, although some of cargo came to port. *Wallerstein v. Columbian Ins. Co.*, 44, 204; 4 Am. Rep. 664.

Voluntary surrender when not loss of freight within policy. *Allen v. Mercantile Mut. Ins. Co.*, 44, 437; 4 Am. Rep. 700.

Duty of applicant to notify of loss before issue of policy. *Snow v. Mercantile Mut. Ins. Co.*, 61, 160.

Deviation — total loss without abandonment. *McCall v. Sun Mut. Ins. Co.*, 66, 505.

Total loss — abandonment — contribution — agency — delivery of cargo. *Robertson v. Atlantic Mut. Ins. Co.*, 68, 192.

Total loss of freight without abandonment — salvage — completion of voyage by substituted vessel. *Hubbell v. Great Western Ins. Co.*, 74, 246.

When vessel reaches destination after disaster it is not “actual total loss.” *Burt v. Brewers and Maltsters' Ins. Co.*, 78, 400.

### III. Life insurance.

#### 1. Generally.

A foreign insurance company is prima facie entitled to recover here upon a premium note. *Mutual Benefit Life Ins. Co. v. Davis*, 12, 569.

Insurance on life of another void without interest in life. *Ruse v. Mut. Ben. L. Ins. Co.*, 23, 516.

By creditor on life of debtor—limitations—evidence—admissions—opinions—fraud—warranty. *Rauls v. American Mut. Life Ins. Co.*, 27, 282.

Insurance company may take guaranty notes. *Hope Mut. Life Ins. Co. v. Perkins*, 38, 404.

Insurance for benefit of a third—action may be brought by his personal representative—when action is based on policy and not on account stated. *Greenfield v. Massachusetts Mut. Life Ins. Co.*, 47, 430.

Reinsurance—contract of, when unaffected by collection of former reinsurance. *Glen v. Hope Mut. Life Ins. Co. of N. Y.*, 56, 379.

—action against reinsurer—former judgment. *Fischer v. Hope Mut. Life Ins. Co.*, 69, 161.

Agreement to exchange policy—parol evidence—note of third person as payment—forfeiture—tender of performance. *Shaw v. Republic Life Ins. Co.*, 69, 286.

In action to cancel policy complaint alleging fraud and referee finding no fraud—complaint held properly dismissed. *Globe, etc. v. Reals*, 79, 202.

When executor may here sue insurance company of another State. *Palmer v. Phoenix Mut. Life Ins. Co.*, 84, 63.

## 2. Construction of policy.

Condition of good health on renewal refers to original policy—what is “good health.” *Peacock v. New York Life Ins. Co.*, 20, 293.

Words “settled limits of the United States” mean the geographical boundaries of the Union, including the Territories. *Casler v. Connecticut Mutual Life Ins. Co.*, 22, 427.

Who is “attending physician.” *Gibson v. American Mut. Life Ins. Co.*, 37, 580.

When congestion of liver is “disease of liver.” *Cushman v. United States Life Ins. Co.*, 63, 404.

Whether sunstroke is a “severe sickness or disease,” is question of fact. *Boos v. World Mut. Life Ins. Co.*, 64, 236.

Permit to travel—insured must return within specified time—agreement to continue policy, when invalid. *Evans v. United States Life Ins. Co.*, 64, 304.

“Known violation of the law”—when question of fact. *Bradley v. Mutual Benefit Life Ins. Co.*, 45, 422; 6 Am. Rep. 115.

Military service means as a combatant—building bridge as contractor is not. *Wells v. Connecticut Mut. Life Ins. Co.*, 48, 34; 8 Am. Rep. 578.

“Disease”—“usual medical attendant”—evidence. *Cushman v. United States Life Ins. Co.*, 70, 72.

Question as to use of intoxicants refers to habitual use—burden of proof to show breach is on defendant. *Van Valkenburgh v. American Popular Life Ins. Co.*, 70, 605.

Forfeiture by “travel on seas” rescinds agreement to issue paid-up policy—waiver—permit. *Douglas v. Knickerbocker Life Ins. Co.*, 83, 492.

A clause in a policy entitling the insured to a paid-up policy for whole amount paid is enforceable though such amount exceeds the sum insured for. *Christy v. Homoeopathic M. Life Ins. Co.*, 93, 345.

## 3. Warranties and representations.

Fraudulent representation as to immaterial fact avoids policy if insurer deems it material. *Valton v. National Fund Life Assurance Co.*, 20, 32.

What is fraudulent concealment of facts. *Smith v. Aetna Life Ins. Co.*, 49, 211.

Untrue statements made to medical examiner do not vitiate policy unless warranties. *Higbie v. Guardian Mut. Life Ins. Co.*, 53, 603.

Although application and policy declare statements in application warranties, yet if other parts of policy show that a strict warranty was not intended, that must govern. *Fitch v. American Popular Life Ins. Co.*, 59, 557; 17 Am. Rep. 372.

"False or fraudulent" held to mean untrue or fraudulent in respect to warranties — agent's knowledge maintained. *Foot v. Aetna Life Ins. Co.*, 61, 571.

Disaffirmance of insurance for fraud — offer of judgment, when equivalent to. *Harris v. Equitable Life Ins. Co.*, 64, 196.

When insurer not liable for mistake of its medical examiner in filling up application. *Flynn v. Equitable Life Assur. Society*, 67, 500; 23 Am. Rep. 134.

Breach of immaterial warranty invalidates — knowledge of agent does not relieve. *Bartean v. Phoenix Mut. Life Ins. Co.*, 67, 595.

Warranty as to disease and physicians. *Dilleber v. Home Life Ins. Co.*, 69, 256; 25 Am. Rep. 182.

Reinsurance — application of warranties on original insurance — complaint — presumption from failure to produce first policy. *Cohen v. Continental Life Ins. Co.*, 69, 300.

When reference not warranty — agent dictating applicant's answers, when company estopped. *Higgins v. Phoenix Mut. Life Ins. Co.*, 74, 6.

Company may defend for fraud without returning premiums — when company estopped by its medical examiner's acts and omissions in filling application. *Flynn v. Equitable Life Ins. Co.*, 78, 568; 34 Am. Rep. 561.

Warranty as to health not broken by existence of hidden disease — untruthful answer by fault of medical examiner not breach of warranty. *Grattan v. Metropolitan, etc., Ins. Co.*, 92, 274; 44 Am. Rep. 372.

#### 4. Premiums.

Wife bound by stipulations of policy taken out by husband on his life for her benefit. *Baker v. Union Mut. Life Ins. Co.*, 43, 283.

Acceptance by wife of policy procured by husband — payment of premium. *Thompson v. American, etc., Ins. Co.*, 46, 674.

Payment of premiums to authorized agent in Alabama during the civil war in

Confederate currency was valid. *Sands v. New York Life Ins. Co.*, 50, 626; 10 Am. Rep. 535.

Payment of premiums, when excused by civil war. *Martine v. International Life Ins. Co.*, 53, 339; 13 Am. Rep. 529.

When payment of premium at day due excused by conduct of company. *Lestie v. Knickerbocker Life Ins. Co.*, 63, 27.

Forfeiture for non-payment of premium note — amount unnecessary. *Roelmer v. Knickerbocker Life Ins. Co.*, 63, 160.

Payment of premium to general agent — revocation of authority. *McNeilly v. Continental Life Ins. Co.*, 66, 23.

Memorandum of extension of time to pay premium, when sufficient. *Homer v. Guardian Mut. Life Ins. Co.*, 67, 478.

Tender of premiums; when not necessary on judgment relieving from forfeiture. *Hayner v. American Popular Life Ins. Co.*, 69, 435.

Action to declare policy in force — custom as to paying premiums — application of dividends — tender of premiums after refusal to accept. *Meyer v. Knickerbocker Life Ins. Co.*, 73, 516; 29 Am. Rep. 200.

Waiver of due payment of premiums — when effectual although contrary to condition. *Dilleber v. Knickerbocker Life Ins. Co.*, 76, 567.

Insanity no excuse for non-payment of premiums — not obstacle to performance of condition — payment may be made by another — when insurer agrees after default to issue paid-up policy, death of party does not affect. *Wheeler v. Conn. Mut. Life*, 82, 543; 37 Am. Rep. 594, note.

When general agent may accept overdue premium. *Palmer v. Phoenix Mut. Life Ins. Co.*, 84, 63.

Non-payment of premiums within time — secretary of company said had been paid — had not in fact — no waiver of forfeiture — must be with knowledge. *Robertson v. Met. Life Ins. Co.*, 88, 541.

Insurance company parting with its assets and reinsuring its policies elsewhere releases insurers from premiums and is liable for breach of contract. *People v. Empire, etc., Ins. Co.*, 92, 105.

Policy forfeited by non-compliance with provisions as to paying premium and surrender — equitable relief refused where insured was negligent as to rights. *Matter of Attorney-General v. Continental Ins. Co.*, 93, 70.

#### 5. Assignment of policy.

A policy effected by one on his own life is assignable. *St. John v. American M. Life Ins. Co.*, 13, 31.

Policy on one's own life assignable to another having no interest in his life. *Valton v. National Fund Life Assurance Co.*, 20, 32.

Married woman's insurance on husband's life not transferable so as to divest her interest. *Eddie v. Slimmon*, 26, 9.

Insurance on life of husband for benefit of wife, not assignable during husband's life — conflict of laws — witness — costs. *Barry v. Equitable Life Ass. Society*, 59, 587.

Assignment — may be by delivery — condition against assignment without consent when not forfeiture — when general agent not prohibited from waiving forfeiture. *Marcus v. St. Louis Mut. Life Ins. Co.*, 68, 625.

When assignment by wife of policy on life of husband is obtained by duress, she may claim benefit of policy substituted therefor — judgment in another action — protection against double payment. *Barry v. Brusse*, 71, 261.

Policy on husband's life in favor of wife does not pass by her assignment executed under undue influence and in ignorance of her rights. *Fowler v. Butterly*, 78, 68; 34 Am. Rep. 507.

Policy by husband for benefit of wife — death of wife — subsequent marriage — assignment to second wife valid — survivorship. *Olmstead v. Keyes*, 85, 593.

Endowment policy for benefit of wife valid and non-assignable. *Brummer v. Cohn*, 86, 11; 40 Am. Rep. 503.

Creditors of wife cannot attack assignment by her of policy on husband's life. *Smillie v. Quinn*, 90, 492.

#### 6. Proof of death.

Mere notice is not "proof of death" — omission of company to object is not waiver. *O'Reilly v. Guardian Mut. Life Ins. Co.*, 60, 169; 19 Am. Rep. 151.

Refusal to furnish blanks for proofs — answers in application to be taken together — company chargeable with its medical examiner's mistake in filling up certificate — evidence. *Grattan v. Metropolitan Life Ins. Co.*, 80, 281; 36 Am. Rep. 617.

#### 7. Suicide.

Suicide while insane does not avoid a policy conditioned to be void if the insured shall die by his own hand. *Breasted v. Farmers' Loan and Trust Co.*, 8, 299.

Suicide avoids policy unless the deceased did not understand that the act would be fatal, or unless he could not resist the insane impulse. *Van Zandt v. Mutual Benefit Life Ins. Co.*, 55, 169; 14 Am. Rep. 215.

Warranty, when modified by other provisions — diseases — family physician — suicide. *Fitch v. American Popular Life Ins. Co.*, 59, 557; 17 Am. Rep. 372.

Death of insured "by his own hand, sane or insane" — suicide avoids policy. *DeGogorza v. Knickerbocker Life Ins. Co.*, 65, 232.

Burden of proof of insanity on claimant — when no evidence for jury. *Weed v. Mutual Benefit Life Ins. Co.*, 70, 561.

Suicide by insane person is not "by his own hand" — evidence of judicial determination of insanity of other members of family. *Newton v. Mutual Ben. Life Ins. Co.*, 76, 426; 32 Am. Rep. 325.

"Death by his own hand, voluntary or otherwise," does not cover case of death by over dose of medicine taken by mistake. *Penfold v. Universal Life Ins. Co.*, 85, 317; 39 Am. Rep. 660.

#### 8. Evidence.

Evidence — effect on mind of medical examiner by representation that applicant



is rich, competent. *Valton v. Nat. Loan Fund Life Ass. Soc.*, 4 Abb. 437.

Express provision for forfeiture not to be varied by representations in prospectus. *Ruse v. Mut. Ben. Life Ins. Co.*, 23, 516.

Prospectus inadmissible to vary policy. *Ruse v. Mutual Life Ins. Co.*, 24, 653.

Burden of proof—request to charge abstract proposition. *Jones v. Brooklyn Life Ins. Co.*, 61, 79.

Prior declarations of one insured for benefit of another, when competent evidence. *Swift v. Massachusetts Life Ins. Co.*, 63, 186; 20 Am. Rep. 522.

When policy is competent without application—declarations of assured as to his health—confidential communications to physician. *Edington v. Mutual Life Ins. Co.*, 67, 185.

Declarations of insured—prohibition of physician's testimony—repeating objection. *Dilleber v. Home Life Ins. Co.*, 69, 256; 25 Am. Rep. 182.

Evidence as to causes of disease producing death, when competent—physician's testimony. *Edington v. Aetna Life Ins. Co.*, 77, 564.

Life policy, though due, not evidence of debt within section 1778 of Code of Civil Procedure. *New York Life v. Universal Life, etc.*, 88, 424.

#### 9. Waiver.

"Indebtedness"—waiver of objection to proofs—wager policy. *Goodwin v. Massachusetts Mutual Life Ins. Co.*, 73, 480.

Waiver of forfeiture and agreement to reinstate policy, when binding—presumption as to rejection of certificate required—tender. *Miesell v. Globe Mutual Life Ins. Co.*, 76, 115.

Case of waiver of forfeiture. *Prentice v. Knickerbocker Life Ins. Co.*, 77, 483; 33 Am. Rep. 651.

When broker is not agent—estoppel—waiver of forfeiture—evidence. *How v. Union Mutual Life Ins. Co.*, 80, 32.

General agent cannot waive condition when expressly prohibited by policy.

*Marvin v. Universal Life Ins. Co.*, 85, 278; 39 Am. Rep. 657.

Ratification of unauthorized contract of agent defeating right to recover back premiums. *Andrews v. Aetna Ins. Co.*, 92, 596.

#### 10. Receivers and insolvency.

Receiver of insolvent life company cannot require the securities from the superintendent of the insurance department. *Ruggles v. Chapman*, 59, 163.

When receiver of insolvent company cannot compel superintendent to transfer securities to him for distribution. *People v. Chapman*, 64, 557.

Insolvent life company—payment of matured policy before general distribution is discretionary—intervenor not entitled to costs. *People v. Security Life Ins. Co.*, 71, 222.

When check by insolvent company does not operate as assignment of fund as against receiver. *Attorney-General v. Continental Life Ins. Co.*, 71, 325; 27 Am. Rep. 55.

When appointment of receiver of life company proper—act of 1869, chapter 902. *People v. Atlantic Mut. Life Ins. Co.*, 74, 177.

In proceedings for appointment of receiver of life company, policy-holders may be allowed to appear and litigate. *Attorney-General v. North American Life Ins. Co.*, 77, 297.

Supreme Court cannot authorize receiver of insolvent life company to carry on business, nor discharge him and restore property to company. *Attorney-General v. Atlantic Mut. Life Ins. Co.*, 77, 336.

Insolvent life company receiver, how governed—what claims excluded—no premiums refundable—"member" means stockholder—partnership—damages—set-off of premium notes—annuities may be based on Northampton tables—death-claims mature before dissolution not preferred—how valued. *People v. Security Life Ins., etc., Co.*, 78, 114; 34 Am. Rep. 522.

Power of court as to notice to creditors to present claims against insolvent company — not exhausted by making order. *People v. Security Life Ins. Co.*, 79, 267.

Receiver of registered policy company entitled to immediate possession of proceeds of sale of securities deposited with insurance department. *Matter of Attorney-General v. North American Life Ins. Co.*, 80, 152.

Receiver of insolvent company, act 1869, chapter 902 — may file exceptions to report of referee taking proof of claims. *Attorney-General v. North American Life Ins. Co.*, 82, 172.

Claims against insolvent company to be valued to date of making order dissolving, not from appointment of receiver. *Id.*

Running registered policies not entitled to payment in preference to death-claims. *Id.*

Receiver of insolvent company giving notice that it will receive no more premiums excuses payment, and policy-holders may recover present value of policy at the time of dissolution and appointment of receiver — premium unpaid to be deducted. *Attorney-General v. Guar. Mut. Life Ins. Co.*, 82, 336.

Superintendent must convert deposited securities and pay proceeds to receiver of insolvent company. *Attorney-General v. North Am. Life Ins. Co.*, 85, 485.

Claim presented to receiver of insolvent company — policy-holder dying — power to direct revaluation — discretionary — application denied for want of power, error. *Matter of Attorney-General v. Con. Life Ins. Co.*, 88, 77.

Allowances out of funds in receiver's hand to special counsel employed by attorney-general unauthorized. *Attorney-General v. Con. Life Ins. Co.*, 88, 571.

Compensation of receiver of life company. *Attorney-General v. North Am. Life Ins. Co.*, 89, 94.

Costs not allowable to policy-holders intervening in suit to dissolve company. *Matter of Attorney-General v. North Am. Ins. Co.*, 91, 57; 43 Am. Rep. 648.

When life company dissolved by State, agent has no claim for breach of contract

of service. *People v. Globe, etc., Ins. Co.*, 91, 174.

Foreign life company agreeing with receiver of insolvent New York life company to assume liabilities — surrender and exchange of policies — judgment that only holders of the policies of the New York company entitled to share in distribution — foreign company not such a holder. New York holders retaining policies and paying premiums to foreign company — not assent to the contract, cutting off their right to share. *Reese v. Smyth*, 95, 645, 649.

#### IV. Accident and other insurance.

Walking from steamboat to railway is "traveling by public or private conveyance." *Northrup v. Railway Pass. Ass. Co.*, 43, 516; 3 Am. Rep. 724.

Accident — fraudulent concealment of facts — what is accidental death — presumptions. *Mallory v. Travelers' Ins. Co.*, 47, 52; 7 Am. Rep. 410.

One shot and killed while intoxicated — this avoids policy conditioned to be void if death occurs while insured is intoxicated. *Shader v. Railway Pass. Ass. Co.*, 66, 441; 23 Am. Rep. 65.

Agent of foreign plate-glass insurance company which has not filed certificate in insurance department, liable to penalty. *People v. McCann*, 67, 506.

#### V. General matters.

A foreign corporation must pay taxes on securities deposited with State comptroller. *British Com. L. Ins. Co. v. Comm'rs of Taxes and Ass.*, 1 Abb. 199.

Superintendent of insurance department entitled to the percentage on transfer of securities deposited by companies with him. *People v. Miller*, 56, 448.

Superintendent may rely on mortgagor's certificate of no defense, on assignment by company to department. *Smyth v. Munroe*, 84, 354.

Mortgage assigned by company — certificate of, no defense — release — recording assignment, constructive notice. *Smyth v. Knickerbocker Life Ins. Co.*, 84, 589.

## INTEREST.

An acceptance of the principal sum as full payment waives right to interest. *Cutter v. Mayor of N. Y.*, 92, 166.

An instrument not mentioning interest nor time of payment carries interest from date. *Purdy v. Philips*, 11, 406.

Recoverable on breach of contract where damages are liquidated. *Winch v. Mut. Ben. Life Co.*, 86, 618.

Recoverable on attorney's account from rendition. *Mygatt v. Wilcox*, 45, 306; 6 Am. Rep. 90.

Properly entered on judgment by default in action for attorney's services. *Bullard v. Sherwood*, 85, 253.

Allowable on unliquidated demand from time of suit. *McCullum v. Seward*, 62, 316.

Allowable on account for work after demand for payment. *Robbins v. Carll*, 93, 656.

On unpaid salary of officer of New York city recoverable only from demand. *Taylor v. Mayor, etc.*, 67, 87.

On open account for goods sold, may be recovered on expiration of credit, or where it has been the course of dealing of the parties, or the uniform known practice of the creditor to charge it, or where such is the general usage of the particular business. *Esterly v. Cole*, 3, 502.

In action for rent, payable in merchandise, the value of which is unliquidated, interest is recoverable from the time the rent fell due. *Van Rensselaer v. Jewett*, 2, 135.

May be recovered as damages beyond penalty of bond. *Lyon v. Clark*, 8, 148.

Not due on legacy till a year from granting of letters, unless testator's contrary intention clearly appears. *Bradner v. Faulkner*, 12, 472.

On legacy for support runs from testator's death. *Cooke v. Meeker*, 36, 15.

Plaintiff to be paid "out of any money or property" received from sale or license of patents, only entitled to interest from time moneys received. *Howard v. Johnston*, 82, 271.

Vendee in contract for purchase of land, taking possession without paying, is bound

for interest, although he has made improvements. *Stevenson v. Maxwell*, 2, 408.

Recoverable on claim for money had and received for remittance, without demand. *Stacy v. Graham*, 14, 492.

When recoverable on lease. *Livingston v. Miller*, 11, 80.

When purchaser from receiver liable for. *Gillet v. Van Rensselaer*, 15, 397.

Allowed whenever debtor is in default, as indemnity. *Adams v. Fort Plain Bank*, 36, 255.

Stockholder individually liable, liable for interest on amount equal to his stock from commencement of suit. *Burr v. Wilcox*, 22, 551.

On claim for services allowable without demand when debtor has left State — exception. *Graham v. Chrystal*, 2 Abb. 263; 2 Keyes, 21.

In action to compel payment of dividends. *Boardman v. Lake Shore, etc., R. Co.*, 84, 157.

Cause of action arising in another State, rate allowed by its laws should control. *Brown v. Knapp*, 79, 136.

Compound, as between parties — authorities collated. *Johnson v. Hartshorne*, 52, 174.

Agreement to pay compound, when valid. *Guernsey v. Rexford*, 63, 631.

Compound, when allowed — what is not agreement for — account stated. *Young v. Hill*, 67, 162; 23 Am. Rep. 162.

When allowable as damages. *McMahon v. N. Y. & Erie R. Co.*, 20, 463.

Recoverable as damages for value of property lost by negligence. *Parrott v. Knickerbocker and N. Y. Ice Cos.*, 46, 361.

Held allowable as item of damages in action for injury to property. *Mairs v. Manhattan, etc., Ins. Co.*, 89, 498.

On contract after maturity at legal rate. *Reese v. Rutherford*, 90, 644.

On debt after maturity is at statute rate. *Bennett v. Bates*, 94, 354.

Legal rate governs where given as damages. *Sanders v. Lake Shore, etc., R. Co.*, 94, 641.

Computed at legal rate where judgment rendered. *First Nat. Bk. v. Fourth Nat. Bk.*, 89, 412.

On merger of mortgage in judgment, is at legal and not conventional rate. *Taylor v. Wing*, 84, 471.

Chargeable to sureties in action on bond for deficit by public officer. *Supervisors of Monroe v. Clark*, 92, 391.

On recovery for death by negligence is governed by statute in force at verdict. *Salter v. Utica, etc., R. Co.*, 86, 401.

When right to, cannot be affected by jury's arbitrary reduction of amount of claim. *Martin v. Silliman*, 53, 615.

Jury cannot add in verdict for death from negligence — act 1870, chapter 78. *Manning v. Port Henry Iron Ore Co.*, 91, 664.

When cannot be considered on question whether recovery is more favorable than offer on appeal from Justice's Court. *Pike v. Johnson*, 47, 1.

When rests not allowed in computation. *Corn Ekv. Bk. v. Nassau Bk.*, 91, 74.

On judgment rendered prior to act of 1879, chapter 538, interest attaches at seven per cent up to January 1, 1880, when act took effect, and after that at six per cent, the new rate. *O'Brien v. Young*, 95, 428.

See BANK; DAMAGES; NEGOTIABLE INSTRUMENT; USURY; WILL.

## INTERPLEADER.

Bill maintainable by owner of farm lying in two towns and assessed in both, against the two collectors. *Dorn v. Fox*, 61, 264.

Not proper in conversion. *Dows v. Kidder*, 84, 121.

When proper in foreclosure. *Tauton v. Groh*, 4 Abb. 358.

Action not maintainable where plaintiff denies a part of the indebtedness claimed. *Baltimore, etc., R. Co. v. Arthur*, 90, 234.

When proper in action to test validity of notes issued by county treasurer. *Board of Supervisors v. Deyoe*, 77, 219.

Proper although party proposed to be brought in is the United States. *Johnston v. Stimmel*, 89, 117.

See PARTIES; PLEADING.

## Intoxicating Liquors.

See CONTRACT; CIVIL DAMAGE ACT; DRUNKARD; EXCISE.

## J.

### Jeopardy.

See CRIMINAL LAW.

### Joinder.

See ACTION; PARTIES; PLEADING.

### Joint Adventure.

See ACCOUNT.

## JOINT DEBTORS.

Where judgment has been had under the joint debtor act, the cause of action

in a subsequent proceeding to charge both does not arise upon the judgment. *Oakley v. Aspinwall*, 4, 513.

Not served — new action lies against, without bringing in, under Code. *Lane v. Salter*, 51, 1; *Morey v. Tracey*, 92, 581.

When death releases. *Richardson v. Draper*, 87, 337.

See EXECUTION; JUDGMENT.

## JOINT-STOCK COMPANY.

Action against members — complaint must show original cause of action as well as judgment and execution against com-

pany. *Witherhead v. Allen*, 3 Keyes, 562 ; 4 Abb. 628.

When stockholder not bound by assessment before whole capital has been subscribed for. *Bray v. Farwell*, 81, 600.

Suable in name of president — how found — evidence of indebtedness — requisites of complaint. *National Bank of Schuylerville v. Van Derwerker*, 74, 234.

Company may be sued by member. *Wescott v. Fargo*, 61, 542 ; 19 Am. Rep. 300.

### Joint Tenants.

See TENANCY.

## JUDGE.

County, term of, elected in November, 1869. *People v. Gardner*, 45, 812.

Cannot act after seventy years of age. *People v. Brundage*, 78, 403.

Not incompetent under special statute. *People v. Nichols*, 52, 478 ; 11 Am. Rep. 734.

Judge where not disqualified by interest from appointing drainage commissioners. *Matter of Application of Ryers*, 72, 1 ; 28 Am. Rep. 88.

When not interested as original stockholder. *Palmer v. Lawrence*, 5, 389.

May sit in cause of a corporation although related within prohibited degree to a stockholder. *Matter of Dodge and Stevenson Manufg. Co.*, 77, 101 ; 33 Am. Rep. 579.

Disqualified by consanguinity cannot sit even by consent. *Oakley v. Aspinwall*, 3, 547.

Is disqualified by consanguinity to a party who is a mere surety or is indemnified. *Id.*

Not liable in damages for judicial act in excess of jurisdiction. *Lange v. Benedict*, 73, 12 ; 29 Am. Rep. 80, note.

See CONSTITUTIONAL LAW ; COURTS ; JUDGMENT ; JUSTICE'S COURT.

## JUDGMENT.

### I. In general.

### II. Foreign judgments.

### III. Effect of.

#### 1. As an estoppel.

#### 2. Impeachment collaterally.

#### 3. Validity of.

#### 4. Miscellaneous.

### IV. Lien of.

### V. Assignment.

### VI. By confession.

### VII. In action against joint parties.

### VIII. Practice as to.

#### 1. Form of.

#### 2. Entry.

#### 3. Amendment.

#### 4. Review.

#### 5. Miscellaneous.

### I. In general.

Where the amount has been paid to the attorney in the execution, and the creditor allows him to retain it in payment of a debt, it cannot be recovered on reversal of the judgment. *Langley v. Warner*, 3, 327.

Agreement between judgment debtor and purchaser under execution extending time for redemption is valid, and affects other creditors. *Miller v. Lewis*, 4, 554.

Requisites of clerk's certificate of copy of judgment docket. *Id.*

Presumption of payment of one recovered prior to the Revised Statutes may be repelled by proof of debtor's insolvency. *Waddell's Adm'r v. Elmendorf's Adm'r*, 10, 170.

Merged in second judgment on note by debtor and surety given for former. *Craft v. Merrill*, 14, 456.

Purchaser on partition sale in action by tenant in common of remainder gets good title. *Blakeley v. Calder*, 15, 617.

When decision on motion has force of. *Dwight v. St. John*, 25, 203.

What operates as satisfaction. *Beers v. Hendrickson*, 45, 665.

On creditor's bill — delay in entering, effect of, as to question of payment of original judgment. *Fitzgerald v. Topping*, 48, 438.

Effect of recitals as to infants. *Bosworth v. Vandewalker*, 53, 597.

Directing payment to receiver—docketed in favor of plaintiffs, vacated as unauthorized. *Geery v. Geery*, 79, 565.

Construction of proper judgment absolute to be entered on affirmation of order for new trial—arbitration and award. *Hiscock v. Harris*, 80, 403.

On default, in action by attorney for services, properly includes interest demanded. *Bullard v. Sherwood*, 85, 253.

When not paid by conveyance of land. *Territt v. Brooklyn Improvement Co.*, 87, 92.

Presumption of payment on a sealed instrument after twenty years when—equity of redemption. *N. Y. L. Ins. and Trust Co. v. Covert*, 3 Abb. 350.

## II. Foreign judgments.

Of another State may be impeached in action upon it here, for fraud. *Dobson v. Pearce*, 12, 156.

Action on, of another State—sufficiency of record and certificate. *Hatcher v. Rochecou*, 18, 86.

Of another State has no greater effect here than there. *Suydam v. Barber*, 18, 468.

Of court of State in secession—regularity and force of, in suit on. *Pepin v. Lachenmeyer*, 45, 27.

Interlocutory order of another State is not conclusive here. *Brinkley v. Brinkley*, 50, 184; 10 Am. Rep. 460.

“Brennan” instead of “Brenham”—when not material error in record of another State. *Miller v. Brenham*, 68, 83.

Judgment record from another State, showing that action was brought for benefit of another—latter may sue on here. *Greene v. Republic Fire Ins. Co.*, 84, 572.

Of another State presumed valid. *Pringle v. Woolworth*, 90, 503.

## III. Effect of.

### 1. As an estoppel.

Where defendant covenanted to repair gate, and in consequence of failure cattle

entered, a judgment for the trespass is not a bar to an action for subsequent trespass. *Beach v. Crain*, 2, 86.

Order of Chancery, affirmed in error, allowing plea to stand for answer, is conclusive that the matter, if true, is a good defense. *Bangs v. Strong*, 4, 315.

Recovery for malicious prosecution is a bar to an action for slander for same accusation. *Sheldon v. Carpenter*, 4, 578.

For malicious prosecution does not bar action for slander subsequent to that action, but alluding to the same general subject. *Rockwell v. Brown*, 36, 207.

In summary proceedings, finding no rent due, is conclusive in replevin by tenant for property distrained. *White v. Coatsworth*, 6, 137.

Decree in Chancery binds representatives of parties in a new suit as a matter then determined. *Burhans v. Van Zandt*, 7, 523.

Conclusive upon parties only as to the points embraced in it. *Mason's Executors v. Alston*, 9, 28.

Effect on dower of foreclosure of lands devised in lieu of. *Lewis v. Smith*, 9, 502.

Former, may be conclusive in subsequent action, although subject-matter may be different. *Castle v. Noyes*, 14, 329.

Former, no estoppel as to immaterial allegation. *Sweet v. Tuttle*, 14, 465.

Recovery in ejectment by landlord no bar to action for previous rent. *Vernam v. Smith*, 15, 327.

In action against sheriff for misconduct of deputy on notice to deputy does not conclude deputy's surety not notified. *Thomas v. Hubble*, 15, 405.

Operates as estoppel, although a contrary judgment was subsequently rendered between same plaintiff and another plaintiff and same defendant. *Mersereau v. Pearsall*, 19, 108.

In action “for obstructing passage of water” no bar to action in respect to a “stream of water.” *Goodale v. Tuttle*, 29, 459.

Summary proceedings may operate as bar of former judgment. *Demarest v. Darg*, 32, 281.

Former, for any portion of damages arising out of indivisible claim, is bar. *Draper v. Stouvenel*, 38, 219.

In justice's court for surgical services is bar to action for malpractice. *Gates v. Preston*, 41, 113.

When not a bar to right of subrogation. *Bennett v. Cook*, 45, 268.

Former, for board of a horse is a bar to action for its conversion. *Collins v. Bennett*, 46, 490.

By default, for interest on note — conclusive against plea of usury in subsequent action on note. *Newton v. Hook*, 48, 676.

Against city for injury by defect in street is conclusive against one bound by contract to repair and notified of the action. *Mayor v. Troy & Lansingburgh R. Co.*, 49, 657.

Against manufacturing company, not evidence in action to enforce trustees' liability. *Miller v. White*, 50, 137.

On default, on service of summons alone for recovery of money, merges right of arrest, and allegations of fraud in complaint do not conclude defendant in bankruptcy. *Shuman v. Strauss*, 52, 404.

Estops only parties and privies. *Atlantic Dock Co. v. Mayor, etc.*, 53, 64.

Former, in conversion, when not bar to assumpsit for value of same property. *Stowell v. Chamberlain*, 60, 272.

Former, when not a bar in action against common carrier on bill of lading. *Armour v. Michigan Cent. R. Co.*, 65, 111; 22 Am. Rep. 603.

Of partition, charging a mortgage of tenant on another's share, no bar to action to foreclose. *Reid v. Gardner*, 65, 578.

Of justice of peace on penalty — conclusiveness. *Halleck v. Dominy*, 69, 238.

Equitable action does not lie to set aside for perjury. *Ross v. Wood*, 70, 8.

Reversal destroys efficacy as estoppel. *Smith v. Frankfield*, 77, 414.

Only final, conclusive on parties in subsequent action — interlocutory order not such. *Webb v. Buckelew*, 82, 555.

Conclusive against third person liable over to defendant. *Heiser v. Hatch*, 86, 614.

When may settle rights as between co-defendants. *Derham v. Lee*, 87, 599.

Not conclusive as to knowledge by creditor of insolvency. *Getman v. Second Nat. Bk.*, 89, 136.

In justice's court — effect as a bar. *Boyer v. Schofield*, 2 Keyes, 628.

Conclusive as between the defendants themselves. *Craig v. Ward*, 3 Keyes, 387.

### 2. Impeachment collaterally.

May not be impeached collaterally. *McCarthy v. Marsh*, 5, 262.

Of inferior court cannot be impeached collaterally for want of jurisdiction, when record shows evidence tending to give, and adjudged sufficient. *Sheldon v. Wright*, 5, 497.

Cannot be collaterally impeached for fraud. *White v. Merritt*, 7, 352.

Domestic judgment cannot be collaterally impeached for fraud. *Krekeler v. Ritter*, 62, 372.

Domestic, may be collaterally assailed as founded on forged appearance. *Ferguson v. Crawford*, 70, 253; 26 Am. Rep. 589.

Irregular judgment, not null, cannot be impeached collaterally. *Pendleton v. Weed*, 17, 72.

Rendered upon unauthorized appearance alone, cannot be collaterally impeached. *Brown v. Nichols*, 42, 26.

When will not be annulled in independent action for fraud or because of a good defense — sufficiency of complaint. *Smith v. Nelson*, 62, 286.

Admission of service of summons not stating time or place, but consenting to judgment, gives jurisdiction as against collateral attack. *White v. Bogart*, 73, 256.

Evidence to impeach, must be clear. *Ferguson v. Crawford*, 86, 609.

### 3. Validity of.

Personal, in action against non-resident mortgagor served by publication and not appearing, invalid. *Schwinger v. Hickok*, 53, 280.

Of Circuit, not void, although entered after judgment by Special Term. *Platt v. Woodruff*, 61, 378.

Final, on demurrer, cannot be avoided by discontinuance. *Stanton v. King*, 76, 585.

Rendered against non-resident on service by publication — what property affected thereby — real estate sold, no attachment issued — purchaser gets no title. *McKinney v. Collins*, 88, 216.

By court of general jurisdiction upon default presumed valid. *Maples v. Mackey*, 89, 146.

Procured by one defendant against others without serving answer or notice on them, avoidable. *Edwards v. Woodruff*, 90, 396.

By judge disqualified by consanguinity is incurably void. *Chambers v. Clearwater*, 1 Keyes, 310; 1 Abb. 341.

#### 4. *Miscellaneous.*

Where debtor obtains discharge without complying with terms of delivery, and it is not filed, the judgment remains in force, and superior to a mortgage executed to secure a loan while the discharge is thus held. *Crosby v. Wood*, 6, 369.

In trespass, is evidence of title only to that part of close on which trespass was committed, where title to that part was pleaded. *Dunckel v. Wiles*, 11, 420.

Where State and Federal courts differ the decisions of the former are controlling except on Federal questions. *Tovle v. Forney*, 14, 423.

Does not attach to mere naked title without interest. *Siemon v. Schurck*, 29, 598.

In action for detaining and injuring a horse does not change title. *Thurst v. West*, 31, 210.

Of Commission of Appeals in same case will not be interfered with here. *Terry v. Wait*, 56, 91.

Effect of reversing discontinuance of highway. *Briggs v. Bowen*, 60, 454.

Equity between judgment debtor's grantee and purchaser for his benefit of the premises on execution. *Carnes v. Platt*, 59, 405.

#### IV. *Lien of.*

One who buys land and undertakes to pay a judgment, supposed to be a lien thereon, as part of the consideration, may be compelled, although it was not actually a lien. *Haverly v. Becker*, 4, 169.

Lien on land is subject to equitable rights of one in possession under contract of purchase from the debtor. *Moyer v. Hinman*, 13, 180.

Being suspended by order, lien re-attaches on vacating order. *King v. Harris*, 34, 330.

Legislature may abolish lien of, on lands, before title has accrued. *Watson v. New York Cent. R. Co.*, 47, 157.

Agreement of parties as to lien of — docketing in wrong county — equitable rights of plaintiff. *Lanning v. Carpenter*, 48, 408.

Against tenant for life — lien destroyed by breach of covenant forfeiting estate. *Moore v. Pitts*, 53, 85.

When extinguished by release by equitable owner. *Stillwell v. Carpenter*, 62, 639.

Where lands subject to judgment are conveyed, the judgment creditor's release of sureties on appeal discharges him. *Barnes v. Mott*, 64, 397; 21 Am. Rep. 625.

Is subordinate to prior unrecorded deed by judgment debtor. *Trenton Banking Co. v. Duncan*, 86, 221.

Suspended on appeal but subsequently restored, subordinate to judgment entered during the suspension — assignee for less than face may enforce. *Harmon v. Hope*, 87, 10.

#### V. *Assignment.*

On assignment of judgment, warranty that whole amount is due is implied — limitation of, construed. *Furniss v. Ferguson*, 15, 437; 34, 485.

Intention to satisfy — assignment of — on credit. *Harbeck v. Vanderbilt*, 20, 395.

Payment to sheriff, when is purchase, not payment of. *Smith v. Miller*, 25, 619.

One who having assigned a judgment satisfies it is liable to assignee for its



amount or in damages. *Booth v. Farmers and Mechanics' Nat. Bank*, 50, 396.

Assignee takes subject to equities. *Waring v. Loder*, 53, 581; *Blydenburgh v. Thayer*, 3 Keyes, 293.

Purchaser from assignee takes subject to equities. *Outts v. Guild*, 57, 229.

After assignment of judgment plaintiff's attorney has no control. *Robinson v. Brennan*, 90, 208.

#### VI. By confession.

Sufficiency of statement — not impeachable for fraud when confessed directly to third party. *Kirby v. Fitzgerald*, 31, 417.

Offer of judgment by insurance company for premiums paid — when equivalent to return of premiums and rescission. *Harris v. Equitable Life Assurance Soc.*, 64, 196.

Entry of judgment upon offer, concludes as to every part of claim in action. *Davies v. Mayor of New York*, 93, 250.

What is sufficient statement. *Dow v. Platner*, 16, 562; *Thompson v. Van Vechten*, 27, 568; *Ely v. Cooke*, 28, 365; 2 Abb. 14; *Frost v. Koon*, 30, 428; *Acker v. Acker*, 1 Keyes, 291; 1 Abb. 1; *Clements v. Gerow*, 1 Keyes, 297; *Hopkins v. Nelson*, 24, 518; *Freligh v. Brink*, 22, 418.

Confession need not in terms state that sum is due or to become due. *Lanning v. Carpenter*, 20, 447.

Statement need not be precise and particular; character and dates of items need not be given. *Gandall v. Finn*, 1 Keyes, 217; 2 Abb. 232.

When void for defective statement. *Read v. French*, 28, 285.

By default not valid except upon personal service. *Id.*

Merely setting forth note insufficient. *Chappell v. Chappell*, 12, 215.

May be set aside by junior judgment creditor. *Id.*

On insufficient statement good between the parties. *Neusbaum v. Keim*, 24, 325; *Miller v. Earle*, 24, 110.

Such judgment cannot be impeached by creditor having no judgment or lien. *Id.*

Sufficiency of statement — validity between parties. *Harrison v. Gibbons*, 71, 59.

By married woman not void. *Rorabaack v. Stebbins*, 4 Abb. 100.

When deemed fraudulent as to other creditors. *Dunham v. Waterman*, 17, 9.

To secure future advances, ceases when advances to its amount have been made and paid. *Truscott v. King*, 6, 147.

When affidavit insufficient — judgment vacated. *Ingram v. Robbins*, 33, 409.

Verification may be amended — may be taken to secure future advances of notes. *Cook v. Whipple*, 55, 150; 14 Am. Rep. 202.

By confession against joint maker of promissory note prior to Code of Civil Procedure, section 1278, merged the note. *Candee v. Smith*, 93, 349.

#### VII. In action against joint parties.

Where a partnership debt is merged in a judgment against one partner, a vacatur saving the rights of the partner not sued, does not revive the cause of action against him. *Olmstead v. Webster*, 8, 413.

In action against two as partners may go against one alone. *Brumskill v. James*, 11, 294.

May pass against two constituting firm, in action against three sued as firm, the third not being served. *Pruyn v. Black*, 21, 300.

In action against husband and wife when may go against husband and be dismissed as to wife. *Marquat v. Marquat*, 12, 336.

In action against partners there may be nonsuit as to some and judgment against others. *Fielden v. Lahens*, 2 Abb. 111.

When joint, proper. *Calkins v. Smith*, 48, 614; 8 Am. Rep. 575.

Signing petition for discharge of one joint judgment debtor does not transfer to assignee claim against other. *Elsworth v. Caldwell*, 48, 680.

In action on joint contract, judgment may be given against one defendant and

in favor of the other as against plaintiff. *Barker v. Cocks*, 50, 689.

Separate judgments against partners instead of joint judgment constitute mere irregularity—remedy, motion within a year. *Judd Linseed and Sperm Oil Co. v. Hubbell*, 76, 543.

### VIII. Practice as to.

#### 1. Form of.

In replevin, under section 277, Code of Procedure, must be in alternative. *Dwight v. Enos*, 9, 470; *Fitzhugh v. Winan*, 9, 559.

In action of tort to recover for loss of gold coin, judgment should be for gold and not for value in money. *Kellogg v. Sweeney*, 46, 291; 7 Am. Rep. 303.

On contract payable in steam power, when court may not render judgment for money—should appoint receiver. *McLean v. Cary*, 88, 391.

Judgment directing payment of money may be rendered in equitable action. *Murtha v. Curley*, 90, 372.

A judgment of set-off when granted, on stipulation, effect of failure to perform stipulation—opening judgment. *Butler v. Lee*, 1 Abb. 279.

Proper form of, in action on covenant for payment of mortgage for others. *Farnham v. Mallory*, 2 Abb. 100.

When legal and equitable relief demanded, court may award either according to proof. *Johnson v. Hathorn*, 2 Abb. 465.

What is not a final, in action to set aside assignment for creditors. *Myers v. Becker*, 95, 486.

Not a “contract or obligation,” within act of 1879, chapter 538, as to interest. *O'Brien v. Young*, 95, 428.

#### 2. Entry.

On report of referee, how entered. *Hancock v. Hancock*, 22, 568.

Under 2 R. S. 469, § 73, entry of judgment is proper. *Austin v. Rawdon*, 42, 155.

Court may order entered, so appeal may be taken. *Skinner v. Quin*, 43, 99.

Docketing under chapter 386, Laws of 1840, not essential in action to recover land. *Sheridan v. Andrews*, 49, 478.

Roll not signed by clerk is not rendered void. *Goelet v. Spofford*, 55, 647.

Entering of, without including costs, waives them but is regular—separate books not necessary for legal and equitable actions. *Whitney v. Townsend*, 67, 40.

Four full days must elapse between filing of decision of court and giving notice to attorney and entry of judgment. *Marvin v. Marvin*, 75, 240.

Entry in judgment book is not equivalent to entry in docket book. *Sheridan v. Linden*, 81, 182.

What not entry of, within sections. 1236 and 1254. Code of Civil Procedure—memorandum of General Term not judgment—simply authority to enter—formal should be entered and attested by clerk—order directing attorney (Code, § 1238) to enter. *Knapp v. Roche*, 82, 366.

#### 3. Amendment.

Amendable error in statement does not vitiate lien when not misleading or prejudicial. *Sears v. Burnham*, 17, 445.

Amendment of judgment after creditor's suit is valid and effectual. *Produce Bank v. Morton*, 67, 199.

Amendment adding parties by stipulation—added parties not bound without proof of attorney's authority. *Lyon v. Lyon*, 67, 250.

#### 4. Review.

When judgment by default not “final determination” within Code, section 245. *Mott v. Union Bank*, 38, 18.

Directing foreclosure and sale and for deficiency is final. *Morris v. Morange*, 38, 172.

Mode of review. *Fisher v. Hepburn*, 48, 41.

Interest cannot be added in determining whether recovery is more favorable. *Johnston v. Catlin*, 57, 652.

5. *Miscellaneous.*

Decree of sale of lands—injunction—sale under second decree—estoppel—reversal of second decree. *Wambaugh v. Gates*, 8, 138.

Proof of service of summons no part of record upon demurrer. *Smith v. Holmes*, 19, 271.

Of New York City District Court docketed in Common Pleas, how enforced. *Brush v. Lee*, 36, 49.

Evidence of, transcript of docket, when not conclusive. *Stephens v. Santee*, 49, 35.

Satisfaction—what is—attorney may not make without payment. *Beers v. Hendrickson*, 45, 665.

When justice's docket shows valid discontinuance for want of jurisdiction. *Bradner v. Howard*, 75, 417.

When General Term cannot order, in names of original parties, nunc pro tunc, when one dies pending appeal. *Tuomy v. Dunn*, 77, 515.

Action to restrain collection—sham sale of collaterals to plaintiff—power of plaintiff to compromise. *Roach v. Duckworth*, 95, 391.

See APPEAL; ARBITRATION AND AWARD; EXECUTION; FORMER ADJUDICATION; JUDICIAL SALE; SUPPLEMENTARY PROCEEDINGS.

**JUDICIAL SALE.**

Sale by religious corporation under authority of court is not judicial within champerty act. *Christie v. Gage*, 71, 189.

When will be set aside. *King v. Platt*, 37, 155.

Purchaser's title not avoided by mere irregularities. *De Forest v. Farley*, 62, 628.

That personal property is not present where presence impracticable does not invalidate. *Winter v. Eckert*, 93, 367.

Special guardian selling infant's interest in land at one-half, when it is really but one-third, may be required to refund one-third of purchase-money. *Matter of Price*, 67, 231.

Purchaser at partition sale cannot refuse to take title on ground that pleadings did not correctly state interest of parties. *Noble v. Cromwell*, 3 Abb. 382.

See JUDGMENT; MORTGAGE—Foreclosure.

**JURISDICTION.**

- I. *By consent or appearance.*
- II. *Equity.*
- III. *Courts generally.*
- IV. *State courts.*
- V. *Criminal.*
- VI. *How lost.*
- VII. *Practice.*

I. *By consent or appearance.*

Of foreign corporation, acquired by appearance and answer. *McCormick v. Penn. Cent. R. Co.*, 49, 303.

Want of, of action, not waived by general appearance, if pleaded—may be pleaded after demurrer withdrawn. *Wheelock v. Lee*, 74, 495.

Appearance by guardian *ad litem* when infant has not been served with summons, does not confer. *Ingersoll v. Mangam*, 84, 622.

Court cannot acquire, by consent, jurisdiction not given by statute—court must dismiss action whenever want of, appears. *Davidsburgh v. Knickerbocker L. Ins. Co.*, 90, 531.

II. *Equity.*

Of Chancery to set aside a will for fraud or undue influence. *Brady v. McCosker*, 1, 214.

When bill to obtain testimony after judgment at law not sustainable. *Vilas v. Jones*, 1, 274.

Of Chancery of bill for specific performance. *Crary v. Smith*, 2, 60.

Of equity of suit for diversion of water. *Olmstead v. Loomis*, 9, 423.

III. *Courts generally.*

This court does not lose, until remittitur filed below. *Burkle v. Luce*, 1, 239.

Federal courts not "inferior." *Ruckman v. Cowell*, 1, 505.

Supreme Court may set aside a decree of Chancery. *Sherman v. Felt*, 2, 186.

A judgment of a County Court in assumpsit is void, unless the declaration alleges that the defendant is a resident of that county. *Frees v. Ford*, 6, 176.

Of United States District Court in bankruptcy. *Chemung Canal Bank v. Judson*, 8, 254.

Of New York Superior Court to restrain city from consenting to a railroad. *People v. Sturtevant*, 9, 263.

Supreme Court may compel judgment debtor to convey lands in another State for benefit of creditors. *Bailey v. Ryder*, 10, 363.

Supreme Court may compel appearing defendant to convey land in another State. *Gardner v. Ogden*, 22, 327.

Justice of Supreme Court may make order for custody of minor child at chambers. *Wilcox v. Wilcox*, 14, 575.

County Court has, in partition. *Double day v. Heath*, 16, 80.

Of inferior court presumed, where no question was raised there, unless it appears from the record to have been impossible. *Bidwell v. Astor Mut. Ins. Co.*, 16, 263.

County Courts have general, of habitual drunkards. *Davis v. Spencer*, 24, 386.

Of enforcement of trusts is in Supreme Court. *McCartney v. Bostwick*, 32, 53.

Supreme Court has, for less than \$100. *Marsh v. Benson*, 34, 358.

City judge of New York has no authority to issue habeas corpus. *Nash v. People*, 36, 607.

Supreme Court has, of action for negligence occurring on vessel on Lake Champlain. *Dougan v. Champlain Trans. Co.*, 56, 1.

Supreme Court has, of action under 16 U. S. Stats. 440, § 43, for injury by carrying excess of steam. *Carroll v. Staten Island R. Co.*, 58, 126; 17 Am. Rep. 221.

Circuit may try case after injunction by Special Term. *Platt v. Woodruff*, 61, 378.

Supreme Court has no jurisdiction in admiralty even by stipulation — judgment

in personam cannot be obtained against non-resident by constructive service of process — construction of recitals in stipulation. *Bartlett v. Spicer*, 75, 528.

Supreme Court may issue attachment against National bank of another State. *Robinson v. Nat. Bank of Newberne*, 81, 385; 37 Am. Rep. 508.

When Supreme Court none, to appoint guardian for infant — bringing into State by stratagem. *Matter of Hubbard*, 82, 90.

Service of a process upon a convict in a State prison gives the court jurisdiction. *Davis v. Duffie*, 1 Abb. 486.

#### IV. State courts.

State courts have none, of foreign consul. *Valarino v. Thompson*, 7, 576.

Courts of this State have not, to enjoin or remove structures extending into New York bay from New Jersey shore. *People v. Cent. R. Co. of N. J.*, 42, 283.

State court has, of action on contract although it involves validity of patent. *Middlebrook v. Broadbent*, 47, 443; 7 Am. Rep. 457.

State courts have none, of action to restrain or recover damages for injury to rights created by and under patent laws. *Hovey v. Rubber Tip Pencil Co.*, 57, 119; 15 Am. Rep. 470.

State courts have jurisdiction of action for injury to vessel on river St. Lawrence. *Baird v. Daly*, 57, 236; 15 Am. Rep. 448.

#### V. Criminal.

Property stolen in one county carried to another — may be indicted in latter. *Mack v. People*, 82, 235.

#### VI. How lost.

Court does not lose because one of its essential members testifies in cause before it. *People v. Dohring*, 59, 374; 17 Am. Rep. 349

#### VII. Practice.

Requisites of affidavit by receiver of insolvent corporation for issue of warrant

for examination of debtor. *Noble v. Haliday*, 1, 330.

Sale of intestate's real estate under surrogate's order is void as to infant heirs without guardian. *Schneider v. McFarland*, 2, 459.

Objection to, cannot be first raised on appeal. *Clarke v. Sawyer*, 2, 498.

Of vice-chancellor in action on contract made at one place but to be performed at another. *Burckle v. Eckhart*, 3, 132.

Recital of jurisdictional facts in order on proceedings to condemn lands for a railroad company may be contradicted. *Adams v. Saratoga & Washington R. Co.*, 10, 328.

A judge who did not hear argument may sit with others who did, to constitute court. *Corning v. Slosson*, 16, 294.

Attachment issued by justice of peace to be deemed valid when collaterally attacked, although the evidence so slight that it would be set aside if directly assailed. *Skinnion v. Kelley*, 18, 355.

In case of collision on Long Island sound. *Mahler v. Transportation Co.*, 35, 352.

Of action on check drawn in another State on drawee here—attachment. *Hibernia Nat. Bk. v. Lacombe*, 84, 367; 38 Am. Rep. 518.

See CONFLICT OF LAWS; CONSTITUTIONAL LAW; CRIMINAL LAW: JUDGMENT; MARRIAGE—Divorce.

## JURY.

In action to set aside judgment for fraud—not matter of right, or waived by not demanding. *Whittlesey v. Delaney*, 73, 571.

When waived in action for specific performance. *Greason v. Keteltas*, 17, 491.

Trial by, may not be demanded in foreclosure suit commenced in Chancery. *Palmer v. Lawrence*, 5, 389.

Trial by, indispensable in summary proceedings for possession of land. *Benjamin v. Benjamin*, 5, 383.

Property qualification must appear by assessment-roll. *Kelley v. People*, 55, 565; 14 Am. Rep. 342.

Objection to summoning or impaneling is waived by going to trial without objection. *Dayharsh v. Enos*, 5, 531.

Challenge to array of grand jury not allowed—to array of petit jury—selection by officer de facto valid. *Carpenter v. People*, 64, 483.

Where juror is called and does not answer, and his name is returned to the undrawn ballots, he cannot be required to sit on coming into court subsequently. *People v. Larned*, 7, 445.

Form of question to juror as to formation of opinion. *Lohman v. People*, 1, 379.

When opinion disqualifies in criminal case. *Cancemi v. People*, 16, 501.

Opinion which will not influence verdict will not disqualify. *People v. Cornetti*, 92, 85.

Construction of chapter 444, Laws of 1851, as to designating term of sessions for attendance. *Cyphers v. People*, 31, 373.

Laws of 1858, chapter 322, as to Kings county, is general, and requires jurors to be summoned by commissioner—new panel. *Kenny v. People*, 31, 330.

See CONSTITUTIONAL LAW; CRIMINAL LAW; TRIAL.

## JUSTICE'S COURT.

- I. *Jurisdiction.*
- II. *Summons.*
- III. *Appearance.*
- IV. *Amendment.*
- V. *Plea of title.*
- VI. *Judgment.*
- VII. *Attachment.*
- VIII. *Execution.*

### I. *Jurisdiction.*

On issue of long summons. *Barnes v. Harris*, 4, 374.

When jurisdiction to grant attachment shown. *Schoonmaker v. Spencer*, 54, 366.

To punish for contempt in refusing to answer. *Rutherford v. Holmes*, 66, 368.

In action for penalty—conclusiveness of judgment. *Hallock v. Dorniny*, 69, 238.

Has jurisdiction of action for personal injury. *Coulter v. American Mer. Un Ex. Co.*, 56, 585.

Has no jurisdiction of disputed action for arrears of perpetual rent reserved on lease in fee. *Main v. Cooper*, 25, 180.

Defaulting witness or juror may be summarily punished after suit—manner of proceeding. *Robbins v. Gorham*, 25, 588.

## II. Summons.

Constable's return to summons made by justice, when valid. *Reno v. Pinder*, 20, 298.

Long summons against non-resident not a nullity, but defendant waives irregularity by appearing and pleading without objection. *Ulapp v. Graves*, 26, 418.

Return to summons—appearance without authority shown—jurisdiction. *Sperry v. Reynolds*, 65, 179.

## III. Appearance.

Offer of judgment and entry before return day—proof of authority to appear. *Fowler v. Haynes*, 91, 346.

## IV. Amendment.

May strike out name of joint plaintiff. *Lapham v. Rice*, 55, 472.

## V. Plea of title.

No jurisdiction to try title to right of way. *Little v. Denn*, 34, 452.

Evidence concerning title to land does not oust of jurisdiction, where title is not

in issue. *Boyer v. Schofield*, 2 Keyes, 628; 1 Abb. 177.

In new action in Supreme Court after plea of title new allegations allowed. *Fox v. Erie Preserv. Co.*, 93, 55.

## VI. Judgment.

When neglect to docket judgment does not invalidate. *Fish v. Emerson*, 44, 376.

Omission to enter judgment—effect of. *Stephens v. Santee*, 49, 35.

Where a justice of the peace makes a memorandum of judgment within four days after submission, judgment is valid, although not docketed until after four days. *Walrod v. Shuler*, 2, 134.

Judgment by justice holding over cannot be collaterally impeached. *Read v. City of Buffalo*, 4 Abb. 22.

When declaration sufficient to uphold judgment, although bad on demurrer. *Copley v. Rose*, 2, 115.

Lien of judgment on real estate—effect of docketing in county clerk's office. *Waltermire v. Westover*, 14, 16.

## VII. Attachment.

Bond requisite on attachment against non-resident under section 33 of act to abolish imprisonment for debt. *Bennett v. Brown*, 4, 254.

## VIII. Execution.

Power to issue execution after two years. *Morse v. Gould*, 11, 281.

See APPEAL.

# K.

## Kidnapping.

See CRIMINAL LAW.

## KINGS COUNTY.

Public administrator has prior right to administration under Laws 1882, chapter 124, in special cases. *Matter of Goddard*, 94, 544.

## L.

## Labels.

See TRADE-MARK.

## LACHES.

When fatal to claim of equitable relief. *Platt v. Platt*, 58, 646.

When no bar. *Ormsby v. Vermont Copper Mining Co.*, 56, 623.

Not imputable to people. *Looney v. Hughes*, 26, 514.

When fatal to application to revive. *Beach v. Reynolds*, 53, 1.

When cannot be invoked. *Boardman v. Lake Shore & M. S. Ry. Co.*, 84, 157.

See GUARANTY; MORTGAGE—*Foreclosure*; SURETY.

## LANDLORD AND TENANT.

- I. *Relation of landlord and tenant.*
- II. *Lease.*
- III. *Assignment of lease.*
- IV. *Construction of lease.*
- V. *Action on lease.*
- VI. *Surrender.*
- VII. *Surety on lease.*
- VIII. *Rights and liabilities of landlord.*
- IX. *Rights and liabilities of tenant.*
  1. *Generally.*
  2. *Tenant holding over.*
  3. *Possession.*
  4. *Under-tenant.*
  5. *Notice to quit.*
  6. *Untenantability.*
- X. *Emblements.*
- XI. *Waiver.*
- XII. *Repairs and alterations.*
- XIII. *Summary proceedings.*
- XIV. *Eviction.*
- XV. *Re-entry.*

I. *Relation of landlord and tenant.*

Relation, when not created. *Freeman v. Ogden*, 40, 105.

II. *Lease.*

To commence in future, passes present interest. *Whitney v. Allaire*, 1, 305.

Avowry not setting forth title, when good. *Nichols v. Dusenbury*, 2, 283.

Reservation of quarter-sales, void. *DePeyster v. Michael*, 6, 467.

Covenant for refusal of premises at expiration of lease implies renewal at same rent, and acceptance of new lease at increased rent, under protest, is no waiver. *Gracy v. Albany Exchange Co.*, 7, 472.

Lessee may elect before termination of lease. *Id.*

His liability for rent in arrear does not impair his right. *Id.*

Where rent is reserved, payable where the lessor may direct; the direction may be material subject of an issue raised by the pleadings. *Livingston v. Miller*, 8, 283.

When an agreement is a lease and not a contract for a lease. *Averill v. Taylor*, 8, 44.

Manorial — quit-rents — limitations — possession bar to action. *People v. Livingston*, 9, 291.

Indefinite leasehold estate of tenant passes to his executors, and they are liable for occupancy. *Pugsley v. Aikin*, 11, 494.

Mortgage on, when valid. *Van Heusen v. Radcliff*, 17, 580.

Ancient, how proved — joinder — evidence. *Clark v. Owens*, 18, 434.

On lease including easement in other land, and partial eviction from easement under paramount title, tenant entitled to abatement of rent. *Blair v. Claxton*, 18, 529.

And may counter-claim it. *Id.*

Quia emptores — rent reserved with distress on grant in fee, valid — covenant running with title. *Van Rensselaer v. Hays*, 19, 68; *Van Rensselaer v. Ball*, 19, 100.

Acceptance of lease, with privileges as enjoyed by a certain tenant, does not oblige lessee to leave buildings as covenanted by tenant. *Ombony v. Jones*, 19, 234.

Lease by one without title—confirmation by owner—when lessee bound—estoppel. *Whalin v. White*, 25, 462.

Lease in fee—findings of facts and of law inconsistent—conditional sale of rents. *Van Rensselaer v. Barringer*, 39, 9.

Conveyance by way of advancement is a "disposal of premises," within covenant to renew lease. *Elston v. Schilling*, 42, 79.

Parol lease for a year to commence in future—lessee rescinding, lessor may refuse to recognize, and hold him for rent. *Becar v. Flues*, 64, 518.

New agreement does not discharge surety on lease when expressly conditioned not to affect his liability. *Morgan v. Smith*, 70, 537.

Oral agreement for new lease for more than a year does not work surrender of lease under seal—what is not new lease—want of consideration. *Coe v. Hobby*, 72, 141; 28 Am. Rep. 120.

Lease binding lessee to pay taxes—cancellation and surrender as of a given day does not discharge from liability for prior breach of covenant. *Roe v. Conway*, 74, 201.

When lease not merged in contract of sale—equitable lien of third party. *Bostwick v. Frankfield*, 74, 207.

When agreement about fixtures may be shown independent of written lease. *Lewis v. Seabury*, 74, 409; 30 Am. Rep. 311.

Agreement to leave improvements made by lessee—mechanics' lien on building enforceable against land—act of 1862, chapter 478. *Burkett v. Harper*, 79, 273.

When relation recognized, tenant cannot question. *Carleton v. Darcy*, 90, 566.

Not a subject of replevin. *Nichols v. Mase*, 94, 160.

### III. Assignment of lease.

Assignment after rent due does not discharge lessee from obligation to lessor. *Phelps v. Van Dusen*, 4 Trans. App. 399.

Assignee recognized by tenant may sue for rent. *Moffatt v. Smith*, 4, 126.

A covenant relating to improvements to be made does not run with the land and bind the assignee unless named. *Tallman v. Coffin*, 4, 134.

Where one joint maker of a note, in consideration of a lease by the other, agreed to pay the note for the rent, and assigned the lease, the holder of the note cannot recover of the assignee thereon. *Dolph v. White*, 12, 296.

Assent to—what notice constitutes privity of contract between assignee of lessee and sub-tenant under lessee—evidence. *Despard v. Walbridge*, 15, 374.

Perpetual annual rent reserved on conveyance in fee is assignable. *Van Rensselaer v. Read*, 26, 558.

Assignee of perpetual annual rent reserved on conveyance in fee may maintain ejectment for non-payment. *Van Rensselaer v. Slingerland*, 26, 580.

Under-letting—assignment—form of action for rent—surrender—evidence. *Bedford v. Terhune*, 30, 453.

Assignee of undivided interest in term, in possession, liable for entire rent, and not entitled to apportionment. *Demainville v. Mann*, 32, 197.

Assignee not liable to lessor unless whole term assigned. *Davis v. Morris*, 36, 569.

Liability of assignee—promise for benefit of third party without his privity. *Van Schaick v. Third Ave. R. Co.*, 38, 346.

Assignee of lease not assignable without lessor's consent, and assigned with his consent, assuming the covenants, is not liable for prior breach of covenant to build—estoppel. *Townsend v. Scholey*, 42, 15.

When sub-lease and not assignment—waiver of forfeiture by taking rent. *Collins v. Hasbrouck*, 56, 157; 15 Am. Rep. 407.

Acceptance of rent after assignment with knowledge waives breach of covenant for forfeiture—what excuses assignee's agreement to procure assent to assignment for his purchaser. *Murray v. Harway*, 56, 337.



IV. *Construction of lease.*

For one year with privilege of a longer specified period defeasible on tenant's notice. *Chretien v. Douey*, 1, 419.

On sealed lease for one year of wharfage right, covenant of quiet enjoyment is implied. *Mayor v. Mabie*, 13, 151.

What are "necessary repairs." *Ward v. Kelsey*, 38, 80.

Covenant for quiet enjoyment in lease for years — effect. *Burr v. Stenton*, 43, 462.

Repugnancy. *Barhydt v. Ellis*, 45, 107.

When executor and devisee may unite in action of dispossession — apportionment — demand of interest. *People v. Dudley*, 58, 323.

Agreement to work mines for royalty. *Gilmore v. Ontario Iron Co.*, 86, 455.

Where lessees agreed to erect building — boiler and elevator held part of building. *Finkelmeier v. Bates*, 92, 172.

Construction of covenant for renewal of leases — arbitration as to rent. *Livingston v. Sage*, 95, 280.

V. *Action on lease.*

Bad plea of former adjudication — evasive affidavit of non-demand of rent — demand of one joint tenant sufficient. *Geisler v. Acosta*, 9, 227.

Implied covenant of quiet enjoyment is broken by lessor's unlawful interference, under color of right, with lessee's enjoyment. Lessee may recoup damages by breach of covenant for quiet enjoyment. *Mayor v. Maybie*, 13, 151.

For use and occupation corporeal occupation is not essential. *Hall v. Western Trans. Co.*, 34, 284.

For injury to possession by trespass is in tenant. *Tobias v. Cohn*, 36, 363.

For rent not barred by landlord's failure to perform his contract — remedy is recoupment or suit for damages. *Kelsey v. Ward*, 38, 83.

By landlord for breach of covenant to pay tax lies without pre-payment. *Rector, etc., of Trinity Church v. Higgins*, 48, 532.

When lessor to partnership may recover rent for term although one partner has died. *Johnson v. Hartshorne*, 52, 173.

For forcible dispossession by purchaser of premises leased and sub-let — damages. *Eten v. Luyster*, 60, 252.

Relief from forfeiture for non-payment of taxes, how awarded — laches. *Giles v. Austin*, 62, 486.

Change in grade of street no defense to action for rent. *Gallup v. Albany Ry. Co.*, 65, 1.

When landlord may enforce lease made by agent in his own name — parol evidence to contradict. *Nicoll v. Burke*, 78, 580.

Agreement to arbitrate operating as cancellation of. *Harris v. Hiscock*, 91, 340.

By railroad company of its franchises and road. Lessee estopped to question validity of, in action for rent. *Woodruff v. Erie R. Co.*, 93, 609.

VI. *Surrender.*

After distress does not defeat distress. *Nichols v. Dusenbury*, 2, 283.

A covenant to surrender possession upon the lessor's paying for improvements is not upon the condition precedent that the improvements shall be paid for. *Tallman v. Coffin*, 4, 134.

Release of remainder of term by tenant does not discharge rent due and unpaid. *Sperry v. Miller*, 8, 336.

Forfeiture of term not worked by mere words, nor by default of rent when there is no re-entry clause in lease. *De Lancy v. Ganong*, 9, 9.

Where premises were destroyed by fire after execution of lease and before commencement of term, and a condition that it should determine in such case was omitted by mistake, lease must be surrendered and canceled. *Wood v. Hubbell*, 10, 479.

Of term — when rent due not extinguished. *Sperry v. Miller*, 16, 407.

Unexpired term for a year in a lease for three years may be surrendered by parol. *Smith v. Devlin*, 23, 363.

Notice to terminate tenancy at will need not specify time for surrender. *Burns v. Bryant*, 31, 453.

Agreement between landlord and grantee of lessee in fee — surrender — merger — performance of agreement by assignee — lien of assignor's mortgage — rents and profits. *Millard v. McMullin*, 68, 345.

Memorandum of contract to give lease, when not lease — surrender of keys — defective flue — allegation without proof of assignment and reassignment of rent. *Thomas v. Nelson*, 69, 118.

When sale of premises determines lease — improvements — arbitration. *Morton v. Wier*, 70, 247.

Covenant in lease for lien on lessee's property on premises for rent binds purchaser of interest of one of lessees — abandonment of lien. *Wisner v. Occum-paugh*, 71, 113.

Lease of house and furniture may not be reformed or canceled for omission to fulfill oral agreement to furnish additional furniture to house. *Wilson v. Deen*, 74, 531.

Where tenant enters under parol letting for more than a year, the letting regulates the tenancy except as to length of term. *Laughran v. Smith*, 75, 205.

When prior lease, surrendered in consideration of a new void lease and settlement of a suit, not reinstated — agricultural lease, when void. *Clark v. Barnes*, 76, 301; 32 Am. Rep. 306.

#### VII. *Surety on lease.*

Guarantor of lessee — surrender — fire insurance. *Kingsbury v. Westfall*, 61, 356.

Tenants' surety not released as to subsequent rents by extension of time of payment of prior rents — question of fact as to surrender of lease. *Coe v. Cassidy*, 72, 133.

#### VIII. *Rights and liabilities of landlord.*

Action by lessor for waste — right of quarrying — judgment by lessee against trespasser. *Freer v. Stotenbur*, 2 Abb. 189.

Vested right of, not taken away by statute abolishing distress for rent. *Conley v. Palmer*, 2, 182.

Where landlord agrees to pay lessee for buildings to be erected by him in a certain manner, the buildings not being erected according to agreement, he is not bound to give notice of his intention not to accept. *Pike v. Butler*, 4, 360.

Where rent is payable at one or the other of two places as the lessor shall direct, he may recover without showing such direction. *Livingston v. Miller*, 11, 80.

Lease may be made out by letter from lessor and indorsement on it by lessee — may not be contradicted by parol. *Mal-lory v. Tioga R. Co.*, 3 Keyes, 354.

Wrongful acts of, impairing value of occupation — when no defense to action for rent. *Edgerton v. Page*, 20, 281.

Where landlord repudiates agreement for lease, he cannot maintain action for use and occupation. *Gretton v. Smith*, 33, 245.

Liable for injury to third, by coal-hole in sidewalk not properly covered. *Irvine v. Wood*, 51, 224; 10 Am. Rep. 603.

Surviving partner can give notice to claim extension of lease. *Betts v. June*, 51, 274.

When liable to tenant for injury of part of premises by leaving open a trap-door in floor of general entrance hall used by landlord. *Totten v. Phipps*, 52, 354.

Not liable to tenant for injury by explosion of kitchen boiler. *Jaffe v. Har-teau*, 56, 398; 15 Am. Rep. 438.

Agreement to make improvement — performance — recoupment. *Ayer v. Kobbe*, 59, 454.

Letting premises knowing them to be infected by a contagious disease, and not notifying tenant, is liable for communication of disease to him. *Cesar v. Karutz*, 60, 229; 19 Am. Rep. 164.

Not bound to keep platform of fire-escape safe for young children to play on. *McAlpin v. Powell*, 70, 126; 26 Am. Rep. 555, note.

Duty as to fire-escapes, in Brooklyn — contributory negligence of tenant — what

sufficient to warrant finding of negligence. *Willy v. Mulledy*, 78, 310; 34 Am. Rep. 536.

When not liable for trespass or negligence of contractor. *Morton v. Thurber*, 85, 550.

Nuisance permitted by, not counterclaim in action for rent of premises occupied. *Boreel v. Lawton*, 90, 293; 43 Am. Rep. 176.

## IX. Rights and liabilities of tenant.

### 1. Generally.

Entering the premises of another after the lease has expired is a trespass — if trespasser insolvent may be enjoined. *Boisubin v. Reed*, 1 Abb. 161.

Covenant to pay assessments runs with the land, and covers one not authorized by law at time of execution of lease, but subsequently imposed. *Post v. Kearney*, 2, 394.

When demise by assignee of lease is sub-lease and not an assignment. *Id.* But see *Woodhull v. Rosenthal*, 61, 382.

Under-tenant may be sued for use and occupation. *Moffatt v. Smith*, 4, 126.

Under sealed lease, abandoning premises on ground of nuisance thereon, must show landlord's leasing for that purpose, or his connivance or consent. *Gilhooley v. Washington*, 4, 217.

A post-dated contract of a lease for a term then commencing gives lessee, when that day arrives, right to eject a stranger wrongfully withholding — may maintain action for damages. *Trull v. Granger*, 8, 115.

When lessor has broken his covenant to purchase lessee's improvements, liability does not attach to his assignee with knowledge. *Coffin v. Tallman*, 8, 465.

Cannot controvert landlord's title. *Ingraham v. Baldwin*, 9, 45; *Territt v. Cowenhoven*, 79, 400; *Prevot v. Lawrence*, 51, 219; *Whalin v. White*, 25, 462; *Sands v. Hughes*, 53, 293; *Vernam v. Smith*, 15, 327.

Although a tenant cannot deny the title of his landlord, he may show an outstand-

ing title in another, even though it be a trustee of the landlord. *Hoag v. Hoag*, 35, 469.

Acceptance of lease and payment of rent do not estop lessee, after term, from asserting right to use premises without lessor's consent. *Child v. Chappell*, 9, 246.

When entitled to enjoyment of extensions of pier. *Hancox v. Jaques*, 10, 347.

When lessee agrees to pay lessor deficiency on reletting, after re-entry, the recovery can only be the difference between the rent originally reserved and all the rent realized. *Hackett v. Richards*, 13, 138.

Consideration of lease — recovery in ejectment no bar to action for previous rent. *Vernam v. Smith*, 15, 327.

Under lease only for agricultural purposes, tenant may not work an opened quarry. *Freer v. Stotenbur*, 2 Keyes, 467.

May recover premises from landlord entering to rebuild after destruction of buildings by public authorities as a nuisance. *Rowan v. Kelsey*, 2 Keyes, 594.

Apportionment of rent, when effected between tenants in common. *Van Rensselaer v. Chadwick*, 22, 32.

Sub-letting original lessee may recover against adjoining owner for negligently undermining buildings erected by him. *Austin v. Hudson River R. Co.*, 25, 334.

At common law, lessee of upper apartments, with no covenant to rebuild, is discharged from rent by destruction of building by fire. *Graves v. Berdan*, 26, 498.

Consent to landlord's tortious act no defense if coupled with a provision which the landlord disregards. *Willard v. Bunting*, 34, 153.

Right to remove fixtures — lost by renewal of lease without reservation. *Loughran v. Ross*, 45, 793; 6 Am. Rep. 173.

Privilege to occupy after expiration of term ceases with lessor's death. *Western Transportation Co. of Buffalo v. Lansing*, 49, 499.

Attornment — tenants in common — estoppel. *Austin v. Ahearn*, 61, 6.

Transferee of part of leased premises not bound to assert title as against subsequent transferee of residue making improvements thereon—damages. *Woodhull v. Rosenthal*, 61, 382.

Right of way acquired by, inures to landlord. *Dempsey v. Kipp*, 61, 462.

Lease executed by agent individually not binding on principal—entry and payment of rent by lessee. *Kiersted v. Orange, etc., R. Co.*, 69, 343; 25 Am. Rep. 199.

When agreement to renew lease binds lessor alone. *Bruce v. Nat. Bank*, 79, 154; 35 Am. Rep. 505.

When optional with lessee to take new lease. *Id.*

## 2. Tenant holding over.

Lease to partnership—change of partners—term not renewed by holding over. *James v. Pope*, 19, 324.

Tenant holding over may be treated as tenant although refusing to continue. *Schuyler v. Smith*, 51, 309; 10 Am. Rep. 609.

For brief period without consent, does not become tenant by sufferance and entitled to notice to quit. *Smith v. Littlefield*, 51, 539.

Implied renewal of lease by—provision for removal of buildings. *Clarke v. Howland*, 85, 204.

## 3. Possession.

Lease need not be accompanied by immediate change of. *Booth v. Kehoe*, 71, 341.

Recovery by tenant of damages for deprivation of use, equivalent to, and tenant liable for rent. *Knox v. Hexter*, 71, 461.

One obtaining under-lease will not hold adversely by merely disclaiming landlord's title. *Whiting v. Edmonds*, 94, 309.

## 4. Under-tenant.

Where an under-tenant entered at the commencement of the term, and paid

three-quarters' rent to the lessor, a jury may infer an agreement to pay to the lessor that will sustain an action for use and occupation for the balance. *McFarlan v. Watson*, 3, 286.

May voluntarily pay rent to landlord where lease contains clause for re-entry. *Peck v. Ingersoll*, 7, 528.

Provision against sub-letting not applicable to mere change in firm of lessees—erasure. *Roosevelt v. Hopkins*, 33, 81.

Under lease of hotel and furniture with conditional sale of furniture—when furniture not subject to be distrained. *Bean v. Edge*, 84, 510.

## 5. Notice to quit.

Tenant in possession under agreement void by statute of frauds—when entitled to. *People v. Darling*, 47, 666.

Tenant for lives, holding over, is not entitled to. *Livingston v. Tanner*, 14, 64.

One who enters under tenant at will is not entitled to. *Reckhow v. Schanck*, 43, 448.

One entering without permission, fixing of term on reservation of rent, is tenant at will and entitled to. *Larned v. Hudson*, 60, 102.

Tenant from year to year, when entitled to. *Reeder v. Sayre*, 70, 180; 26 Am. Rep. 567.

## 6. Untenantability.

Tenant's remaining after fire, not conclusive that premises were tenantable. *Kip v. Merwin*, 52, 542.

Statute of 1860, chapter 345, relieving from rent when premises have become untenable by action of elements, does not include gradual decay. *Suydam v. Jackson*, 54, 450.

When premises become untenable, tenant bound for rent if he remains and refuses access to landlord for repairing—act of 1860, chapter 345—eviction. *Johnson v. Oppenheim*, 55, 280.

Lease taken out of statute relieving from rent in case of untenability. *Bulter v. Kidder*, 87, 98; act of 1860, chap. 345.

# X. Emblements.

Where grass is to belong to landlord he may mortgage it while growing. *Jencks v. Smith*, 1, 90.

Lease giving lessor a lien on lessee's personal property which may be put on premises, is valid and covers crops. *McCaffrey v. Woodin*, 65, 459; 22 Am. Rep. 644.

# XI. Waiver.

Tenant may waive statutory provision in his favor. *Phyfe v. Elmer*, 45, 102.

Landlord knowingly receiving rent from sub-tenant waives forfeiture for sub-letting. *Ireland v. Nichols*, 46, 418.

When tenant's shutting off access to yard does not waive his easement in it for air and light. *Doyle v. Lord*, 64, 432; 21 Am. Rep. 629.

Covenant by tenant to pay taxes — option to landlord to give new lease or pay for improvements — when covenant is condition precedent — waiver. *People's Bank v. Mitchell*, 73, 406.

Receipt of rent after act authorizing forfeiture, waives it. *Conger v. Durgee*, 90, 594.

Statute releasing tenant from rent if premises untenable waived only by express written agreement. *Vann v. Rouse*, 94, 401.

# XII. Repairs and alterations.

Ejectment by tenant against landlord for rooms altered by landlord — estoppel by consent to alteration. *Rowen v. Kelsey*, 4 Abb. 125.

Where lessor has not agreed to repair, lessee cannot defend action for rent by claim for neglect to do so. *Moffat v. Smith*, 4, 126.

Covenant by landlord to repair — counter-claim for breach — what is breach. *Myers v. Burns*, 35, 269.

No implied covenant to repair roof for benefit of tenant of basement. *Doupe v. Genin*, 45, 119; 6 Am. Rep. 47.

When covenant by landlord to repair will not be implied. *Witty v. Matthews*, 52, 512.

Lessee not liable for sub-lessee's neglect to repair, resulting in injury to third person. *Clancy v. Bryne*, 56, 129; 15 Am. Rep. 391.

In action for rent tenant may counter-claim breach of agreement to repair — measure of damages is difference in value of use — contributory negligence. *Cook v. Soile*, 56, 420.

When tenant not warranted in making alterations of premises — waste. *Agate v. Lowenbein*, 57, 604.

Where landlord breaks covenant to repair, tenant may repair at his expense or recover damages. *Hexter v. Knox*, 63, 561.

Covenant to rebuild — remedy — abandonment — evidence — damages — future profits. *Ganson v. Tift*, 71, 48.

Landlord not responsible for injury to third person by tenant's alteration of premises. *Ryan v. Wilson*, 87, 471; 41 Am. Rep. 384.

# XIII. Summary proceedings.

There must be a jury in — office of certiorari in — conventional relation must exist. *Benjamin v. Benjamin*, 5, 383.

Default of rent does not constitute holding over authorizing. *Beach v. Nixon*, 9, 35.

Requisites of affidavit — service of summons. *People v. Boardman*, 4 Keyes, 59.

When judgment debtor is "tenant" — "rent." *Spraker v. Cook*, 16, 567.

The relation must exist by agreement to uphold. *People v. Simpson*, 28, 55.

Requisites and construction of affidavit in. *People v. Matthews*, 38, 451.

No peremptory challenge in. *People v. Hamilton*, 39, 107.

Provision that lessor may terminate lease on sale and sixty days' notice requires no act but notice — holding over authorizes conditional sale. *Miller v. Levi*, 44, 489.

Evidence to show ground of reversal of dispossession in action for damages after.

*Hayden v. Florence Sewing Machine Co.*, 54, 221.

Apply to corporate bodies — adjournment — verification of affidavit — force of judgment by default. *Brown v. Mayor*, etc., 66, 385.

Effect of judgment or default in damages in action for rent. *Jarvis v. Driggs*, 69, 143.

Tenant may show that lease was usurious in. *People v. Howlett*, 76, 574.

Estoppel as to landlord's title — agreement by tenant. *Territt v. Cowenhoven*, 79, 400.

#### XIV. Eviction.

Reservation of building for certain term — occupation afterward in absence of demand, not. *Vanderpool v. Smith*, 4 Abb. 461.

A distress for rent for actual occupancy is not defeated by the premises being untenable by reason of the landlord's breach of agreement. *Nichols v. Dusenbury*, 2, 283.

To render eviction a valid defense against claim for rent it must take place before rent is due, although payable in advance. *Giles v. Comstock*, 4, 270.

Wrongful eviction by landlord from part of premises suspends rent of the whole. *Christopher v. Austin*, 11, 216.

Ejectment not limited to rent-service. *Van Rensselaer v. Ball*, 19, 100.

Right of re-entry assignable. *Id.*

What constitutes. *Lounsbury v. Snyder*, 31, 514; *Home Life Ins. Co. v. Sherman*, 46, 370.

#### XV. Re-entry.

Rent must be demanded on the day it falls due, although the lease gives a right of, in case of non-payment within a certain time thereafter. *Van Rensselaer v. Jewett*, 2, 141.

Where in case of, the lessor is to re-let for benefit of lessee, and has been unable to re-let, he may recover an amount equal to the rent after re-entry as damages, but not as rent. *Hall v. Gould*, 13, 127.

#### LAND OFFICE.

Notice of removal not condition precedent to power of sale — first payment on resale. *Allen v. Comm'rs of Land Office*, 38, 312.

Ejectment by commissioners of land office — notice of re-sale — time to redeem. *Candee v. Hayward*, 37, 653.

#### Larceny.

See CRIMINAL LAW.

#### Lease.

See LANDLORD AND TENANT.

#### Legacy.

See WILL.

#### LEGISLATURE.

Reasons or information on which it acted, not inquired into. *People v. Schuyler*, 791, 89.

See CONSTITUTIONAL LAW; STATUTE.

#### LIBEL AND SLANDER.

- I. *What words actionable.*
- II. *Words actionable per se.*
- III. *Pleading.*
- IV. *Evidence.*
- V. *Privileged communication.*
- VI. *Damages.*

##### I. *What words actionable.*

Slander of title to personal property is actionable — malice — advice of counsel. *Lite v. McKinstry*, 3 Abb. 62; 4 Keyes, 397.

In action for words imputing misconduct by constable under a bench warrant, the words not being independently slanderous, the plaintiff must prove the warrant. *Kinney v. Nash*, 3, 177.

The action lies for falsely imputing perjury as to a promise within the statute of frauds. *Howard v. Sexton*, 4, 157.

Action for, as to title to lands cannot be maintained where injury was result of plaintiff's voluntary act and not of the defendant's words. *Kendall v. Stone*, 5, 14.

One who furnishes reports of pecuniary standing of merchants is liable for false report to persons without interest. *Taylor v. Church*, 8, 452.

Mercantile agency liable for false report to its patrons, although made in good faith. *Sunderlin v. Bradstreet*, 46, 188; 7 Am. Rep. 322.

Husband cannot recover for defamation of wife, merely causing mental depression and consequent loss of service. *Wilson v. Goit*, 17, 442.

Charging that one has a prostitute under his patronage and protection is libelous. *More v. Bennett*, 48, 472.

What libel will not lie for circular claiming ownership of patent, and threatening prosecution for infringements. *Hovey v. Rubber Tip Pencil Co.*, 57, 119; 15 Am. Rep. 470.

Imputing unchastity to female—evidence of other words—re-examination—burden of proof—justification in aggravation—mitigation. *Distin v. Rose*, 69, 122.

Accusation of larceny—sense of words is question of fact—evidence. *Hayes v. Ball*, 72, 418.

Innuendo does not make non-actionable words actionable. *Fleischman v. Bennett*, 87, 231.

## II. Words actionable per se.

To charge keeping whore-house, actionable per se. *Wright v. Paige*, 3 Trans. App. 134; 3 Keyes, 581.

Words not actionable per se, spoken of a public officer, do not become so unless they touch him in his office. *Kinney v. Nash*, 3, 177.

Evidence of malice—what actionable per se—privileged communication. *Fowles v. Bowen*, 30, 20.

Words imputing perjury are actionable per se—matter short of justification may be proved in mitigation. *Spooner v. Kessler*, 51, 527.

Words charging woman with self-pollution not actionable per se—father's refusal to furnish luxuries not special damages. *Anonymous*, 60, 262; 19 Am. Rep. 174.

Words charging the sale of impure milk held libelous per se as charging a misdemeanor. *Brooks v. Harison*, 91, 83.

Statement creating ridicule libelous per se. *Bergman v. Jones*, 94, 51.

## III. Pleading.

On plea of former recovery, it is not competent to show that some of the words charged, but not contained in the former declaration, were given in evidence on the former action. *Campbell v. Butts*, 3, 173.

Action of slander for words imputing misconduct, as a constable, is not sustained by proof of words imputing misconduct as agent in extradition proceedings. *Kinney v. Nash*, 3, 177.

Sufficiency of complaint—evidence of express malice—circulation of newspaper—libel of operatic manager—license. *Fry v. Bennett*, 28, 324.

## IV. Evidence.

Evidence of different words on another occasion, to show malice, is incompetent. *Howard v. Sexton*, 4, 157.

In libel, the directions of the defendant as to the printing are competent to disprove malice. *Taylor v. Church*, 8, 452.

Evidence to explain meaning of language to make out justification—justification on—mitigation, how pleaded. *Wachter v. Quenzer*, 29, 547.

Evidence of utterance of words prior to time laid and when barred by statute of limitations, competent to show malice—opinion that reputation was not affected, incompetent. *Titus v. Sumner*, 44, 266.

Sense of words is question of fact—damage from libel presumed—office of

innuendoes—general imputation. *Sanderson v. Caldwell*, 45, 398; 6 Am. Rep. 105.

Evidence. *Marsh v. Ellsworth*, 50, 309.

Repetition of other slanders after commencement of action, not admissible to show malice. *Frazier v. McCloskey*, 60, 337; 19 Am. Rep. 193.

Objection—evidence of malice—letter—prior article. *Daly v. Byrne*, 77, 182.

Evidence of special damage admissible—loss of business—where malice question for jury *Bergman v. Jones*, 94, 51.

In slander plaintiff may not prove his good character to rebut justification. *Houghtaling v. Kilderhouse*, 1, 530.

#### V. Privileged communications.

Words used in a legal proceeding and pertinent to the controversy are privileged. *Garr v. Seiden*, 4, 91.

Case of privileged communication by banker to customer. *Lewis v. Chapman*, 16, 369.

Report of committee of College of Pharmacy, appointed to investigate alleged adulteration of drugs. *Van Wyck v. Aspinwall*, 17, 190.

Statute exempting publishers of legislative debates, prospective only. Publication of slander uttered by murderer at execution not privileged. *Sandford v. Bennett*, 24, 20.

Commercial agency. *Ormsby v. Douglass*, 37, 477.

When words spoken as a witness privileged—question of fact. *White v. Carroll*, 42, 161; 1 Am. Rep. 503.

Agreement to prosecute swindlers is—where justification and mitigation pleaded, failure to justify does not enhance damages. *Klinck v. Colby*, 46, 427; 7 Am. Rep. 360.

Charge by father of man charged in bastardy that the woman is a prostitute is not privileged. *Bussell v. Elmore*, 48, 561.

Libel of public officer—damages—mitigation. *Hamilton v. Eno*, 81, 116.

See *March v. Ellsworth*, 50, 309; *Hunt v. Bennett*, 19, 173.

#### VI. Damages.

In slander defendant may in his answer justify and mitigate, and though he fails in proof of the former he may submit the latter. *Bisbey v. Shaw*, 12, 67.

Justification—failure to prove is aggravation; proof in part is of no effect; may be shown as to one charge although it fails as to others; cannot be proved under general issue. *Fero v. Ruscoe*, 4, 162.

Mental distress no ground of recovery. *Terwilliger v. Wands*, 17, 54.

Exemplary damages allowed—allegation of publication—of falsehood and malice—jury not judges of law in civil action. *Hunt v. Bennett*, 19, 173.

When matter not provable in mitigation. *Willlover v. Hill*, 72, 36.

Recovery against two—repetition by one justifies new recovery—general verdict—effect of satisfaction of first judgment in action for two libels—motion to vacate second judgment on payment of first. *Woods v. Pangburn*, 75, 495.

Matter in mitigation unavailable unless defendant believed it. *Hatfield v. Lasher*, 81, 246.

#### LICENSE.

Acceptance of, on conditions, constitutes contract. *Mayor v. Troy & Lansingburgh R. Co.*, 49, 657.

To enlarge canal—construction. *Selden v. Delaware & Hudson Canal Co.*, 29, 634.

To cut bark—limitation of time is of essence. *Kellam v. McKinstry*, 69, 264.

To enter on land and cut and carry away timber for a certain period does not authorize subsequent entry to carry off timber previously cut. *Boisaubin v. Reed*, 2 Keyes, 323.

An executed parol license to cut and carry away timber is valid defense against action for its value, although by the written contract the license was to be in writing. *Pierrepoint v. Barnard*, 6, 279.



When not shown for use of lands by railroad company — revocation. *Murdock v. Prospect Park, etc., R. Co.*, 73, 579.

Agreement as to encroachment recognizing each other's title. *Devyr v. Schaefer*, 55, 446.

Parol license to build dam without consideration is not an equitable estoppel — revocability. *Babcock v. Jtter*, 1 Keyes, 115; *id.* 397.

Agreement to furnish water through pipes held license and revocable. *Cronkhite v. Cronkhite*, 94, 323.

In real estate, not assignable. *Mendenhall v. Klinck*, 51, 246.

See EASEMENT; EXCISE; LANDLORD AND TENANT; WATER AND WATER-COURSE.

## LIEN.

Specific equitable, not preferred to prior judgment. *Cook v. Banker*, 50, 655.

An agreement by a debtor to execute a mortgage to his creditor has no preference over a judgment attaching at the same time. *Dwight v. Newell*, 3, 185.

Waiver of condition of execution of chattel mortgage as security on sale — when equitable lien attaches. *Husted v. Ingraham*, 75, 251.

See BAILMENT; BANK; CARRIER; EXECUTION; MECHANICS' LIEN; MORTGAGE; SHIP AND SHIPPING; VENDOR AND PURCHASER.

## Light.

See EASEMENT.

## Limitation.

See CARRIER; INSURANCE; STATUTE OF LIMITATION.

## LOAN COMMISSIONERS.

May not sell mortgage. *Woodgate, v. Fleet*, 44, 1.

Sale under mortgage by one, void — effect of such sale. *Olmsted v. Elder*, 5, 144.

And is not cured by both joining in conveyance. *Powell v. Tuttle*, 3, 396.

Of State moneys — sale by one under mortgage is null — cannot maintain ejectment. *York v. Allen*, 30, 104.

Sale under mortgage must comply with statute — notice of sale defective — mortgagor entitled to redeem — omission of tender only affects costs. *Thompson v. Commissioners*, 79, 54.

Default on mortgage — right to redeem — irregular sale. *Pell v. Almar*, 18, 139.

Foreclosure of mortgage — regularity of — effect of default of interest — ejectment against purchaser in possession. *White v. Lester*, 1 Keyes, 316.

Omission of entries does not vitiate sale to innocent purchaser — signing by only one not fatal. *White v. Lester*, 4 Abb. 585.

Entry of mortgage in books of, out of order of date and on wrong page, not notice to subsequent mortgagees in good faith. *New York Life Ins. Co. v. White*, 17, 469.

## LOST NOTE.

Bond in action on, necessary only when note was negotiable. *Wright v. Wright*, 54, 437.

## LOTTERY.

Annual distribution by lot of works of art purchased by subscription among subscribers is a lottery. *Governors of Almshouse v. American Art Union*, 7, 228.

But such property is not forfeited to the State. *People v. American Art Union*, 7, 240.

"Playing policy," illegal. *Wilkinson v. Gill*, 74, 63; 30 Am. Rep. 264.

Prize candy packages constitute — sale of, void. *Hull v. Ruggles*, 56, 424.

Indictment for, need not allege purpose — statutes relating to, constitutional. *People v. Noelke*, 94, 137; 46 Am. Rep. 128.

Action to recover double the sum paid for tickets — when lies against principal for sales by agent — limitation — joinder of causes of action — evidence — tickets, accounts. *Grover v. Morris*, 73, 473.

See CRIMINAL LAW; CONFLICT OF LAWS.

## M.

## MALICIOUS PROSECUTION.

Probable cause — what is. *Carl v. Ayers*, 53, 14.

Is question of law, but when depending on disputed facts, the decision of those facts is for the jury. *Bulkeley v. Keteltas*, 6, 384.

Where no conflict of evidence, question is one of law. *Burns v. Erben*, 40, 463.

Want of, cannot be inferred, but where there is no dispute about the facts the judge may direct verdict. *Besson v. Southard*, 10, 236.

When question is for jury although evidence not conflicting. *Heyne v. Blair*, 62, 19.

When question is for jury. *Fagnan v. Know*, 66, 525.

Question of — evidence. *Thaule v. Krekeler*, 81, 428.

Action lies for maliciously procuring an indictment, although the charge made does not constitute a crime. *Dennis v. Ryan*, 65, 385; 22 Am. Rep. 635.

Abandonment and discontinuance of prosecution equivalent to discharge from accusation. *Pay v. O'Neill*, 36, 11.

Honest belief justifies false information leading to imprisonment by another. *Farnam v. Feeley*, 56, 451.

Defendant may testify as to his belief to disprove malice. *McKown v. Hunter*, 30, 625.

## MALPRACTICE.

Question of defendant's skill is a material issue. *Carpenter v. Blake*, 50, 696.

Surgeon bound for ordinary skill — question of fact — evidence — request as to contributory negligence. *Carpenter v. Blake*, 75, 12.

See NEGLIGENCE.

## MANDAMUS.

- I. *When mandamus lies.*
- II. *When does not lie.*
- III. *Alternative.*
- IV. *Peremptory.*
- V. *Practice.*

I. *When lies.*

To compel a clerk of an inferior court to perform a specific duty. *People v. Clerk of Marine Court*, 3 Abb. 492.

To compel supervisors to issue warrants for military commutation. *People v. Supervisors of Chenango*, 8, 317.

To compel supervisors to allow claim which they neglected to act upon at session. *People v. Supervisors of Richmond Co.*, 20, 252.

To compel medical society to admit applicant. *People v. Medical Society*, 32, 187.

To compel county treasurer to pay over moneys assessed and collected to pay town bonds — want of assent of tax payers to their issue is good defense. *People v. Mead*, 36, 224.

At suit of one having interest common to whole community. *People v. Halsey*, 37, 344.

To compel assessors to make affidavit of consent of tax payers to issue of town bonds. *Howland v. Eldredge*, 43, 457.

To compel supervisors to allow proper charges. *People v. Supervisors of Delaware Co.*, 45, 196.

To compel supervisors to review assessment of United States securities under act of 1867, chapter 938, section 1. *People v. Supervisors of Otsego Co.*, 51, 401.

When to compel railroad company to restore highway. *People v. Dutchess & Columbia R. Co.*, 58, 153.

To compel supervisors to obey order of County Court to correct assessment and refund. *People v. Board of Supervisors of Ulster Co.*, 65, 300.

When to compel county to pay for building bridge — resolution on unauthorized condition — immaterial allegations in return — demand for levy of tax. *People v. Board of Supervisors of Livingston Co.*, 68, 114.

When to chairman and clerk of supervisors to convene board, etc. *People v. Brinkerhoff*, 68, 259.

To compel supervisors to refund tax paid upon assessment in two towns. *People v. Board of Supervisors of Essex Co.*, 70, 228.

Lies to canal appraisers to make return to appeal. *People v. Canal Appraisers*, 73, 443.

To compel railroad company to fence. *People v. Rochester, etc., R. Co.*, 76, 294.

When to common council to fill vacancy — relators — issue. *People v. Common Council of Brooklyn*, 77, 503; 33 Am. Rep. 659.

When to compel city to pay for lands sought to be acquired — when delay not fatal. *People v. Common Council of Syracuse*, 78, 56.

To compel secretary of state to give notice of election. *People v. Carr*, 86, 512.

To compel auditor to draw warrant for moneys appropriated — legislative ratification of illegal contract unimportant. *People v. Schuyler*, 79, 189.

To enforce obedience to special legislative acts. *People v. Hardenburgh*, 90, 411; *People v. O'Keefe*, 90, 419.

To compel supervisors to assess debt due from divided town. *People v. Supervisors of Ulster*, 94, 263.

## II. When does not lie.

To compel award of contract by canal contracting board. *People v. Contracting Board*, 27, 378.

Where there is a clear legal remedy by action. *People v. Hawkins*, 46, 9.

To compel restoration of expelled member of religious society. *People v. German, etc., Church*, 53, 103.

To compel assessors to make oath to assessment-roll. *People v. Fowler*, 55, 252.

To attorney-general to bring suit to try title to office. *People v. Fairchild*, 87, 334.

To clerk of supervisors, directing him to recognize relator and record his vote. *Matter of Gardner*, 68, 467.

To town to pay damages recovered against overseer of highways. *People v. Board of Town Auditors of Esopus*, 74, 310.

To compel overseer of poor to prosecute an action against an innkeeper for not putting up proper signs. *People v. Leonard*, 74, 443.

To restrain one from exercising or qualifying for office. *People v. Ferris*, 76, 326.

When to require city to designate official newspaper. *People v. Common Council of Troy*, 78, 33; 34 Am. Rep. 500.

To compel cancellation of taxes upon invalid certificate of exemption. *People v. Campbell*, 93, 196.

When to try title to office. *People v. Lane*, 55, 217.

## III. Alternative.

Must state a substantially good title. *People v. Ransom*, 2, 490.

## IV. Peremptory.

Relator not entitled to, when record shows he has no legal right. *People v. Batchellor*, 53, 123; 13 Am. Rep. 480.

Issues only in case of unquestioned right. *People v. Board of Supervisors*, 64, 600.

Issuing discretionary. *People v. Wendell*, 71, 171.

## V. Practice.

Where there has been a return, issue joined and trial had, it is not a special proceeding but an action. *People v. Lewis*, 3 Abb. 537.

Judgment on, reviewable by appeal and not by writ of error. *People v. Church*, 20, 529.

When relator takes issue instead of demurring to return, he admits its legal sufficiency. *People v. Board of Metropolitan Police*, 26, 316.

Proper form of judgment—court may modify on appeal. *People v. Supervisors of Richmond*, 28, 112.

Relief need not be specified in order to show cause. *People v. Nostrand*, 46, 375.

Power of New York Common Pleas to issue—when proper remedy. *People v. Green*, 58, 295.

Supreme Court rule 55—practice on hearing—designation by supervisors of newspapers—when return had—citizen may institute. *Waller v. Supervisors of Sullivan Co.*, 56, 249.

If relator does not take issue on return, he admits its truth. *People v. Board of Apportionment*, 64, 627.

Requisites to issuing of writ. *People v. Hayt*, 66, 606.

When allegations of petition to be considered averments of writ. *People v. Board of Supervisors of Essex Co.*, 70, 228.

When relator does not take issue on return, it is equivalent to demurrer. *People v. Supervisors of Westchester Co.*, 73, 173.

Practice on motion for peremptory—demurrer. *People v. Fairman*, 91, 885.

See various specific titles.

## MANUFACTURING CORPORATION.

- I. *Acts regarding.*
- II. *Liability of trustees.*
- III. *Liability of stockholder.*
- IV. *Powers and liabilities of corporation.*
- V. *Reports of.*
- VI. *Directors of.*
- VII. *Transfers of stock.*
- VIII. *Dissolution of.*

### I. *Acts regarding.*

Evidence of principal place of business, under Laws of 1854, chapter 232. *Western Transp. Co. v. Scheu*, 19, 408.

For business of pecuniary gain and profit cannot be formed under Laws of 1848, chapter 319. *People v. Nelson*, 46, 477.

Manufacturing act of 1853 does not authorize issue of additional stock. *Schenck v. Andrews*, 46, 589.

Dry-dock company not “manufacturing” corporation, under tax act of 1880. *People v. New York, etc., Dock Co.*, 92, 487.

In Herkimer county (act 1852, chapter 361) no application to those organized under general act of 1848, chapter 40—act of 1853, chapter 179—does not affect liability of stockholders, under general act 1848. Action to recover assessments. *Crykendall v. Corning*, 88, 129.

### II. *Liability of trustees.*

When chargeable individually for debts. *Garrison v. Howe*, 17, 458.

When and how far personally liable for debts for not publishing statement. *Boughton v. Otis*, 21, 261.

Does not continue liable if debt contracted after he ceases to be trustee. *Shaler & Hall Quarry Co. v. Bliss*, 27, 297.

Trustees must sign annual report. *Bolen v. Crosby*, 49, 183.

When trustees liable for paying dividend when company insolvent. *Rorke v. Thomas*, 56, 559.

Illegal contract between company and trustee—in *pari delicto*. *Knoolton v. Congress & Empire Spring Co.*, 57, 518.

Trustee cannot be made liable for debt unauthorized or imposed on corporation by creditor's fraud. *Adams v. Mills*, 60, 533.

May not sue trustees for declaring dividend, diminishing capital stock—complaint—former judgment. *Excelsior Petroleum Co. v. Lacey*, 63, 422.

Trustee creditor cannot sue co-trustees for failure to file report. *Easterly v. Barber*, 65, 252.

For failure to file annual report—burden of proof—false report—contingent obligation not indebtedness within terms of statute. *Whitney Arms Co. v. Barlow*, 68, 34.

Trustee not liable for failure to file report without acceptance of office—time of filing and publishing—“place” of

business means the town. *Cameron v. Seaman*, 69, 396 ; 25 Am. Rep. 212, note.

When one sued as trustee not estopped from denying incorporation. *De Witt v. Hastings*, 69, 518.

Not liable for a constructive false report. *Bonnell v. Griswold*, 89, 122.

Action for not filing report need not be brought within three years accruing of debt. *Duckworth v. Roach*, 81, 49.

For false report—only those signing liable—knowledge of falsity must be actual. *Pier v. Hanmore*, 86, 95.

For not filing report—resignation—practical dissolution. *Bruce v. Platt*, 80, 379.

Assignee of claim may sue trustee for failure to file report. *Pier v. George*, 86, 613.

When trustees on expiration of charter cannot be charged as partners. *Central City San. Bk. v. Walker*, 66, 424.

### III. Liability of stockholder.

One holding stock of a manufacturing company as collateral security, appearing as owner on the books, is individually liable as a stockholder. *Rosevelt v. Brown*, 11, 148.

Apportionment of stock in manufacturing company constitutes stockholder—liable for interest. *Burr v. Wilcox*, 22, 551.

Payment of capital in property—fraud—certificate—evidence. *Boynton v. Hatch*, 47, 225.

Perfecting of judgment against, under act of 1848, chapter 40, as condition precedent to stockholders' liability, excused by stay thereof in bankruptcy proceedings instituted by the corporation. *Shellington v. Howland*, 53, 371.

General agent of mining company not "servant," entitled to recover against stockholder for services. *Hill v. Spencer*, 61, 274.

Liability of stockholders of stock not fully paid—question of valuation of property purchased. *Boynton v. Andrews*, 63, 93.

Stockholder who is also creditor may set up his claim in suit to make him indi-

vidually liable—form of action. *Mathez v. Neidig*, 72, 100.

Action to charge stockholder of stock issued for purchase of property—fraud must be shown in purchase—pending action for failure to file report, no bar. *Douglass v. Ireland*, 73, 100.

Action against stockholder for debt of—indebtedness arises on purchase and not on renewal of note given therefor. *Jagger Iron Co. v. Walker*, 76, 521.

Stockholder's liability—limit and conditions. *Handy v. Draper*, 89, 334.

—does not attach until execution returned unsatisfied against company. *Rocky Mountain Nat. Bank v. Bliss*, 89, 338.

Has no implied power to increase or diminish its capital stock. *Sutherland v. Olcott*, 95, 93.

### IV. Powers and liabilities of corporation.

Conditional sale by manufacturing corporation of merchandise acquired by it. *De Groff v. American Linen Thread Co.*, 21, 124.

Creditors of a manufacturing company organized to defraud creditors of its president have no priority over latter creditors. *Booth v. Bunce*, 24, 592.

Denial of right to prefer debts constitutional. *Story v. Furman*, 25, 214.

No implied power to create a lien on its stock for debt of stockholder. *Driscoll v. West Bradley, etc., Manuf'g Co.*, 59, 96.

How it may mortgage its property. *Carpenter v. Black Hawk Gold Mining Co.*, 65, 43.

Requisites of assent to mortgage the real estate—stock actually issued is the capital stock—selling lands to another may agree to advance money for building. *Greenpoint Sugar Co. v. Whittin*, 69, 323.

Company may not assail order of sequestration and for receiver collaterally—waiver of misnomer—alteration of subscription to capital stock. *Whittlesey v. Frantz*, 74, 456.

Chattel mortgage by, when valid—seizure by mortgagee for purchase-price, when warranted. *Coman v. Lakey*, 80, 345.

## 270 MANUFACTURING CORPORATION, V. — MARRIAGE.

Who may dissolve — act of insolvency — lease — presumption of assent to mortgage — conclusiveness of judgment of foreclosure. *Denike v. New York, etc., Lime, etc., Co.*, 80, 599.

Mortgage — assent of stockholders — company owning its own stock cannot assent — shares transferred by it as collateral cannot be deducted — receiver may set aside. *Vail v. Hamilton*, 85, 453.

Must file report though closing up business — stockholder creditor may enforce liability against trustees. *Sanborn v. Lefferts*, 58, 179.

Suit to enforce personal liability of stockholder — certificate not conclusive of payment of capital — effect of increase — estoppel — recording certificate — what is payment in money — when suit within a year — counter-claims of stockholders — personal liability of executor. *Veeder v. Mudgett*, 95, 295.

### V. Reports of.

Trustees not filing report, not liable for debt renewed and not due — renewal does not discharge trustees — short statute of limitations, Code of Procedure, section 92. *Jones v. Barlow*, 62, 202.

When report sufficient — ultra vires. *Whitney Arms Co. v. Barlow*, 63, 62; 20 Am. Rep. 504.

On appointment of receiver, trustees no longer bound to file annual report. *Huguenot Nat. Bank v. Studwell*, 74, 621.

Failure to file annual report — statute limitation of action, continued default does not revive — new liability not created, trustee not personally liable if corporation practically abandoned. *Loose v. Bullard*, 79, 404.

Filing untrue report is not a failure to file a report — construction of report — verification. *Bonnell v. Griswold*, 80, 128.

Trustee, creditor, cannot take advantage of non-filing of report — construction of act of 1875, chapter 510, as to filing report — limitation. *Knox v. Baldwin*, 80, 610.

Trustees not liable for not filing report, where company ceases business within a

year from their election. *Van Amburgh v. Baker*, 81, 46.

Failure to file report — if trustee's term expired before debt contracted, must show he held over and continued to act — will not be presumed — bankruptcy proceedings admissible to show severed connection. *Phila., etc. v. Hotchkiss*, 82, 471.

### VI. Directors.

Election of directors may be held within sixty days of day designated by by-laws. *People v. Cummings*, 72, 433.

### VII. Transfers of stock.

Transfer of stock releases transferror from unpaid assessments. *Billings v. Robinson*, 94, 415.

Not entered in books may be valid as between the parties. *Johnson v. Underhill*, 52, 203.

When action lies to compel transfer on books of shares of stock — demand. *Cushman v. Thayer Manfg. Jewelry Co.*, 76, 365; 32 Am. Rep. 315.

Proof of debt against, in bankruptcy, no bar to action against stockholder — transfer of stock not in register does not relieve. *Shellington v. Howland*, 53, 371.

### VIII. Dissolution of.

Action for dissolution — voluntary appearance of stockholders — conclusiveness of judgment. *People v. Hydrostatic Paper Co.*, 88, 623.

Receiver cannot recover from stockholders for debts. *Furnsworth v. Wood*, 91, 308.

See CORPORATION.

## MARRIAGE.

- I. What constitutes contract of.
- II. Breach of promise.
- III. Ante-nuptial agreement.
- IV. Husband and wife.
- V. Offspring.
- VI. Rights and liabilities of husband.

VII. *Rights and liabilities of married woman.*

VIII. *Contracts between husband and wife.*

IX. *Actions between husband and wife.*

X. *Separate estate of wife.*

XI. *Dower.*

1. *Generally.*

2. *Admeasurement of.*

3. *How barred.*

XII. *Curtesy.*

XIII. *Divorce.*

1. *Limited.*

2. *Foreign divorce.*

3. *Adultery.*

4. *Alimony.*

5. *Practice.*

XIV. *Marriage after divorce.*

I. *Contract of marriage, what constitutes.*

What constitutes valid promise of. *Homan v. Earle*, 53, 267.

Evidence to prove — when insufficient. *Chamberlain v. Chamberlain*, 71, 423.

That law of another State different, not presumed. *Hynes v. McDermott*, 82, 40; 37 Am. Rep. 538.

Proof of, by cohabitation, reputation, and reception in society. *Clayton v. Wardell*, 4, 230.

Contract to marry in future, followed by cohabitation, is not marriage in fact. *Cheney v. Arnold*, 15, 345.

Proof of, by cohabitation — burden of proof of death. *O'Gara v. Eisenlohr*, 38, 296.

Presumption of, from cohabitation, reputation, etc., though actual marriage after. *Betsinger v. Chapman*, 88, 487.

Cohabitation as husband and wife held to raise a presumption of marriage. *Hynes v. McDermott*, 91, 451; 43 Am. Rep. 677.

II. *Breach of promise.*

Action for breach of promise — damages may be mitigated by proof of plaintiff's habit of intoxication. *Button v. McCauley*, 4 Trans. App. 447.

In an action for a breach of promise, what conversations admissible — what may

be shown under a general denial. *Button v. McCauley*, 1 Abb. 282.

What is evidence of breach of promise. *Kniffen v. McConnell*, 30, 285.

III. *Ante-nuptial agreement.*

By wife for conveyance of land, binding on husband if performed by wife. *Dygert v. Remerschnider*, 32, 629.

Void for naming no beneficiary. *Dillaye v. Greenough*, 45, 438.

If no fraud not invalid although husband largely in debt. *Starkey v. Kelly*, 50, 676.

Of wife to release claims upon husband's estate, rigidly scrutinized in favor of wife. *Pierce v. Pierce*, 71, 154; 27 Am. Rep. 22, note.

IV. *Husband and wife.*

Husband as administrator of wife may recover bond executed by him to third person for her benefit. *Halsted v. McChesney*, 2 Abb. 310.

Where husband manages the wife's business as her agent, profits of the business not liable to his creditors. *Merchant v. Bunnell*, 3 Abb. 280.

Deed by husband and wife of wife's lands, reciting its object to be to have immediate reconveyance to husband, is not invalid. *Lynch v. Livingston*, 6, 422.

Whether wife of a farmer, accustomed to direct, purchasing horses and giving note in her own name, acted as agent for husband, is question of fact. *Gates v. Brouer*, 9, 205.

Deed of husband and wife executed in 1760 to one in possession under act of February 16, 1771, is valid against claimants under wife, although not acknowledged. *Van Winkle v. Constantine*, 10, 422.

Where land is conveyed to husband and wife they hold as tenants by the entirety, and the survivor takes the whole. *Torrey v. Torrey*, 14, 430; *Bertles v. Nunan*, 92, 152; 44 Am. Rep. 361.

Confession of judgment by husband and wife valid as to former but void as to latter. *Watkins v. Abrahams*, 24, 72.

Husband's taking note to order of himself and wife constitutes surviving wife owner at his decease. *Sanford v. Sanford*, 45, 723.

Husband alone can sue for injury to paraphernalia at common law. *McCormick v. Pennsylvania Cent. R. Co.*, 49, 303.

Husband permitting insane wife to become public charge—liable to town for her support—estopped from denying, she a pauper—no defense that wife abandoned him—incapable of so doing. *Goodale v. Lawrence*, 88, 513; 42 Am. Rep. 259.

Investment of wife's money by husband presumed as agent for wife, and statute does not run and wife entitled to interest. *Matter of Frazer*, 92, 239.

#### V. Offspring.

Legitimacy of child dependent on law of domicile of parents when married. *Miller v. Miller*, 91, 315; 43 Am. Rep. 669.

#### VI. Rights and liabilities of husband.

Action by husband against stranger for harboring wife—burden of proof on husband. *Barnes v. Allen*, 1 Keyes, 390; 1 Abb. 111.

Wife dying intestate, husband takes her personality. *Ransom v. Nichols*, 22, 110.

Succession of husband to wife's personality—limits of wife's power to will—evidence of course of dealing. *Ryder v. Hulse*, 24, 372.

Husband permitting wife to carry on business as ostensibly her own, is estopped as to third persons. *Sammis v. McLaughlin*, 35, 647.

Husband not liable for necessities sold to wife by one expressly prohibited by him, unless creditor shows his neglect. *Keller v. Phillips*, 39, 351.

Liability of husband for wife's fraud. *Kowing v. Manly*, 49, 192; 10 Am. Rep. 346.

Husband not liable for injury by defect in wife's premises. *Fiske v. Bailey*, 51, 150.

Unauthorized extension of time of husband's debt discharges wife's mortgage collateral. *Bank of Albion v. Burns*, 46, 170.

Husband succeeds to title of deceased intestate wife's personal property. *Barnes v. Underwood*, 47, 351.

Husband may recover for injury to wife so far as concerns her ability to render household service, but not beyond. *Brooks v. Schwerin*, 54, 343.

Wife living with father on husband's agreement to pay for support—general notice not to trust—right of recovery by father. *Daubney v. Hughes*, 60, 187.

Husband may maintain action for trespass on his house although wife owns the land. *Alexander v. Hard*, 64, 228.

In absence of special agreement wife's services in respect to boarders belong to husband. *Reynolds v. Robinson*, 64, 589.

For necessities furnished to wife separated from husband pending suit for divorce, no promise by husband to pay for, is implied. *Catlin v. Martin*, 69, 393.

Title to paraphernalia paid for by husband is presumed to be in him. *Curtis v. Delaware, etc., R. Co.*, 74, 116; 30 Am. Rep. 271.

Recognizance to support wife. *People v. Pettit*, 74, 320.

Husband prima facie entitled to earnings of wife. *Birkbeck v. Ackroyd*, 74, 356; 30 Am. Rep. 304.

When payment by bank in another State, of dividends belonging to wife, to husband, valid against wife—conflict of laws. *Graham v. First Nat. Bk. of Norfolk*, 84, 393; 38 Am. Rep. 528.

Action by wife against husband for support not maintainable under Code of Civ. Proc., § 1766. *Ramsden v. Ramsden*, 91, 281.

Husband entitled to services of wife since statutes as to married women—conveyance on consideration of services void as to his creditors. *Coleman v. Burr*, 93, 17; 45 Am. Rep. 160.

Where husband borrows money on wife's notes, his declaration that she wanted it for her own estate is incompetent. *Deck v. Johnson*, 2 Keyes, 348.



Husband had vested interest in legacy to wife before 1848, not taken away by act of 1848. *Westervelt v. Gregg*, 12, 202.

#### VII. Rights and liabilities of wife.

May employ husband without liability to his creditors — gift — fraud — exception — demand. *Kluender v. Lynch*, 2 Abb. 538; 4 Keyes, 361; *Abbey v. Deyo*, 44, 343.

May employ husband to carry on her farm without becoming liable for his debts — presumption as to tools and stock. *Vrooman v. Griffiths*, 4 Abb. 505; 1 Keyes, 53; *Merchant v. Bunnell*, 3 Keyes, 539; *Gage v. Dauchy*, 34, 293.

Judgment confessed by her is not void. *Roraback v. Stebbins*, 4 Abb. 100; 3 Keyes, 62.

May take to herself a mortgage for debt due to her and her husband. *Wolfe v. Scroggs*, 4 Abb. 634.

May convey her lands by deed without the concurrence of her husband. *Albany Fire Ins. Co. v. Bay*, 4, 9.

But the estate of a wife in a reversion, where the husband has disposed of his curtesy, is not separate estate. *Id.*

Gift by father to married daughter — bond therefor by husband to father is wife's property. *Halsted v. McChesney*, 2 Keyes, 92.

When may enforce a chattel mortgage given her in consideration of the mortgagor's obligation to support her. *Wolfe v. Scroggs*, 2 Keyes, 491.

When entitled to crops of farm carried on by her as against husband's creditors. *Van Etten v. Currier*, 3 Keyes, 329.

After R. S. and before 1849, could not bequeath her separate personal property. *Wadhams v. American Home Miss. Soc.*, 12, 415.

May execute power independently. *Wright v. Tallmadge*, 15, 307.

On contract to pay to husband or wife or longest liver, a right of action survives to wife and is assignable by her after death of the husband. *Prindle v. Caruthers*, 15, 425.

Lease to, valid. *Darby v. Callahan*, 16, 71; *Westervelt v. Ackley*, 62, 505.

Lease to, as against lessor, valid before 1860. *Draper v. Stouvenel*, 35, 507.

Marriage of female mortgagee with mortgagor does not extinguish her right in mortgage. *Power v. Lester*, 23, 527.

Does not lose her chattels by allowing her husband to use them. *Sherman v. Elder*, 24, 381.

A power to mortgage lands reserved to a wife in a settlement to her use supports her mortgage for her husband's debt. *Leavitt v. Pell*, 25, 474.

In 1851 a married woman might buy real or personal property on credit, and own and manage it as her separate property. *Knapp v. Smith*, 27, 277.

May submit to arbitration. *Palmer v. Davis*, 28, 242.

When not bound by her guaranty of mortgage unless for benefit of her estate. *White v. McNett*, 33, 371.

May carry on business through agency of husband. *Buckley v. Wells*, 33, 518.

Liable for services of her attorney for the benefit of her separate estate although unsuccessful — husband may act as agent of. *Owen v. Cawley*, 36, 600.

Her estate liable for fees of attorney employed by her to defend divorce. *Blanke v. Bryant*, 55, 649.

Short and fair case not violation of provision against anticipating income. *Van-devoort v. Gould*, 36, 639.

Liable for price of real estate bought by her. *Ballin v. Dillaye*, 37, 35.

When liable for work on her building under contract with husband. *Fowler v. Seaman*, 40, 592.

Liable for injuries by her straying cattle. *Rove v. Smith*, 45, 230.

When chargeable with husband's fraud — evidence of husband's declarations. *Warner v. Warren*, 46, 228.

May have resulting trust. *Floote v. Bryant*, 47, 544.

May sue for injury to paraphernalia given her by husband. *Rawson v. Pennsylvania R. Co.*, 48, 212; 8 Am. Rep. 543.

May own and transfer stock. *Leitch v. Wells*, 48, 585.

Cannot recover damages for negligence impairing her ability to labor, unless she

is carrying on a trade or business. *Filer v. New York Cent. R. Co.*, 49, 47; 10 Am. Rep. 327.

May be compelled to specifically perform contract to buy land where she has separate estate. *Hinckley v. Smith*, 51, 21.

Her lease binding — estoppel of her lessee. *Prevot v. Lawrence*, 51, 219.

May bar right of action against trustee by acquiescence in unauthorized investment by trustee, but not her right to withdraw the investment. *Sherman v. Parish*, 53, 483.

When bound by presumed continuance of husband's agency. *Bodine v. Killeen*, 53, 93.

Cannot be held for husband's fraud in which she did not participate. *Vanneman v. Powers*, 56, 39.

Wife chargeable for work on her premises by husband's agency. *Jones v. Walker*, 63, 612.

Not liable on note signed as surety for husband and not purporting to charge her estate — findings. *Yale v. Dederer*, 68, 329.

Not liable as surety on guardian's bond not expressing a charge. *Gosman v. Cruger*, 69, 87; 25 Am. Rep. 141.

When may maintain action for fraud by vendor of land on contract made by husband as her agent but in his own name. *Beardsley v. Duniley*, 69, 577.

Her oral agreement to refund advances is binding. *Herrington v. Robertson*, 71, 280.

May consent to extension of time of payment of note indorsed by him. *Third Nat. Bk. v. Blake*, 73, 260.

May become surety on appeal. *Woolsey v. Brown*, 74, 82.

As grantee, personally bound by assumption of mortgage on premises — so is her grantee in like manner assuming. *Cushman v. Henry*, 75, 103; 31 Am. Rep. 437, note.

Her will revoked by subsequent marriage. *Brown v. Clark*, 77, 369.

Her land may be subjected to a mechanics' lien. *Husted v. Mathes*, 77, 383.

When trust for benefit of wife not affected by married woman's acts of 1848 and 1849. *Douglas v. Cruger*, 80, 15.

Liable for family necessities purchased on her own credit, although she has no separate estate — evidence — objection. *Tiemeyer v. Turnquist*, 85, 516; 39 Am. Rep. 674.

When liable on lease. *Ackley v. Westervelt*, 86, 448.

General rules of law apply to ownership of property by married woman unaffected by marital relations. *Whiton v. Snyder*, 88, 299.

Statute entitling married woman to act as administratrix does not affect statute as to preference for unmarried. *Matter of Curser*, 89, 401.

Her assignment of insurance on husband's life valid as to her creditors. *Smilie v. Quinn*, 90, 492.

#### VIII. *Contract between husband and wife.*

Gift by husband to wife valid at common law except as against creditors — his declarations at time admissible. *Kelly v. Campbell*, 2 Abb. 492; 1 Keyes, 29.

Declaration of trust, that lands paid for in part by husband's money are for wife's separate use, is binding. *Martin v. Martin*, 1, 473.

Proceeds of sale of wife's real estate held subject to husband's rights belong to husband, subject to her equitable right of support. *Id.*

Obligation to wife with husband's assent, survives to wife. *Borst v. Spelman*, 4, 284.

When husband's declaration to the contrary not competent evidence. *Id.*

Deed from husband to wife is void. *White v. Wager*, 25, 323.

Deed from husband to wife may be sustained in equity. *Hunt v. Johnson*, 44, 27; 4 Am. Rep. 631.

Loan by wife to husband — when effectual as against his creditors. *Savage v. O'Neil*, 44, 298.

Loan by wife to husband before 1848 — payment in 1857 valid. *Woodworth v. Sweet*, 51, 8.

When business cannot be deemed wife's conducted by husband as agent. *Hamilton v. Douglas*, 46, 218.

Failing husband may prefer debt to wife. *Jaycox v. Caldwell*, 51, 395.

Voluntary note by husband to wife invalid as against his heirs. *Whitaker v. Whitaker*, 52, 368; 11 Am. Rep. 711.

Husband may give note of third person to wife. *Reed v. Reed*, 52, 651.

Wife may recover against husband on note given in consideration of promise to marry. *Wright v. Wright*, 54, 437.

Note taken by husband to order of himself and wife deemed gift to her on his decease — election of testamentary provision — estoppel. *Sanford v. Sanford*, 58, 69.

Discontinuance of action by wife for divorce valid to sustain note by husband to wife. *Adams v. Adams*, 91, 377; 43 Am. Rep. 675.

Wife becoming a partner, under secret trust for husband, may maintain action for dissolution and accounting. *Bitter v. Rathman*, 61, 512.

Note by wife to order of husband prima facie void. *Second Nat. Bk. of Watkins v. Miller*, 63, 639.

Power of attorney from wife to husband to make, sign, indorse and accept all checks, notes, drafts, etc., does not authorize his giving a post-dated check in exchange. *Nash v. Mitchell*, 71, 199; 27 Am. Rep. 38.

Gratuitous transfer of property by wife to husband may be set aside, although procured by his false representation that it was liable to certain debts — burden of proof is on husband to show fairness. *Boyd v. De La Montagnie*, 73, 498; 29 Am. Rep. 197.

Defendant in action on claim assigned to married woman by her husband cannot dispute its validity. *Seymour v. Fellows*, 77, 178.

Under act of 1860, chapter 90, requiring consent of husband to wife's conveyance, consent need not be concurrent with execution of deed. *Wing v. Schramm*, 79, 619.

Mortgage by husband to secure wife for her moneys used by him, valid before 1848. *Syracuse Chilled Plow Co. v. Wing*, 85, 421.

#### IX. Action between husband and wife.

Wife can maintain partition against husband. *Moore v. Moore*, 47, 467; 7 Am. Rep. 466.

Wife cannot maintain action for assault and battery against husband. *Schultz v. Schultz*, 89, 644.

Husband not necessary party to action against wife for fraud in sale of her real estate. *Baum v. Mullen*, 47, 577.

#### X. Separate estate of wife.

Declarations of husband that money borrowed on a married woman's note was for the benefit of her separate estate are not competent; how made competent. *Deck v. Johnson*, 1 Abb. 497; 2 Keyes, 348.

Wife's separate estate not liable at law for her ante-nuptial debts, nor in equity except by her post-nuptial act. *Vanderheyden v. Mallory*, 1, 452.

But wife's liability reattaches on husband's death. *Id.*

Wife's separate estate not charged by her mere signing her husband's note as surety. *Yale v. Dederer*, 18, 265; 22, 451; 68, 329.

Married woman trader, giving notes for goods in 1857, is bound by her promise after husband's death to pay them. *Goulding v. Davidson*, 26, 604.

Voluntary conveyance from wife to husband void. *Winans v. Peebles*, 32, 423.

Wife not liable for malicious prosecution instituted by herself and her husband, she acting in his presence and by his order — evidence of her independent action competent. *Cassin v. Delany*, 38, 178.

Liable to mechanics' lien. *Hauptman v. Catlin*, 20, 247; *Husted v. Mathes*, 77, 388.

Married woman may charge separate estate by indorsement — manner of doing it. *Corn Ex. Ins. Co. v. Babcock*, 42, 613; 1 Am. Rep. 601.

Married woman may contract for property to enable her to engage in separate business. *Frecking v. Rolland*, 53, 422.

Wife may bind her separate estate by parol for board of herself and husband — set-off. *Maxon v. Scott*, 55, 247.

Married woman's note, obtained by duress, not for benefit of her estate nor in her business, void even in hands of innocent holder. *Loomis v. Ruck*, 56, 462.

Wife not liable for goods obtained on her credit and contract, but used by her husband, where the contract does not expressly charge her estate. *Manhattan Brass and Mfg. Co. v. Thompson*, 58, 80.

Married woman carrying on separate business cannot set up that she had a dormant partner. *Scott v. Conway*, 58, 619.

Household goods of wife do not become husband's by being mingled with his. *Fitch v. Rathbun*, 61, 579.

What amounts to charge of estate by married woman living apart from husband — intent to charge separate estate may be inferred from circumstances. *Conklin v. Cantrell*, 64, 217.

Married woman liable for money borrowed for benefit of her estate although not so applied. *McVey v. Cantrell*, 70, 295; 26 Am. Rep. 605.

Agreement by married woman to charge her estate for past services not rendered for its benefit is void. *Eisenlord v. Snyder*, 71, 45.

Married woman may bind her estate for payment of a note by a separate writing — note and paper construed together. *Treadwell v. Archer*, 76, 196.

Wife's separate real estate before 1848 — deed direct to wife — action to recover possession from husband's tenant — notice to quit — improvements. *Wood v. Wood*, 83, 575.

What contracts of married woman bind her estate — note by her not presumed to be for benefit of her business or estate. *Saratoga Co. Bank v. Pruyn*, 90, 250.

## XI. Dower.

### 1. Generally.

Defendant in ejectment for, holding under quit-claim deed, may show that husband was not seised of dowerable estate. *Sparrow v. Kingman*, 1, 242.

Alien widow of a naturalized citizen is entitled to dower. *Burton v. Burton*, 1 Abb. 271.

Dower right paramount to mortgage being foreclosed — distribution of supplies — want of notice to dowress. *Mathews v. Duryee*, 3 Abb. 220.

The language "subject to the dower and thirds of his wife," does not entitle the wife to a third of the personal estate. *O'Hara v. Dever*, 3 Abb. 407.

Widow has none in fruits and grass growing on husband's lands at his death. *Kain v. Fisher*, 6, 597.

Ejectment for, must be against actual occupant. *Ellicott v. Mosier*, 7, 201.

Receipt of rent for several years in lieu, will not bar. *Id.*

Demand not necessary. *Id.*

Inchoate — in surplus moneys — forfeiture or waiver. *Matthews v. Duryee*, 4 Keyes, 525.

None in husband's vested remainder in expectancy by devise. *Durando v. Durando*, 23, 331.

Wife has dower when husband is seised of vested remainder expectant on life estate and buys the life estate, and her interest is not divested by sale of the life estate on execution against husband. *House v. Jackson*, 50, 161.

None capable of being independently conveyed during marriage. *Marvin v. Smith*, 46, 571.

When wife has joined in deed, she has no interest in surplus moneys on prior mortgages under which the premises were sold, the husband dying before distribution. *Elmendorf v. Lockwood*, 57, 322.

Right of widow to damages for withholding. *Kyle v. Kyle*, 67, 400.

### 2. Admeasurement of.

Proceedings — notice to owners not essential — setting off part of building without regard to rooms — when vacated. *Stewart v. Smith*, 4 Abb. 306.

Assigned cannot be sold under order for payment of husband's debts. *Lawrence v. Miller*, 2, 245.

Relation of title after assignment of dower — rights of widow on proceedings to sell husband's lands for debts — when fraud on widow does not affect purchaser under decree. *Lawrence v. Brown*, 5, 394.

Surrogate's decree for admeasurement — estoppel of widow — injunction. *Wood v. Seely*, 32, 105.

Widow's unmeasured dower right passes to receiver in supplementary proceedings. *Payne v. Becker*, 87, 153.

### 3. How barred.

Not barred by divorce for husband's adultery. *Wait v. Wait*, 4, 95.

Not barred by her adultery when husband also guilty. *Schiffer v. Pruden*, 64, 47.

Only barred by conviction of adultery in action for divorce — condonation bars action. *Pitts v. Pitts*, 52, 593.

When not barred by will — effect of foreclosure of lands devised by such will. *Lewis v. Smith*, 9, 502.

Not cut off by foreclosure of purchase-money mortgage, the wife not being made party. *Mills v. Van Voorhies*, 20, 412.

Barred by eminent domain proceedings. *Moore v. Mayor*, 8, 110.

Ante-nuptial agreement by woman releasing dower and widow's rights valid. *Matter of Young*, 92, 235.

## XII. Curtesy.

Does not exist in wife's estate in reversion or remainder unless it terminates during coverture. *Ferguson v. Tweedy*, 43, 543.

Curtesy still prevails — what seisin establishes. *Hatfield v. Sneden*, 54, 280.

## XIII. Divorce.

### 1. Limited divorce.

Cohabitation not condonation. *Reynolds v. Reynolds*, 1 Trans. App. 103 ; 4 Abb. 35 ; 3 Keyes, 368.

What constitutes cruel and inhuman treatment. *Kennedy v. Kennedy*, 73, 369.

Where wife fails in action for limited divorce, court cannot award custody of children to her. *Davis v. Davis*, 75, 221.

### 2. Foreign divorce.

In another State, without residence, service, or appearance, void here. *Kerr v. Kerr*, 41, 272.

Obtained by collusion and consent in another State cannot be collaterally questioned here. *Kinnier v. Kinnier*, 45, 535; 6 Am. Rep. 132.

In another State, without residence or service, is invalid — record not conclusive of jurisdiction — refusal on technical grounds of application to set aside immaterial. *Hoffman v. Hoffman*, 46, 30 ; 7 Am. Rep. 299.

Where divorce in another State no defense to prosecution for bigamy here. *People v. Baker*, 76, 78 ; 32 Am. Rep. 274.

Obtained in another State by husband against absent wife — upon substituted service of process, when valid by laws of that State will be recognized here — judgment may be questioned collaterally for fraud. *Hunt v. Hunt*, 72, 217 ; 28 Am. Rep. 129.

Action of damage lies for fraudulently procuring — no prior decree of annulment requisite. *Blossom v. Barrett*, 37, 434.

### 3. Adultery.

Presumption of illicit intercourse may be repelled — what repels. *Caujolle v. Ferrie*, 23, 90.

### 4. Alimony.

When proof of marriage not sufficient to warrant — when proper, although parties are living under articles of separation. *Collins v. Collins*, 80, 1.

Cannot be granted after final decree. *Kamp v. Kamp*, 59, 212.

Not allowable except in action for divorce or separation. *Ramsden v. Ramsden*, 91, 231.

## 5. Practice.

Prohibition against remarrying — effect of Revised Statutes on marriage contracted before. *Cropsey v. Ogden*, 11, 228.

Husband may be required to pay money for referee's fee. *Schloemer v. Schloemer*, 49, 82.

When alimony and expenses allowed, although marriage is denied. *Brinkley v. Brinkley*, 50, 184; 10 Am. Rep. 460.

Discontinuance of divorce suit valid consideration of note — public policy. *Adams v. Adams*, 91, 381; 43 Am. Rep. 675.

## XIV. Marriage after divorce.

Man marrying divorced woman cannot impeach divorce for fraud and have his own marriage declared void. *Ruger v. Heckel*, 85, 483.

In another State, by party forbidden by divorce decree here to marry, valid, when valid there. *Van Voorhis v. Brintnall*, 86, 18; 40 Am. Rep. 505; *Thorp v. Thorp*, 90, 602; 43 Am. Rep. 89; *Moore v. Hegeman*, 92, 521; 44 Am. Rep. 408.

One divorced for his adultery remarrying in this State, commits bigamy. *People v. Faber*, 92, 146; 44 Am. Rep. 357

See CRIMINAL LAW — *Bigamy*; CONTRACT; GIFT; PARENT AND CHILD; WILL.

**MARSHALING SECURITIES.**

Doctrine when applicable. *Farmers' Loan and Trust Co. v. Walworth*, 1, 433.

See EXECUTOR AND ADMINISTRATOR; SURREGATE; WILL.

**MASTER IN CHANCERY.**

Leave to sue bond. *In Matter of Petition of Van Eps*, 56, 599.

**MASTER AND SERVANT.**

## I. Contract of service.

## II. Liability of master for servant's neglect to strangers.

## III. Liability of master for injury to servant.

1. Negligence generally.
2. Defective tools, etc.
3. Negligence of fellow-servant.

## I. Contract of service.

Hiring of farm servant construed to be from year to year. *Davis v. Gorton*, 16, 255.

Servant disabled by sickness may recover quantum meruit. *Wolfe v. Howes*, 20, 197.

Servant may be discharged for habitual drunkenness. *Huntingdon v. Claffin*, 38, 182.

What sufficient to establish relation as to third person. *Swenson v. Atlantic Mail Steamship Co.*, 57, 108.

Presumption as to rate of compensation. *Smith v. Velie*, 60, 106.

One who contracts to render service in a mill for a stipulated compensation and the use of a house belonging to the mill property, occupies the house as servant and not as tenant. *Kerrains v. People*, 60, 221; 19 Am. Rep. 158.

Repudiation of contract by employer — tender — remedy. *Howard v. Daly*, 61, 363; 19 Am. Rep. 285.

On wrongful dismissal, servant cannot recover for wages subsequently accruing — former judgment. *Weed v. Burt*, 78, 191.

Right to discharge servant for cause, waived by continuance in employment. *Paine v. Howells*, 90, 660.

## II. Liability of master for servant's neglect to strangers.

Employer not liable to third persons for contractor's negligence. *Blake v. Ferris*, 5, 48.

Provision in contract for safety of third persons — effect of, as to strangers. *Id.*

Where purchaser removes goods from seller's store with help of his own porter, the seller is not liable for his negligence injuring a third person. *Stevens v. Armstrong*, 6, 435.

Railroad liable for detention of passenger by willful act of conductor. *Weed v. Panama R. Co.*, 17, 362.

Master liable for negligence of servant's servant injuring third person. *Althorf v. Wolfe*, 22, 355.

Driver or brakeman of street car, assisting passengers to get on board, acts in scope of employment. *Drew v. Sixth Ave. R. Co.*, 26, 49.

Master not liable for unauthorized arrest at instigation of servant. *Mali v. Lord*, 39, 381.

Evidence of employment in action for injury to third person. *Norris v. Kohler*, 41, 42.

Master not civilly liable for unauthorized killing by servant of one endeavoring to enter his premises. *Fraser v. Freeman*, 43, 566; 3 Am. Rep. 470.

When master liable for negligence of servant in acting for benefit of third person. *Lannen v. Albany Gas-light Co.*, 44, 459.

Master liable for servant's wrongful ejection of passenger from car. *Higgins v. Water-vliet Turnpike Co.*, 46, 23; 7 Am. Rep. 293.

When railroad company not liable for conductor's pushing passenger from car in motion. *Isaacs v. Third Ave. R. Co.*, 47, 122; 7 Am. Rep. 418.

Master liable for illegal or excessive force in execution of his order. *Jackson v. Second Ave. R. Co.*, 47, 274; 7 Am. Rep. 448.

Test of master's responsibility is whether act was in his business, not whether in accordance with his instructions. *Cosgrove v. Ogden*, 49, 255; 10 Am. Rep. 361.

Street railway company liable for act of driver in throwing off person endeavoring to pass over platform of car not in motion. *Shea v. Sixth Ave. R. Co.*, 62, 180; 20 Am. Rep. 480.

When railroad company liable for forcible ejection of trespasser from train. *Rounds v. Delaware, etc., R. Co.*, 64, 129; 21 Am. Rep. 597.

Liability of master for willful injury by servant to third person in course of employment. *Cohen v. Dry Dock, etc., R. Co.*, 69, 170.

When employers of log-driving contractor not liable for his negligence. *Town of Pierrepont v. Loveless*, 72, 211.

Liability of master for servant's malicious act in course of employment. *Mott v. Consumers' Ice Co.*, 73, 543.

Liability of railroad company for brakeman's kicking boy from platform of moving car. *Hoffman v. New York Cent., etc., R. Co.*, 87, 25; 41 Am. Rep. 337, note.

Railroad company liable for malicious injury to passenger by employee. *Stewart v. Brooklyn, etc., R. Co.*, 90, 588; 43 Am. Rep. 185.

Railroad liable for negligence of servants in helping young and infirm passengers off cars. *Drew v. Sixth Ave. R. Co.*, 3 Keyes, 429.

### III. Liability of master for injury to servant.

#### 1. Negligence generally.

Servant engaging in dangerous enterprise takes risks—contributory negligence. *Curran v. Warren Chemical and Manfg. Co.*, 36, 153.

When master not liable to servant for injury not proximately due to negligence. *Hofnagle v. New York, etc., R. Co.*, 55, 608.

Railroad company bound by foreman's employment of man to scrape snow from tracks, and his engagement to advise him of coming trains. *Bradley v. New York Cent. R. Co.*, 62, 99.

Liability of master to servant for negligence—excavating bank—contributory negligence. *Leonard v. Collins*, 70, 90.

Duty of master to servant in keeping of ferocious dog—contributory negligence. *Muller v. McKesson*, 73, 195; 29 Am. Rep. 123.

When minor assumes risks of employment—negligence—question of fact. *De Graff v. New York Cent., etc., R. Co.*, 76, 125.

Negligence—course of employment—ferry. *Quinn v. Power*, 87, 535; 41 Am. Rep. 392.

#### 2. Defective tools, etc.

A railroad company, knowingly using a defective and dangerous engine, is liable to

its servant injured in running it. *Keegan v. Western R. Corporation*, 8, 175.

Railroad bound to servant of another company permitted to use its track, for adoption of known, tested and practicable improvements. *Smith v. N. Y. & Harlem R. Co.*, 19, 127.

Master liable to servant for injury by fall of insecure privy. *Ryan v. Fowler*, 24, 410.

Master not liable for injury to servant by fall of bridge originally well constructed and not apparently defective. *Warner v. Erie Ry. Co.*, 39, 468.

Contributory negligence of engineer in running engine on defective railway—knowledge that track was out of repair. *Mehan v. Syracuse, etc., R. Co.*, 73, 585.

Servant having knowledge of danger—express orders to run engine over road—question of contributory negligence for jury. *Hawley v. North. Cent. Ry. Co.*, 82, 370.

Duty of railroad, to provide engine fit and proper for use—not discharged by servants supervising—if they negligent so is company. *Kirkpatrick v. N. Y. Cent. R. Co.*, 79, 240.

When manager of railroad liable for injury to engineer by defective engine. *Fuller v. Jewett*, 80, 46; 36 Am. Rep. 575.

Receiver of Vermont company, appointed there, leasing jointly with another Vermont company the rolling stock and machinery of a New York company—liable individually for negligent injury to employee by such machinery. *Kain v. Smith*, 80, 458.

Duty of master as to machinery—question of fact. *Painton v. Northern Cent. Ry. Co.*, 83, 7.

Assuming risks of employment—knowledge of servant—car coupler—ditches—running across tracks—stepped into one, fell under cars and killed—no recovery. *De Forest v. Jewett*, 88, 264.

Master liable to servant for injury from imperfect working implement. *Kain v. Smith*, 89, 375.

Master using due care in selection of implements not liable to servant for injury

from defective one. *Devlin v. Smith*, 89, 470; 42 Am. Rep. 311, note.

Railroad company liable to injury to workman from defect in bridge purchased from another company. *Vosburgh v. Lake Shore, etc., R. Co.*, 94, 374; 46 Am. Rep. 148.

Railroad liable for injury to employee from defective machinery, although negligence of a co-servant contributed. *Ellis v. New York, Lake Erie, etc., R. Co.*, 95, 546.

### 3. Negligence of fellow-servant.

Master not liable to servant for injury by negligence of fellow-servant. *Coon v. Syracuse & Utica R. Co.*, 5, 492; *Boldt v. New York Cent. R. Co.*, 18, 432.

Laborer of railroad company and engineer fellow-servants. *Russell v. Hudson River R. Co.*, 17, 134.

Brakeman and engineer or conductor fellow-servant. *Sherman v. Rochester & Syracuse R. Co.*, 17, 153.

Switch-tender of railroad permitting another company to use its tracks is not servant of latter. *Smith v. N. Y. & Harlem R. Co.*, 19, 127.

Master not liable to one servant for unskillfulness of another unless injury resulted from such unskillfulness. *Wright v. New York Cent. R. Co.*, 25, 562.

Who not fellow-servants. *Stone v. Western Transp. Co.*, 38, 240.

When the incompetency of a servant is known to the master's agent employed to select servants, he is liable to another servant injured thereby—evidence. *Lanning v. New York Cent. R. Co.*, 49, 521; 10 Am. Rep. 417.

Liability of railroad company to employer for neglect of train dispatcher to furnish sufficient brakemen. *Flike v. Boston & Albany R. Co.*, 53, 549; 13 Am. Rep. 545.

Evidence of knowledge of master of servant's incompetency—conversation between master's superintendent and the servant. *Chapman v. Erie Ry. Co.*, 55, 579.



Evidence that master knew of servant's intemperate habits competent to show negligence. *Cleghorn v. New York Cent., etc., R. Co.*, 56, 44; 15 Am. Rep. 375.

Negligence of general agent, master liable for. *Corcoran v. Holbrook*, 59, 517; 17 Am. Rep. 359.

Case of negligence of fellow-servant — nonsuit proper. *Sammon v. New York & Hudson R. Co.*, 62, 251.

When master not liable for negligence of foreman. *Malone v. Hathaway*, 64, 5; 21 Am. Rep. 573.

Fellow-servants — brakeman and head-brakeman and yard-master. *Besel v. New York Cent., etc., R. Co.*, 70, 171.

Sending out railroad train with insufficient number of brakemen — contributory negligence of co-servant not chargeable to plaintiff. *Booth v. Boston & Albany R. Co.*, 73, 38; 29 Am. Rep. 97, note.

Servant's right of action for injury by defective machinery not defeated by contributory negligence of co-servant. *Cone v. Delaware, etc., R. Co.*, 81, 206; 37 Am. Rep. 491.

Case of negligence of co-servants — brakemen on railway train — absence of negligence on part of master. *Henry v. Staten Island Ry. Co.*, 81, 373.

When master not liable to servant for negligence of general agent in performance of a co-servant's duties. *Crispin v. Babbitt*, 81, 516; 37 Am. Rep. 521, note.

Yard-master of railroad company — when deemed fellow-servant. *McCosker v. Long Island R. Co.*, 84, 77.

Railroad manager not liable to fireman for negligence of telegraph operator and conductor. *Slater v. Jewett*, 85, 61; 39 Am. Rep. 627.

Employee cannot recover for injuries caused by negligence of co-servant — when nonsuit proper. *Murphy v. Boston & Albany*, 88, 146; 42 Am. Rep. 240.

Misplaced switch — engineer killed — evidence as to competency of switchman — failure to close switch — inattention and carelessness not inability — was co-servant — defendant not liable. *Harvey v. N. Y. Cent.*, 88, 481.

Duty of master to servant to select competent co-servants. *Mann v. Delaware, etc., Canal Co.*, 91, 495.

See AGENCY: NEGLIGENCE; PARENT AND CHILD

## MECHANICS' LIEN.

- I. Acts regarding.
- II. New York city acts.
- III. Rights of owner.
- IV. Liability of contractor.
- V. Liability of owner.
- VI. Who deemed owner.
- VII. When lien attaches.
- VIII. Construction of laws.
- IV. Practice.

### I. Acts regarding.

Act of 1862, chapter 478 — omission to file affidavit of issue on service of summons and complaint after requisition, fatal. *Mushlitt v. Silverman*, 50, 360.

Under act of 1862, chapter 478, lien for flagging sidewalk may be established — statement in notice that materials were furnished for third person does not vitiate proceedings against designated owner. *Moran v. Chase*, 52, 346

Acts of 1864, chapter 366, 1866, chapter 788 — under contract with sub-contractor one can acquire no lien after contractor has paid sub-contractor. *Lumbard v. Syracuse, etc., R. Co.*, 55, 491.

Rensselaer county acts — notice properly filed in town clerk's office. *VanDenburgh v. Prest., etc., of Greenbush*, 66, 1.

Laws constitutional. *Glacius v. Black*, 67, 563; *Blauvelt v. Woodworth*, 31, 285.

Under Kings and Queens county act all lienors may be parties to foreclosure. Error in judgment corrected by application to court and not by appeal — costs allowable against owner — lien allowed for expense of sidewalk in street — trial by jury not of right — serving notice on owner not required — payment to contractor. *Kenney v. Appgar*, 93, 539.

II. *New York city acts.*

Act of 1844, chapter 220, expires in one year and is not prolonged by judgment. *Freeman v. Cram*, 3, 305.

None on public building in New York. *Poillon v. Mayor, etc.*, 47, 666.

Under New York acts of 1851 and 1855 lienor may maintain action for assignee — personal judgment proper — inoperative notice no bar to subsequent one. *Hallahan v. Herbert*, 57, 409.

Act of 1863, chapter 500, was not retroactive. *Fitzpatrick v. Boylan*, 57, 433.

Act of 1863, chapter 500 — power of amendment — expiration of lien before judgment. *McGraw v. Godfrey*, 56, 610.

Act of 1875 not repealed by general law of 1880 for cities. *McKenna v. Edmundstone*, 91, 231.

Sub-contractor has lien to extent only of amount due contractor. *Gibson v. Lenane*, 94, 183.

Interest of owner not chargeable for building erected by lessee. *Cornell v. Barney*, 94, 394.

III. *Rights of owner.*

In action to foreclose, owner cannot be required specifically to perform agreement to convey real estate in payment. *Dowdney v. McCullom*, 59, 367.

Right of owner to avail himself of contractor's defenses against sub-contractor. *Cheney v. Troy Hospital Association*, 65, 282.

When owner is forced to complete building at his own expense, the lien against contractor is subject to that set-off. *Rodbourn v. Seneca Lake Grape and Wine Co.*, 67, 215.

Forfeiture of contract — owner finishing at contractor's expense. *Wheeler v. Scofield*, 67, 311.

Prior to mortgage, when not affected by foreclosure. *Emigrant Industrial Savings Bank v. Godman*, 75, 127.

When payments in advance will be protected against. *Post v. Campbell*, 83, 279.

IV. *Liability of contractor.*

When forfeiture waived by owner. *Murphy v. Buckman*, 66, 297.

When personal judgment will not pass against contractor — joinder of actions. *Burroughs v. Tostevan*, 75, 567.

Action by sub-contractor — substantial performance of contract — waiver — act of 1863, chapter 500, repealed by act of 1875, chapter 379 — “liable to pay at the time,” construed. *Heckman v. Pinkney*, 81, 211.

V. *Liability of owner.*

Construction of chapter 513 of Laws of 1851 — applies to married women — notice. *Hauptman v. Cailin*, 20, 247. See *Husted v. Mathes*, 77, 388.

Enforceable against land, where lessee agreed to have improvements made — notice need not allege permission of owner. *Burkitt v. Harper*, 79, 273.

Interest of owner liable where improvements made by lessee with his consent. *Otis v. Dodd*, 90, 336.

VI. *Who deemed owner.*

One who contracts to sell land, the deed to be delivered on completion of building by purchaser, is not “owner of the building.” *Loonie v. Hogan*, 9, 435.

Laws of 1862, chapter 478 — contract with equitable owner. *Rollin v. Cross*, 45, 766.

When lessor not deemed owner. *Muldoon v. Pitt*, 54, 269.

VII. *When lien attaches.*

“Erection, construction or finishing” of buildings does not cover flagging sidewalks, yards and areas. *McDermott v. Palmer*, 8, 383.

Does not attach in favor of one furnishing materials to contractor, where owner has paid contractor. *Carman v. McIncrow*, 18, 70.

May attach to a building erected by a tenant and removable. *Ombony v. Jones*, 19, 234.

Not acquired for materials furnished contractor where he has abandoned and been paid — nor for materials furnished sub-contractor after he has been paid — nor for balance for materials furnished sub-contractor under owner's promise to pay. *Crane v. Genin*, 60, 127.

Nor where amount due contractor has been equaled by forfeitures for delay. *Cheney v. Troy Hospital Ass'n*, 65, 282.

When vendor's lien for purchase-money subject to. *Hackett v. Badeau*, 63, 476.

Contiguous buildings may be considered one — service on owner, where not essential — release of part of houses. *Hall v. Sheehan*, 69, 618.

Does not attach to municipal property held for public use. *Leonard v. City of Brooklyn*, 71, 498; 27 Am. Rep. 80, note.

When subject to equitable mortgage. *Payne v. Wilson*, 74, 348.

Married woman's land subject to. *Husted v. Mathes*, 77, 388.

Does not attach in favor of a non-resident delivering personal property out of this State, which is made a fixture here. *Birmingham Iron Foundry v. Glen Cove Starch Manuf'g Co.*, 78, 30.

When attaches to mirror frames — evidence — lienor's want of knowledge immaterial — deposit of amount of lien — waiver of judgment for deficiency. *Ward v. Kilpatrick*, 85, 413; 39 Am. Rep. 674.

#### VIII. Construction of laws.

Sheds on piers are "structures connected therewith." *Collins v. Drew*, 67, 149.

As to vendor and purchaser — damages. *Schuyler v. Haywood*, 67, 253.

Construction of contract is question of law. *Glacius v. Black*, 67, 563.

Superintending architect entitled to — not precluded by account rendered but not assented to. *Stryker v. Cassidy*, 76, 50; 32 Am. Rep. 262, note.

#### IX. Practice.

How jurisdiction of action acquired. *Maltby v. Greene*, 1 Keyes, 548; 3 Abb. 144.

How protected on foreclosure of mortgage. *Livingston v. Mildrum*, 19, 440.

Under chapter 384, Laws of 1852, enforceable by judgment — law constitutional — lien not to be defeated by conveyance. *Blauvelt v. Woodworth*, 31, 285.

Time for filing notice in Kings county. *Spencer v. Barnett*, 35, 94.

Appearance cures defect in service of summons. *Mors v. Stanton*, 51, 649.

Under act of 1854, chapter 402, judgment must have been perfected within the year from filing notice. *Benton v. Wickwire*, 54, 226.

Proceedings to enforce, no bar to action on note given as collateral security for the work. *Gambling v. Haight*, 59, 354.

Offer of judgment — costs — modification on appeal. *Lumbard v. Syracuse, etc., R. Co.*, 62, 290.

Proceeding abates on defendant's death, under act of 1863, chapter 500. *Leavy v. Gardner*, 63, 624.

Act of 1863, chapter 500 — essentials of complaint — continuance of lien — lien ceasing pending proceedings. *Darrow v. Morgan*, 65, 333.

If action is commenced within year, lien continues till judgment — costs — new trial. *Fox v. Kidd*, 77, 489.

Personal judgment merely incidental — proceedings fail where no lien ever existed. *Weyer v. Beach*, 79, 409.

In Canandaigua, in 1866, notice must be filed in county clerk's office. *Whippie v. Christian*, 80, 523.

When action to foreclose not enjoined as cloud on title. *Lehman v. Roberts*, 86, 232.

#### Mercantile Agency.

See LIBEL.

#### MERGER.

Not affected when especially provided to contrary. *Spencer v. Ayrault*, 10, 202.

Never takes place against clear intention. *Bascom v. Smith*, 34, 320.

Union of legal and equitable estates does not necessarily effect. *Sheldon v. Edwards*, 35, 279.

Fraudulent conveyance does not merge a prior less estate when set aside for the fraud. *Malloney v. Horan*, 49, 111; 10 Am. Rep. 335.

Stipulation in contract for sale of land that vendor should retain possession for a certain period is not merged in deed not expressing it. *Morris v. Whitcher*, 20, 41.

Of fee and rent charge, when may be shown not to be intended. *Sheehan v. Hamilton*, 2 Keyes, 304.

Mortgage, when not merged. *Kellogg v. Ames*, 41, 259.

When executor of mortgagee purchases the land for himself he may elect to preserve the lien of the mortgage on all or part of premises. *Clift v. White*, 12, 519.

Conveyance to mortgagee of part of mortgaged premises does not merge mortgage. *Smith v. Roberts*, 91, 470.

Judgment confessed by chattel mortgage expressly to secure mortgage debt does not merge mortgage. *Butler v. Miller*, 1, 496.

But what acts are repugnant to subsequent claim under mortgage. *Id.*

Assignment of a decree of foreclosure to the grantee of equity of redemption will not operate as merger unless so expressed therein. *Binsse v. Paige*, 1 Abb. 140.

When the equity of redemption in land to the mortgagee thereof after he has transferred the mortgage to a third party does not create a merger. *Campbell v. Vedder*, 1 Abb. 295.

In ejectment for premises leased forever, if defendant pleads legal merger of rent charge, defendant may show that in equity there was none. *Sheehan v. Hamilton*, 4 Abb. 211.

Purchase by executor of mortgage on testator's land undisposed of by will — no merger. *Carter v. Holahan*, 92, 498.

When lease not merged in contract of purchase — question of intent. *Bostwick v. Frankfield*, 74, 207.

Life estate and remainder — case of no merger. *Jackson v. Littell*, 56, 108.

Power of sale in fee inoperative. *Jennings v. Conboy*, 73, 230.

Judgment creditor of mortgagor of chattels cannot invoke as against mortgagee with bill of sale. *Walker v. Henry*, 85, 130.

See CONTRACT ; DEED ; FORMER ADJUDICATION ; JUDGMENT ; MORTGAGE.

### Mesne Profits.

See EJECTMENT ; STATUTE OF LIMITATIONS.

### METROPOLITAN POLICE.

Act of 1857 construed. *People v. Draper*, 15, 532.

Prisoner arrested for riding on sidewalk may not be detained at station-house over night till opening of court. *Schneider v. McLane*, 3 Keyes, 568; 4 Abb. 154.

See CONSTITUTIONAL LAW ; NEW YORK CITY.

### MILITIA.

Governor cannot appoint major-general during recess of senate, to fill vacancy, except in time of war. *People v. Molyneux*, 40, 113.

Officer of, mustered into service of the United States, may not be arrested for contempt of State process. *People v. Campbell*, 40, 133.

When removal renders ineligible for new office. *People v. Smith*, 23, 53.

Exemption from taxation. *People v. Board of Assessors of Brooklyn*, 84, 610.

Supervisors cannot deduct from amount certified for care of armory. *People v. Supervisors of Ulster*, 91, 672.

Of State, proceeding for contempt, suspended by muster of defendant into Federal military service as member of State militia. *People v. Campbell*, 40, 133.

See CONSTITUTIONAL LAW ; OFFICE AND OFFICER.

**MINES.**

Rights in, under exception in grant — manner of exercise — non-user — subjacent support — nuisance. *Marvin v. Brewster Iron Mining Co.*, 55, 538; 14 Am. Rep. 322.

See EASEMENT.

**Misdemeanor.**

See CRIMINAL LAW.

**MISNOMER.**

No ground of nonsuit. *Traver v. Eighth Ave. R. Co.*, 3 Keyes, 497.

See CRIMINAL LAW; PARTIES; PLEADING.

**MISTAKE.**

Cannot be relieved against, unless clear and mutual. *Stoddard v. Hart*, 23, 556; *Nevius v. Dunlap*, 33, 676; *Bryce v. Lorillard Ins. Co.*, 55, 240; 14 Am. Rep. 249; *Paine v. Jones*, 75, 593.

Must be mutual, or fraud on one side. *Prior v. Williams*, 3 Abb. 624.

Must be clearly proved to justify reformation of written agreement. *Ford v. Joyce*, 78, 618.

Of law — no relief against. *Jacobs v. Morange*, 47, 57; *Weed v. Weed*, 94, 243.

Ignorance of fact not mistake of fact. *National Life Ins. Co. v. Minch*, 53, 144; *Scott v. Frink*, 54, 635.

Action for mistake cannot be maintained where complaint is for fraud. *McMichael v. Kilmer*, 76, 36.

Parol evidence competent to show mutual mistake in instrument — presumption of finding — pleadings. *Meyer v. Lathrop*, 73, 315.

Defendant may allege, in ejectment, but must concede same right to plaintiff. *Hoppough v. Struble*, 60, 430.

Deed may be reformed for mutual mistake in supposing language used corre-

sponds with actual boundaries. *Bush v. Hicks*, 60, 298.

In quantity of land conveyed, not obviated by "more or less." *Paine v. Upton*, 87, 327; 41 Am. Rep. 371.

Action lies to correct, on accounting and settlement. *McDougall v. Cooper*, 31, 498.

Settlement cannot be opened for, unless affirmatively proved. *Herrick v. Ames*, 1 Keyes, 190.

In settlement — burden of proof on party alleging. *Chubbuck v. Vernam*, 42, 432.

Note of insolvent third person not payment where insolvency was unknown. *Roberts v. Fisher*, 43, 159; 3 Am. Rep. 680

Court will rescind executory contract of sale of land for material deficiency. *Belknap v. Sealey*, 14, 143.

In boundaries in deed may be corrected. *Johnson v. Taber*, 10, 319.

In quantity of land in deed, no defense to action for purchase-price. *Flaure v. Martin*, 7, 210.

Contract for exchange of lands — when may be rescinded for, as to identity of lands. *Crowe v. Lewin*, 95, 423.

In action for breach of covenant against incumbrancer defendant may show that the incumbrance in question was by mistake omitted to be excepted. *Haire v. Baker*, 5, 357.

Cross action for reformation with stay of proceedings proper. *Id.*

Relieved against — "risk of navigation." *Pitcher v. Hennessey*, 48, 415.

Money paid by mutual, may be recovered. *Bank of Commerce v. Union Bank*, 3, 230.

Action lies for money overpaid by mistake of fact. *North v. Bloss*, 30, 374.

— although payment was negligent. *Kingston Bank v. Eltinge*, 40, 391.

Of fact — negligence no defense. *Union Nat. Bank of Troy v. Sixth Nat. Bank of N. Y.*, 43, 452; 3 Am. Rep. 718; *Lawrence v. American Nat. Bank*, 54, 432.

Money paid by owner of lands to purchaser at tax sale, under mistaken representation that he had an absolute conveyance, may be recovered. *Martin v. McCormick*, 8, 331.

Agreement to boundary under mistake of facts not binding if disavowed on discovery. *Coon v. Smith*, 29, 392.

But when received with knowledge may be recovered back without demand. *Sharkey v. Mansfield*, 90, 227; 43 Am. Rep. 161.

Action for money paid by — demand necessary — what is not cause of action for. *Southwick v. First Nat. Bk. of Memphis*, 84, 420.

Satisfaction-piece delivered by mistake may be set aside. *Slocum v. Freeman*, 2 Trans. App. 303.

Insufficient to set aside sealed release. *Dambmann v. Schulting*, 85, 622.

Money paid to city for assessment on lot of another recoverable in absence of evidence showing that city could not be restored to its former right. *Mayer v. Mayor, etc.*, 63, 455.

Case for relief not made out on purchase by partner of his copartner's interests — parties need not have equal knowledge. *Stettheimer v. Killip*, 75, 282.

Moneys paid under mistake as to title of third party to one entitled to receive them not recoverable back. *Youmans v. Edgerton*, 91, 403.

When rule for judgment construed as necessary finding of mutual mistake. *Rider v. Powell*, 28, 310.

Plaintiff must show diligence and good faith — when delay bar to relief. *Thomas v. Barton*, 48, 193.

Time for discovery not limited — statute of limitations. *First Nat. Bk. of Chittanooga v. Morgan*, 73, 593.

Agreement may be reformed, though would be invalid if not in writing. *Prior v. Williams*, 3 Abb. 624.

See REFORMATION.

## MOBS AND RIOTS.

Under act of April 13, 1855, there may be a recovery for destruction of a bawdy-house — notice. *Ely v. Supervisors*, 36, 297

## MONEY HAD AND RECEIVED.

Legatees and next of kin, when liable for. *Green v. Givan*, 33, 343.

See ACTION.

## MORTGAGES.

- I. *Equitable mortgages.*
- II. *Mortgages generally.*
- III. *When valid.*
- IV. *Lien of.*
- V. *Primary liability.*
- VI. *Priority of lien.*
- VII. *Junior mortgagees.*
- VIII. *Collateral and to secure future advances.*
- IX. *Rights of mortgagors.*
- X. *Rights and liabilities of mortgagees.*
- XI. *Rights of assignees.*
- XII. *Liability of grantees of mortgaged premises.*
- XIII. *Insurance.*
- XIV. *Merger.*
- XV. *Payment and satisfaction.*
- XVI. *Corporations.*
- XVII. *Foreclosure by action.*
  1. *Generally.*
  2. *Practice.*
  3. *Parties.*
  4. *Judgment.*
  5. *Duties of referee.*
  6. *Sales under.*
  7. *Purchasers under.*
  8. *Judgment for deficiency.*
  9. *Redemption.*
  10. *Surplus money.*
- XVIII. *Foreclosure by advertisement.*
- XIX. *Strict foreclosure.*
- XX. *Chattel mortgages.*
  1. *Generally.*
  2. *Filing.*
  3. *When valid.*
  4. *Renewals.*
  5. *Defaults.*
  6. *Rights and liabilities of parties.*
  7. *Possession.*

I. *Equitable mortgages.*

Absolute deed may be shown to be mortgage. *Van Dusen v. Worrell*, 1 Trans. App. 224; 4 Abb. 473; *Horn v. Keteltas*, 46, 605.

When deed not construed as mortgage. *Hill v. Grant*, 46, 496.

When deed will not be held to be mortgage — burden of proof. *Fullerton v. McCurdy*, 55, 637.

A mortgage on real property in trust to collect principal and interest for a specific purpose is a trust in personal property. *Bunn v. Vaughn*, 1 Abb. 253.

Conveyance construed to be a mortgage — private sale under, ineffectual to pass title. *Lawrence v. Farmers' Loan and Trust Co.*, 13, 200.

Mortgage is not deed, within statute of uses and trusts — when valid as gift. *Bucklin v. Bucklin*, 1 Keyes, 141.

When subject to trust for creditors. *Briggs v. Davis*, 20, 15.

Equitable lien growing out of contract for purchase of land is not within statute compelling heir or devisee of premises to pay mortgages thereon. *Wright v. Holbrook*, 32, 587.

What is equitable title subject of mortgage — purchaser in possession. *Stoddard v. Whiting*, 46, 627.

Stipulation in deed, absolute on its face, but intended as mortgage, that grantee shall assume prior mortgage, imposes no personal liability on the mortgagee. *Garnsey v. Rogers*, 47, 233; 7 Am. Rep. 440.

Deed absolute in terms, not converted to mortgage by contemporaneous covenant to account to grantor for resales. *Macaulay v. Porter*, 71, 173.

What constitutes equitable mortgage. *Payne v. Wilson*, 74, 348.

Whether deed is mortgage, when question of fact. *Morris v. Budlong*, 78, 543.

When deed may be declared a mortgage, and accounting and redemption had. *Bennett v. Austin*, 81, 308.

Conditional mortgage to secure loan payable upon specified event — certificate as to execution of mortgage by corpora-

tion. *Trustees Can. Acad. v. McKechnie*, 90, 618.

II. *Mortgages generally.*

Mortgage of land held under contract of exchange. *McLallen v. Jones*, 20, 162.

Mortgage not capable of extension by parol. *Stoddard v. Hart*, 23, 556.

Attaching creditor may impeach mortgage for fraud. *Frost v. Mott*, 34, 253.

When giving new bond for mortgage is not novation. *Flower v. Lance*, 59, 603.

When mortgage subject to trust in favor of married woman. *Douglas v. Cruger*, 80, 15.

III. *When valid.*

The word "appurtenances" not necessary in a mortgage to convey the mortgagor's title to a mill and water-right situated on the mortgaged premises. *Babcock v. Utter*, 1 Abb. 27.

A mortgage by a father to a trustee for the benefit of a child, where the rights of creditors do not intervene, is valid. *Bucklin v. Bucklin*, 1 Abb. 242.

When mortgage void for compounding felony — evidence — declarations of mortgagee as against assignee, incompetent. *Earl v. Clute*, 2 Abb. 1.

Mortgagee fraudulently induced by owner of equity to release part, may recover amount so released, the latter having conveyed. *Stebbins v. Howell*, 4 Abb. 297.

When mortgage of chattels void as authorizing retaining and disposing of goods by mortgagor as his own. *Griswold v. Sheldon*, 4, 580.

Mortgage executed on executor's contract for purchase of land is not invalid because mortgagor does not call for deed. *Farmers' Loan and Trust Co. v. Curtis*, 7, 466.

Mortgage in lease, when valid. *Van Heusen v. Radcliff*, 17, 580.

Mortgage not invalidated by marriage of female mortgagee with mortgagor. *Power v. Lester*, 23, 527.

When mortgage valid under trust—dower, when not cut off by. *Marvin v. Smith*, 46, 571.

Interest clause—election of mortgagee—effect of. *Malcolm v. Allen*, 49, 448.

Mortgage exacted as condition of reconveying land to mortgagor, when valid. *Mapes v. Snyder*, 59, 450.

Mortgage to building association to secure loan with contributions, dues, interest and penalties, valid, and equity will not relieve from default. *Concordia Savings Association v. Read*, 93, 474.

#### IV. Lien of.

Lien upon damages awarded by State as damages for abandonment of canal on premises. *Bank of Auburn v. Roberts*, 44, 192.

Lien cannot be discharged by tender of less than amount due—mortgage by order of surrogate—effect of—foreclosure by doweress holding same and another made by decedent. *Graham v. Linden*, 50, 547.

Mortgage of land held in trust to apply rents for life with remainder—when does not affect life estate. *Rathbone v. Hooney*, 58, 463.

Where mortgage does not attach to severed timber—license—estoppel. *Wilson v. Maltby*, 59, 126.

Part of premises conveyed to one assuming first mortgage liable for payment. *Bowne v. Lynde*, 91, 92.

Where part of mortgaged premises conveyed to mortgagee, mortgage rests solely on remainder. *Smith v. Roberts*, 91, 470.

#### V. Primary liability.

A grantor is primarily liable to pay a mortgage on conveyed premises, unless the deed contains a stipulation that grantee shall pay it. *Binsse v. Paige*, 1 Abb. 138.

When a person not primarily liable on the bond, the premises mortgaged are the primary fund—husband's curtesy. *Moore v. Moore*, 3 Abb. 303.

Mortgaged lands being alienated are chargeable with payment of the mortgage

in the inverse order of their alienation. *Crafts v. Aspinwall*, 2, 289.

Where mortgagor sells part of the mortgaged premises, the purchaser assuming the mortgage, the land in his hands is primary fund for payment. *Russell v. Pistor*, 7, 171.

Equities as between mortgages and judgment creditor—inverse order of alienation. *Reynolds v. Park*, 53, 36.

Grantee of mortgaged premises, under deed stating that the mortgage is the consideration, is not liable to mortgagee for deficiency. *Trotter v. Hughes*, 12, 74.

When grantee of part assumed payment of mortgage covering whole and while grantor, still owner of residue, discharged his part from consequences of assumption, grantee of grantor derived no benefit from assumption. *Judson v. Dada*, 79, 373.

Release of part of previous mortgage when not release of part previously conveyed. *Kendall v. Woodruff*, 87, 1.

Where mortgage assumed by grantee not enforceable against third person on parol proof that he was principal. *Tutbill v. Wilson*, 90, 423.

Surety for payment—taking conveyance of premises subject to mortgage not primarily liable—application of payment. *Carter v. Holahan*, 92, 498.

One conveying mortgaged land for full consideration not subject to payment of mortgage is primarily liable for the payment, and the vendee may pay the bond and enforce it against vendor even after foreclosure. *Wadsworth v. Lyon*, 93, 201; 45 Am. Rep. 190.

Grantee of part of mortgaged premises can require resort to be first made to remainder, though part of, situate out of State. *Welling v. Ryerson*, 94, 98.

#### VI. Priority of lien.

Mortgage by railroad company, of lands to be acquired, is lien superior to vendor's for land subsequently conveyed to it. *Fisk v. Potter*, 2 Abb. 138.

Mortgage for purchase-money—failure of title no defense unless there has been



eviction or disturbance of possession. *Farnham v. Hotchkiss*, 2 Keyes, 9.

When wife's mortgage not postponed by her joining in another intended to have that effect. *Gillig v. Maass*, 28, 191.

Mortgage for purchase-money superior to another first recorded. *Dusenbury v. Hulbert*, 59, 541.

Construction of covenant in mortgage giving priority of lien. *Taylor v. Wing*, 84, 471.

Two mortgages recorded at same time — when concurrent. *Granger v. Crouch*, 86, 494.

Mortgage for purchase-money valid against judgment for prior debts. *Spring v. Short*, 90, 538.

#### VII. Junior mortgage.

Where junior mortgagee forecloses and purchases, the land is thenceforth primary fund for payment of senior mortgage. *Mattheus v. Aikin*, 1, 595.

Junior mortgagee not party to foreclosure may redeem without paying costs. *Gage v. Brewster*, 31, 218.

Junior mortgagee may pay off or redeem from senior mortgagee seeking to foreclose — when tender has effect of payment. *Frost v. Yonkers Savings Bank*, 70, 553; 27 Am. Rep. 627.

Title to insurance moneys as between junior and senior mortgagee. *Dunlop v. Avery*, 89, 592.

Junior mortgagee has lien on surplus moneys but cannot maintain separate action for. *Phess v. Buckley*, 90, 286.

#### VIII. As collateral and to secure advances.

Assignee of, for collateral security cannot become purchaser on foreclosure to prejudice of assignor. *Hoyt v. Martense*, 16, 231.

Mortgage for future advances, indefinite in amount, valid for actual advances as against creditor by judgment before they become due. *Robinson v. Williams*, 22, 380.

Instrument in form of mortgage but containing no name of mortgagee, not

effectual by delivery as collateral security. *Chauncey v. Arnold*, 24, 330.

Mortgage to secure liabilities incurred, not void as to creditors or purchasers, for not specifying amount. *Youngs v. Wilson*, 27, 351.

Deed held to be mortgage whenever taken as mere security — statute abolishing resulting trusts does not apply. *Carr v. Carr*, 52, 251.

When mortgage not expected to secure unliquidated demands. *Moury v. Sanburn*, 68, 153.

Mortgage to secure future indebtedness to National bank, void. *Crocker v. Whitney*, 71, 161.

Mortgage as collateral to contract cannot be assigned except subject to extinguishment by performance of contract. *Wanzer v. Cary*, 76, 526.

Mortgage to partnership, as security for its indorsements — construction — death of one mortgagee — power of survivor — payment of notes — damages — renewals — extension of time of payment. *National Bank of Newburgh v. Bigler*, 83, 51.

Mortgage to secure future advances or indorsements, being recorded, has preference over subsequent judgment. *Ackerman v. Hunsicker*, 85, 43; 39 Am. Rep. 621.

Mortgage given as "collateral security for any indebtedness," no indebtedness then existing, held to refer to subsequent indebtedness. *Simons v. First National Bank of Union Springs*, 93, 269.

#### IX. Right of mortgagors.

Where mortgagor sells part of the mortgaged premises, the purchaser assuming the mortgage, the land in his hands is primary fund for payment. *Russell v. Pistor*, 7, 171.

The grantee of the purchaser buying the mortgage, it is thereby paid. *Id.*

Where mortgagor sells and grantee assumes, release of mortgagor does not discharge mortgage. *Bentley v. Vanderheyden*, 35, 677.

When mortgagor conveys to mortgagee, after assignment, assignee has lien as

against innocent purchaser from mortgagee, although conveyances to mortgagee and purchaser were first recorded. *Purdy v. Huntington*, 42, 334; 1 Am. Rep. 532.

Personal judgment against non-resident mortgagor served by publication and not appearing is ineffectual. *Schwinger v. Hickok*, 53, 280.

When mortgage subject to judgment declaring mortgagor's title fraudulent as to creditors. *Ayrault v. Murphy*, 54, 203.

Interest of mortgagor out of possession may be sold on execution, and owner of mortgage in possession may buy it and set it up against action to redeem. *Trimm v. Marsh*, 54, 599; 13 Am. Rep. 623.

Mortgagor not bound to protect title of purchaser on sale, nor estopped from acquiring and enforcing outstanding paramount title. *Jackson v. Littell*, 56, 108.

Extension of time by agreement of mortgagee with grantee not assuming discharges mortgagor. *Murray v. Marshall*, 94, 611.

Without bond—mortgagee must look to premises alone. *Spencer v. Spencer*, 95, 353.

By married woman, as security for loan for her benefit, and on credit of her separate estate, and charging her separate estate, is not an express covenant, and she is not personally liable. *Mack v. Austin*, 95, 513.

### X. Rights and liabilities of mortgagees.

Description of mortgagee as executor, etc., does not show ownership in that capacity. *Peck v. Mullams*, 10, 509.

And his personal representatives must be parties to foreclosure. *Id.*

Mortgagee may maintain personal action against grantee assuming the mortgage—need not foreclose. *Burr v. Beers*, 24, 178.

When mortgagee not entitled to surplus. *Johnson v. Blydenburgh*, 31, 427.

Delivery of mortgage unaccompanied by the bond, does not transfer title to mortgage. *Merritt v. Bartholick*, 36, 44.

When premises conveyed subject to, extension of time to owner of equity of

redemption discharges mortgagor from personal liability. *Spencer v. Spencer*, 95, 353.

Equities as between mortgagees and judgment creditor—inverse order of alienation. *Reynolds v. Park*, 53, 36.

Mortgage, with covenants of seisin and title—mortgagee recording gets subsequently acquired title as against purchaser after recording and before title. *Tefft v. Munson*, 57, 97.

Mortgagee in possession may purchase mortgagor's title on execution and set it up against redemption. *Ten Eyck v. Craig*, 62, 406.

When mortgagee entitled to surplus moneys by agreement with insurer. *Ulster Co. Savings Inst. v. Leake*, 73, 161; 29 Am. Rep. 115.

Possession of real estate by mortgagee, acquired by force or fraud, against will and consent of owner and without color of lawful authority, is not a defense to an action of ejectment brought by owner. *Howell v. Leavitt*, 95, 617.

### XI. Rights of assignees.

Assignee of mortgage may purchase and set up outstanding title against mortgage—limitation of action to redeem does not impair right of one in legal possession to hold. *Wells v. Pierce*, 4 Abb. 559.

Mortgage valid in hands of assignee as against discharge by mortgagee, in consideration of the conveyance of the premises, without production of the mortgage. *Brown v. Blydenburgh*, 7, 141.

Assignees of a term of years may redeem mortgage given by their lessor prior to the lease, and demand acknowledged assignment thereof. *Averill v. Taylor*, 8, 44.

Assignee takes subject to equities—tender. *Hartley v. Tatham*, 1 Keyes, 222.

Assignee takes mortgage subject to defenses between original parties. *Ingraham v. Disborough*, 47, 421; *Crane v. Turner*, 67, 437; *Davis v. Bechstein*, 69, 440; 25 Am. Rep. 218, note.

Assignee of mortgage takes subject to equities of third persons. *Schaeffer v.*

*Reilly*, 50, 61; *Greene v. Warwick*, 64, 220; *Crane v. Turner*, 67, 437; *Davis v. Bechstein*, 69, 440; 25 Am. Rep. 218, note.

Mortgage subject to equities of contracts of purchase — rights of assignee. *Trustees of Union College v. Wheeler*, 61, 88.

Sub-assignee takes subject to equities between his assignor and the mortgagee. *Bush v. Lathrop*, 22, 535.

Assignee purchasing mortgage without requiring bond is chargeable with notice of defect in assignor's title. Equities between assignees. *Kellogg v. Smith*, 26, 18.

Mortgagor may defend against assignee holding as collateral to an illegal agreement. *De Witt v. Brisbane*, 16, 508.

Assignee of certificate of sale from State as collateral security, paying balance and taking patent, is mortgagee in equity, and cannot maintain ejectment. *Murray v. Walker*, 31, 399.

Effect of mortgagor's taking assignment of mortgage. *Champney v. Coope*, 32, 543.

Assignment of mortgage — consideration — evidence. *Gardner v. Barden*, 34, 433.

Who not surety entitled to assignment of mortgage. *Ellsworth v. Lockwood*, 42, 89.

Guaranty of mortgage is in effect guaranty also of the bond. *Ross v. Ferry*, 63, 613.

Assignment — payment to assignor after, when valid. *Van Keuren v. Corkins*, 66, 77.

Manual delivery of mortgage does not pass title where intention is to have written assignment. *Strause v. Josephthal*, 77, 622.

Record of assignment constructive notice of — subsequent acts of mortgagee — fraudulent discharge. *Viele v. Judson*, 82, 32.

Record of assignment, constructive notice to subsequent purchasers of premises. *Smyth v. Knickerbocker Life Ins. Co.*, 84, 589.

Owner of mortgage may pay taxes to protect security though there is no tax clause. *Sidenberg v. Ely*, 90, 257; 43 Am. Rep. 163.

## XII. Liability of grantee of mortgaged premises.

Conveyance subject to mortgage does not render grantee personally liable. *Binsse v. Paige*, 1 Keyes, 87; 1 Abb. 133.

Grantee assuming mortgage cannot set up usury. *Harley v. Harrison*, 24, 170.

Equitable — agreement of grantee to support grantor — reconveyance — right of creditor purchasing on execution. *Chase v. Peck*, 21, 581.

Accepting deed "subject to mortgage" "estimated as part of the consideration and deducted therefrom" imposes no personal liability on grantee. *Belmont v. Comen*, 22, 438.

Grantee of mortgaged premises accepting deed stipulating that he is to pay mortgage is bound although not signing deed and taking it as mere security. *Ricard v. Sanderson*, 41, 179.

Grantee assuming mortgage liable to assignee for full amount. *Freeman v. Auld*, 44, 50.

Grantee assuming mortgage conditioned for less than legal interest cannot object that mortgagor subsequently agreed to pay more for forbearance not exceeding legal rate. *Ritter v. Phillips*, 53, 586.

Grantee subject to mortgage satisfying in ignorance of subsequent judgment may have lien reinstated. *Barnes v. Mott*, 64, 397; 21 Am. Rep. 625.

Grantee of premises subject to mortgage by a guardian to himself, bound by. *Lyon v. Lyon*, 67, 250.

When mortgage executed in consideration of re-conveyance of land deeded to defraud creditors — valid. *Norton v. Pattee*, 68, 144.

Grantee assuming mortgage not liable for deficiency where grantor was not. *Vrooman v. Turner*, 69, 280; 25 Am. Rep. 195.

Grantee assuming mortgage bound to pay judgment for deficiency against grantor with costs. *Comstock v. Drohan*, 71, 9.

Grantee accepting deed delivered in blank as to grantee is bound by covenant to assume mortgage. *Campbell v. Smith*, 71, 26; 27 Am. Rep. 5.

Where grantee assumes mortgage made by grantor, agreement by holder with grantee to extend time of payment releases grantor. *Calvo v. Davies*, 73, 211; 29 Am. Rep. 130.

Grantee assuming mortgage estopped from alleging failure of title unless evicted. *Parkinson v. Sherman*, 74, 88; 30 Am. Rep. 268.

Grantee assuming — when mortgagor released by agreement between grantee and holder. *Paine v. Jones*, 76, 274.

Grantee assuming, not liable to grantor for mortgage nor to his administrator. *Ayers v. Dixon*, 78, 318.

Grantee subject to mortgage but not assuming, not liable for. *Argall v. Pitts*, 78, 239.

Grantee assuming — when mortgagor liable for deficiency. *Marshall v. Davies*, 78, 414.

When plaintiff owning part of premises mortgages and afterward acquires remainder, in action to redeem mortgagee cannot question his rights as grantee. *Thompson v. Commissioners*, 79, 54.

Equities between several grantees of lands subject to several mortgages. *Zabriskie v. Salter*, 80, 555.

When grantee of deed is vested with legal title — is not decisive as to whether it is legal or equitable. *Pardee v. Treat*, 82, 385.

Grantee assuming, when mortgagee may enforce liability. *Hand v. Kennedy*, 83, 149.

Grantee assuming mortgage not liable to holder. *Root v. Wright*, 84, 72; 38 Am. Rep. 495.

Grantee assuming, but evicted by paramount title, not liable to mortgagee. *Dunning v. Leavitt*, 85, 30; 39 Am. Rep. 617.

Covenant to assume in deed poll enforceable against grantee. *Bowen v. Beck*, 94, 86; 46 Am. Rep. 124.

### XIII. Insurance.

When payment by insurer to mortgagee not payment on mortgage. *Springfield F. and M. Ins. Co. v. Allen*, 43, 389; 3 Am. Rep. 711.

When mortgagee effects insurance and receives payment it must be applied to mortgage. *Waring v. Soder*, 53, 581.

When insurance of mortgagee's interest does not inure to benefit of mortgagor. *Foster v. Van Reed*, 70, 19; 26 Am. Rep. 544.

Covenant to insure in, does not run with land — right of mortgagee to insurance procured by owner of fee. *Reid v. McCrum*, 91, 412.

### XIV. Merger.

Mortgage not paid or merged by conveyance of premises to mortgagee after his assignment of mortgage. *Campbell v. Vedder*, 3 Keyes, 174.

Mortgage not deemed merged against clear intention. *Bascom v. Smith*, 34, 320.

When mortgage not merged. *Kellogg v. Ames*, 41, 259.

### XV. Payment and satisfaction.

Note for mortgage not payment until paid — when mortgagee bound to satisfy without payment of notes. *Ranger v. Goodrich*, 3 Trans. App. 303; 4 Abb. 1.

Payment on a mortgage to the son of mortgagee's agent, who acted as clerk for his father, is not a payment to agent. *Lewis v. Ingersoll*, 3 Abb. 55.

A mortgage given to secure a balance on account is paid or not according to the intention of the parties where trade continues. *Peck v. Minot*, 3 Abb. 465; 4 Trans. App. 303.

Clerk may not discharge mortgage executed to him officially without order of court. *Farmers' Loan and Trust Co. v. Walworth*, 1, 433.

But owners of fund may ratify. *Id.*

When mortgage discharged by other than mortgagee, subsequent incumbrancer bound to inquire as to his authority. *Swarthout v. Curtis*, 5, 301.

Discharge by guardian by order of Chancery must be in strict pursuance of terms of order. *Id.*

Mortgage once paid cannot be revived as security as against subsequent judg-

ment creditors of mortgagor. *Mead v. York*, 6, 449.

When payment to agent not effectual — rate of interest — evidence — letters, when auxiliary. *Lewis v. Ingersoll*, 1 Keyes, 347.

When satisfaction not compellable unless mortgagee is party. *Ranger v. Goodrich*, 3 Keyes, 503.

Action to compel satisfaction — parties — form of judgment. *Farnham v. Malory*, 3 Keyes, 527.

Where one grants and warrants lands mortgaged by former owner, and buys the mortgage, it is thereby discharged. *Mickler v. Townsend*, 18, 575.

Evidence of payment by mortgagor as against assignee. *Foster v. Beals*, 21, 247.

Discharge of record and possession of bond and mortgage by owner of the land, not the mortgagor, canceled, prima facie evidence of payment. *Braham v. Bingham*, 26, 483.

Satisfaction-piece by surviving mortgagee is sufficient where the executors of the deceased mortgagee refuse to join. *People v. Keyser*, 28, 226.

What amounts to extension of payment — avoiding circuitry. *Dodge v. Crandall*, 30, 294.

Discharge of mortgage with money fraudulently obtained by party bound to discharge creates no obligation against mortgagee. *Henry v. Wilkes*, 37, 562.

Mere receipt of rents and profits by mortgagee in possession is not satisfaction. *Hubbell v. Moulson*, 53, 225; 13 Am. Rep. 519.

When receiver may satisfy — ratification by mortgagor of payment by third person. *Heermans v. Clarkson*, 64, 171.

When mortgage not canceled by usurious agreement. *Patterson v. Birdsall*, 64, 294; 21 Am. Rep. 609.

When unauthorized act of attorney in receiving payment does not bind mortgagee — ratification. *Smith v. Kidd*, 68, 130; 23 Am. Rep. 157.

Contract to pay mortgage — when not enforceable by subsequent grantee of promisor. *Miller v. Winchell*, 70, 437.

When deed is not a satisfaction of mortgage — mortgage may be held in part

individually and in part as trustee. *Hubbell v. Blakeslee*, 71, 63.

When note is not payment of mortgage — application of payment. *Feldman v. Beier*, 78, 293.

Requisites of tender to discharge mortgage. *Tuthill v. Morris*, 81, 94.

Consideration — forbearance — application of payment — personal judgment — estoppel — pleading — extension — surety. *Pennsylvania Coal Co. v. Blake*, 85, 226.

When mortgage not satisfied — assignment. *Coles v. Appleby*, 87, 114.

Grantee without title paying mortgage subrogated to mortgagee's rights. *Smith v. Robertson*, 89, 555.

Mortgage will not be canceled for usury at suit of devisee of land. *Buckingham v. Corning*, 91, 525.

Oral agreement between vendor and vendee that prior mortgage should be allowed as payment on purchase-money, mortgage held valid against subsequent assignee of latter mortgage without notice, and not affected by written receipt thereafter given — tender of amount due bars right to foreclose for amount not due. *Green v. Fry*, 93, 353.

One paying prior mortgage in ignorance of junior one held subrogated to interest in prior one. *Simpson v. Del Hoyo*, 94, 189.

Payments actually made are allowable against a bona fide holder for value. *Bennett v. Bates*, 94, 354.

## XVI. Corporations.

Mortgage by railroad company — effect as to after-acquired property. *Stevens v. Watson*, 4 Abb. 302.

To foreign corporation, on land in this State, is not avoided by illegal business carried on by the officers in this State, the loan not being connected therewith. *Bard v. Poole*, 12, 495.

Mortgage "securing indebtedness on commercial paper," to corporation with no power to loan on personal security, prohibited from discounting, but authorized to invest in bonds and mortgages, enforceable. *Pratt v. Eaton*, 79, 449.

XVII. *Foreclosure by action.*1. *Generally.*

Breach of covenant of seisin, without eviction or disturbance, no defense to foreclosure of purchase-money mortgage. *Farnham v. Hotchkiss*, 2 Abb. 93.

Lien of mortgage not extinguished by tender of whole amount where no default—grantee assuming, when entitled to benefit of services of mortgagor under agreement with mortgagee to apply them—grantee not estopped from showing part of mortgage paid. *Hartley v. Tatham*, 2 Abb. 333.

In foreclosure suit, adverse and prior claim cannot be litigated. *Corning v. Smith*, 6, 82.

When deed and bond must be construed together upon foreclosure. *Flagg v. Munger*, 9, 483.

Tender at any time before foreclosure discharges lien, although not kept good. *Kortright v. Cady*, 21, 343.

Mortgage cannot be collaterally attacked by stranger. *Casler v. Shipman*, 35, 533.

Breach of covenant to pay taxes, when does not authorize foreclosure—what is not payment of taxes. *Williams v. Townsend*, 31, 411.

Title acquired on foreclosure—subject to equities of vendee in possession. *Laverty v. Moore*, 33, 658.

Direction as to disposition of leasehold interests. *Catlin v. Grissler*, 57, 363.

Foreclosure by pledgee—when cuts off pledgor. *Bloomer v. Sturges*, 58, 168.

Defective title—non-recording of assignment—defective acknowledgment. *Fryer v. Rockefeller*, 63, 268.

When pledgor may maintain foreclosure—pledgee necessary party plaintiff or defendant. *Simson v. Satterlee*, 64, 657.

Collusive agreement between mortgagee and executor—remedy of remainderman—laches. *McMurray v. McMurray*, 66, 175.

Mortgage executed on land pending appeal from judgment which is a lien thereon, but suspended by security on ap-

peal, has preference over judgment. *Union Dime Savings Inst. v. Duryea*, 67, 84.

Construction of stipulation as to interest prior to maturity of principal. *Cook v. Clark*, 68, 178.

Action lies to foreclose chattel mortgage—when action is not of foreclosure, but to reach assets. *Briggs v. Oliver*, 68, 336.

Right of mortgagor, reserved by deed, to mow and cultivate land conveyed in fee, does not pass on foreclosure. *Pierce v. Keator*, 70, 419; 26 Am. Rep. 612.

Prohibition of proceedings at law to recover debt secured by mortgage, after decree of foreclosure, applies only to holder of mortgage. *Comstock v. Drohan*, 71, 9; *Campbell v. Smith*, 71, 26; 27 Am. Rep. 5.

Malicious and oppressive conduct of assignor and assignee, no defense. *Morris v. Tuthill*, 72, 575.

Agreement to relieve mortgagor from default rendered ineffectual by his failure to complete. *Odell v. Hoyt*, 73, 343.

When mortgage upon foreclosure subject to mechanics' lien. *Emigrant Industrial Sav. Bank v. Goldman*, 75, 127.

Parol agreement to buy land on joint account—title in name of one, who executes bond and mortgage thereon—no judgment for deficiency can pass against the others—payments by others on bond make no difference. *Williams v. Gillies*, 75, 197.

When defense of usury not affected by conveyance of premises subject to usurious mortgage. *Knickerbocker Life Ins. Co. v. Nelson*, 78, 137.

On foreclosure by bank department, when mortgagor estopped from denying validity. *Best v. Thiel*, 79, 15.

Upon mortgage by husband and wife, wife being mere surety, husband's half primarily liable—rights of subsequent mortgagee from wife. *Erie County Sav. Bk. v. Roop*, 80, 591.

Judgment of foreclosure for amount of lien of collateral holder, when no bar to foreclosure by mortgagee. *O'Dougherty v. Remington Paper Co.*, 81, 496.

When lien of junior mortgagee on rents and profits obtained by receiver is superior to equities of prior mortgagee. *Ranney v. Peyser*, 83, 1.

Plaintiff cannot recover upon foreclosure without producing bond on accounting for non-production. *Bergen v. Urbahn*, 83, 49.

Mortgagor may take rents pending motion for appointment of receiver — cannot be compelled to account. *Rider v. Bagley*, 84, 461.

Foreclosure of lost mortgage — condition of indemnity held erroneous. *Stoddard v. Gailor*, 90, 575.

Liability of guarantor in action to foreclose — facts releasing guarantor. *Vanderbilt v. Schreyer*, 91, 392.

Receiver of rents where debt not due not allowed — receivership as to one parcel. *Hollenbeck v. Donnell*, 94, 342.

Action by assignee — satisfaction and new mortgage by assignor — equities between assignee and assignee of new mortgage — subrogation — complaint — parties. *Clark v. Mackin*, 95, 346.

When cuts off junior mortgage to executors. *Lockman v. Reilly*, 95, 64.

## 2. Practice.

Sufficiency of notice of pendency under act of May 14, 1840. *Potter v. Rowland*, 8, 448.

Rule as to filing notice of pendency in 1859. *Stern v. O'Connell*, 35, 104.

Writ of assistance being set aside, party dispossessed must be put back. *Chamberlain v. Choles*, 35, 477.

Judge rendering final judgment need not be same who rendered preliminary judgment — order to ascertain amount due. *Chamberlain v. Dempsey*, 36, 144.

In action to foreclose, mortgagor may have mistake reformed — delay, when not fatal. *Andrews v. Gillespie*, 47, 487.

Where whole amount due on default of interest at mortgagee's election, election cannot be restrained. *Bennett v. Stevenson*, 53, 508.

When leave to sue for deficiency may be refused. *Equitable Life Ins. Soc. v. Stevens*, 63, 341.

Judgment creditor whose judgment is perfected after filing of notice of pendency is affected by Code of Procedure, section 132. *Fuller v. Scribner*, 76, 190.

Action on guaranty pending foreclosure may be authorized by court nunc pro tunc. *McKernan v. Robinson*, 84, 105.

Decision of court below that mortgage was paid conclusive on appeal. *Twombly v. Cassidy*, 82, 155.

Order amending judgment on foreclosure, to charge defendant with deficiency, matter of discretion — not appealable. *Grant v. Griswold*, 82, 569.

Purchaser on foreclosure, restraining mortgagor from committing waste while waiting for confirmation and delivery of deed. *Mut. Life v. Bigler*, 79, 568.

Defendant not entitled to jury trial. *Correll v. Deimel*, 95, 252.

## 3. Parties to.

When assignee may be considered party to foreclosure. *Craig v. Ward*, 2 Trans. App. 281.

Bona fide assignee for value may enforce mortgage given on transfer adjudged void as to creditors — defendants cannot litigate equities. *Smart v. Bement*, 4 Abb. 253.

Assignor not necessary. *Andrews v. Gillespie*, 47, 487.

Assignee in bankruptcy, not made party to foreclosure, may redeem — parties — form of action. *Winslow v. Clark*, 47, 261.

Foreclosure cannot cut off dower where wife did not join in mortgage. *Merchants' Bank v. Thomson*, 55, 7.

Prior mortgagee, not party to foreclosure, has no claim on proceeds — sale must be subject to their mortgages. *Bache v. Doscher*, 67, 429.

In foreclosure of deed constituting equitable mortgage grantor necessary party. *Dodd v. Neilson*, 90, 243.

Prior mortgage not referred to not affected though owner made party. *Smith v. Roberts*, 91, 470.

4. *Judgment on.*

Offer of judgment may be made in foreclosure where judgment for deficiency is asked—counter-claim—interest. *Bathgate v. Haskin*, 59, 533.

Facts justifying decree for foreclosure of lost mortgage. *Stoddard v. Gailor*, 90, 575.

5. *Duties of referee.*

Foreclosure—referee selling free from instead of subject to lien as directed—purchaser not bound to pay amount of lien into court. *Hotchkiss v. Clifton Air Cure*, 2 Abb. 406.

On reference to compute, etc., the decree is conclusive as to all the issues. *McCracken v. Valentine's Ears.*, 9, 42.

Remedy where referee has sold on unauthorized terms—rights of purchaser. *Hotchkiss v. Clifton Air Cure*, 4 Keyes, 170.

Referee must pay taxes, etc., from proceeds of sale—usage to impose proof on purchaser—"valid and sufficient deed." *Easton v. Pickersgill*, 55, 310.

Purchaser cannot complain that referee applies purchase-money differently from order of decree, at his request. *Easton v. Pickersgill*, 75, 599.

6. *Sale under.*

Sales in inverse order of alienation—constructive notice to mortgagee releasing. *Howard Ins. Co. v. Halsey*, 8, 271.

Assignee not to be prejudiced or postponed by controversies among grantees of the premises as to order of sale. *Smart v. Bement*, 3 Keyes, 241.

When sale will not be set aside. *McCotter v. Jay*, 30, 80.

When evidence admissible to set aside. *Craig v. Ward*, 1 Abb. 454.

When sale in parcels must be had. *Ellsworth v. Lockwood*, 42, 89.

Equities between mortgagees as to order of alienation. *Hart v. Wandie*, 50, 381.

On sale of land subject to mortgage, obligor after payment may compel assign-

ment for his protection. *Johnson v. Zink*, 51, 333.

When purchaser not relieved—when lease not forfeited by mortgaging—covenant to build—to set buildings back from street—against offensive trades. *Riggs v. Pursell*, 66, 193.

Provision in decree authorizing parties to purchase will not warrant trustee in purchasing for his own benefit. *Fulton v. Whitney*, 66, 548.

Resale should be on terms of first sale—effect of decision of former motion. *Riggs v. Pursell*, 74, 370.

Owner of equity of redemption when not liable for loss on resale. *Raynor v. Selmes*, 52, 579.

Rule of inverse order of alienation—equities. *Hopkins v. Woolley*, 81, 77.

Sale must be in inverse order of alienation. *Welling v. Ryerson*, 94, 98.

When rule as to sale in inverse order of alienation not enforced. *Bernhardt v. Lyburner*, 85, 172.

Purchaser at foreclosure sale takes title of mortgagee unaffected by his subsequent creation of incumbrances or easements. *Rector of Christ Church v. Mack*, 93, 488; 45 Am. Rep. 260.

Purchaser under junior mortgage sale entitled before Code of Civil Procedure to defend. *Seward v. Huntington*, 94, 104.

7. *Purchasers under*

Purchaser gets no title to crops as against purchaser from owner of equity of redemption. *Van Etten v. Currier*, 4 Abb. 475.

When executor of mortgagee purchases the land for himself he may elect to keep the lien of the mortgage on all or part of the premises. *Clift v. White*, 12, 519.

Purchaser under junior mortgage—rights as against owner of equity of redemption of prior mortgage in possession. *Wells v. Pierce*, 3 Keyes, 102.

When grantee upon sale cannot interpose defense of ejection by paramount title. *National Fire Ins. Co. v. McKay*, 21, 191.



Executed sale in nature of mortgage — when purchaser not bona fide. *Wooster v. Sherwood*, 25, 278.

Purchaser may be compelled to perform — lapse of time — death of party. *Cazet v. Hubbell*, 36, 677.

Purchaser not entitled to rent between purchase and deeding. *Cheney v. Woodruff*, 45, 98.

Purchaser of leased premises takes subject to rent. *People v. Dudley*, 58, 323.

Purchaser not compelled to take title where defect in parties. *Dodd v. Neilson*, 90, 243.

### 8. Judgment for deficiency.

Action on deficiency against grantee assuming, not maintainable without leave of court. *Schofield v. Doscher*, 72, 491.

When grantor liable for deficiency on resale. *Goodwin v. Simonson*, 74, 133.

Where action brought without permission, for deficiency, court may permit and allow to proceed. *Earle v. David*, 86, 634.

Where judgment for deficiency is demanded against grantee assuming, grantee may have deed reformed by striking out resumption clause improperly inserted — negligence. *Albany City Sav. Inst. v. Burdick*, 87, 40.

### 9. Redemption.

Mortgagor asking to redeem must allow for improvements by mortgagee in possession, supposing himself to have the legal title, the mortgagor having delayed for several years. *Mickles v. Dillaye*, 17, 80.

When action to discharge may be maintained — when redemption allowed. *Beach v. Cooke*, 28, 508.

Adjustment of equities of parties interested in equity of redemption. *Erie County Savings Bk. v. Roop*, 48, 292.

In action to redeem mortgage — entitled to accounts of rents and profits. *Thompson v. Commissioners*, 79, 54.

### 10. Surplus money.

Equities of judgment creditors and purchasers as to surplus. *Frost v. Koon*, 30, 428.

What equivalent to order to settle rights to surplus. *Kirby v. Fitzgerald*, 31, 417.  
Rights of lessee in surplus. *Clarkson v. Skidmore*, 46, 297.

Surplus on sale after mortgagor's death goes to heir. *Dunning v. Ocean Nat. Bank*, 61, 497; 19 Am. Rep. 293.

Mortgagee may acquire tax liens against property and enforce them out of surplus moneys. *Cornell v. Woodruff*, 77, 203.

Reference as to surplus — validity of conveyances or liens may be inquired into, and attacked as fraudulent. *Bergen v. Carman*, 79, 146.

### XVIII. By advertisement.

Foreclosure, by advertisement, of paid mortgage does not cut off judgment creditors. *Warner v. Blakeman*, 4 Abb. 530.

Upon foreclosure by advertisement deposit of notices of sale in post-office for resident parties sufficient. *Stanton v. Kline*, 11, 196.

Proceedings to foreclosure by advertisement repel presumption from more than twenty years' possession by mortgagee. *Calkins v. Isbell*, 20, 147.

Notice of foreclosure by advertisement — error in stating number of book not material — must state that the mortgage will be foreclosed. *Judd v. O'Brien*, 21, 186.

Purchaser at void statutory foreclosure sale stands as assignee of mortgage — when he may pay rent due on lease in fee and tack it. *Robinson v. Ryan*, 25, 320.

Sale under statutory foreclosure effectual although affidavit of publication and posting not made and recorded for twenty years. *Truthill v. Tracy*, 31, 157.

Foreclosure — although not in conformity to statutes, may be binding if in conformity to provisions of mortgage. *Elliott v. Wood*, 45, 71.

Foreclosure by statute of purchase-money mortgage bars dower. *Brackets v. Baum*, 50, 8.

Upon foreclosure by advertisement lien of judgment entered after first publication and before sale is not cut off without service of notice. *Graff v. Morehouse*, 51, 503.

Proof of service of notice on mortgagor. *Mowry v. Sanborn*, 65, 581.

Service of notice of sale may be shown by extrinsic evidence — mistake in date. *Mowry v. Sanborn*, 68, 153.

Publication of notice of sale may be shown by parol — construction and requisites of affidavits. *Mowry v. Sanborn*, 72, 534.

Sale upon foreclosure under statute subject to incumbrances lawful — purchase by owner of mortgage — affidavits not conclusive — terms need not be published. *Story v. Hamilton*, 86, 428.

### XIX. Strict foreclosure.

When strict foreclosure allowed — effect — parties. *Bolles v. Duff*, 43, 469.

### XX. Chattel mortgages.

#### 1. Generally.

Chattel mortgagor reserving no right of possession has no interest liable to execution. *Baltes v. Ripp*, 3 Keyes, 210 ; 1 Abb. 78 ; *Mattison v. Baucus*, 1, 295.

Otherwise if right of possession is retained. *Manning v. Monaghan*, 28, 585 ; *Hull v. Carnley*, 11, 501.

When an unfiled chattel mortgage is a lien as against a judgment creditor. *Lane v. Lutz*, 3 Abb. 19.

Debt will not lie on mortgage of chattels unless it contains an express promise to pay or a distinct acknowledgment of the debt. *Culver v. Sisson*, 3, 264.

When purchase of property and payment to mortgagee releases mortgage. *Rickerson v. Raeder*, 1 Keyes, 492.

When parol evidence admissible to identify quantity of property. *Galen v. Brown*, 22, 37.

When canal boats do not pass by mortgage of personality of railroad. *Paris v. Wheeler*, 22, 494.

Consideration may be explained and contradicted by parol. *McKinster v. Babcock*, 26, 378.

Absolute bill of sale of chattels, to be held as security, is a mortgage, and mort-

gagor's interest may be reached by creditors. *Smith v. Beattie*, 31, 542.

Consideration named not conclusive — continued possession not necessarily fraudulent — so of agreement that mortgagee shall sell only for cash — indemnification of mortgagee not improper. *Miller v. Lockwood*, 32, 293.

Although property becomes fixture, transfer of mortgage carries it. *Sheldon v. Edwards*, 35, 279.

Agent of chattel mortgagee selling the mortgaged property without mortgagor's authority is liable to him. *Sprights v. Hawley*, 39, 441.

Pledge of mortgage not presumed without writing. *Bowers v. Johnson*, 49, 482.

Chattel mortgage assigned as security for note of mortgagor — effect of — equities as to other mortgages — bona fides. *Campbell v. Birch*, 60, 214.

When second mortgagee simply sold mortgagor's interest, prior mortgagee cannot maintain action for injury to lien. *Hale v. Omaha National Bank*, 64, 550.

Parol agreement that mortgagor may sell mortgaged property and appropriate proceeds, when carried out, avoids mortgage as to creditors. *Southard v. Benner*, 72, 424.

When receiver of mortgagor may recover surplus on sale from mortgagee — mortgage to secure indorsements — what not within. *Davenport v. McChesney*, 86, 242.

#### 2. Filing.

Chattel mortgage not extinguished by second to secure same debt. *Hill v. Beebe*, 13, 556.

Omission to refile does not affect validity as against subsequent mortgagee with notice. *Id.*

Omission to refile does not invalidate mortgage as against purchasers or mortgagees intermediate the original filing and such omission. *Meech v. Patchin*, 14, 71.

Unfiled mortgage not void as to creditor not having a lien. *Lane v. Lutz*, 1 Keyes, 203.

Mortgage cannot be refiled where mortgagor has become non-resident. *Dillingham v. Bolt*, 37, 198.

Mortgage on vessel registered in Pennsylvania, where the parties live, and void there for want of change of possession, is invalid here. *Watson v. Campbell*, 38, 153.

Mortgage filed before levy but after delivery of execution, void as to levy. *Hale v. Sweet*, 40, 97.

Mortgage need not be filed every year. *Newell v. Warren*, 44, 244.

Refiling necessary after default before taking possession—change of possession not effected by words—sale carries right to contest fraudulent mortgage. *Porter v. Parmley*, 52, 185.

Omission to file does not inure to general creditor. Mortgage for mere precedent debt does not constitute “mortgagee in good faith,” within statute. *Jones v. Graham*, 77, 628.

### 3. When valid.

Mortgage on stock of goods, “with increase and decrease thereof,” mortgagor to remain in possession, void on face. *Mittnacht v. Kelly*, 2 Trans. App. 382; 3 Abb. 301. But see *Edgell v. Hart*, 9, 213; *Ford v. Williams*, 13, 577; *Gardner v. McEwen*, 19, 123; *Conkling v. Shelley*, 28, 360; *Yates v. Olmsted*, 56, 632; *Brackett v. Harvey*, 91, 214.

A chattel mortgage covering the “increase and decrease” of a stock in trade is wholly void. *Mittnacht v. Kelly*, 3 Abb. 301.

Evidence to avoid prior mortgage on ground of fraud must show valuable consideration or security for fair debt. *Baskins v. Shannon*, 3, 310.

Agreement that wool to be manufactured shall belong to indorser of note given for it until paid is mortgage, and unless filed is void as to purchaser. *Thompson v. Blanchard*, 4, 303.

Mortgage of stock of goods by purchaser, including additions, the mortgagor to remain in possession, but not to sell on credit, is fraudulent as to creditors. *Edgell v. Hart*, 9, 213

Mortgage on stock of goods, the mortgagee being allowed to retain and sell at retail for his own benefit, is fraudulent. *Ford v. Williams*, 13, 577.

Mortgage on stock of goods—when validity a question of fact. *Ostrander v. Fay*, 2 Keyes, 586.

Mortgage of chattels valid as to goods on hand, but void as to goods to be brought in. *Gardner v. McEwen*, 19, 123.

How and when mortgage extinguished—refiling—rights of mortgagee and of general creditor—usury—who may set up. *Thompson v. Van Vechten*, 27, 568.

Mortgage of stock of goods, when not fraudulent for indefiniteness—or for mortgagor retaining possession—when mortgagor bound by mortgagee’s agency. *Conkling v. Shelley*, 28, 360.

Mortgage void in part for fraud, void in whole. *Russell v. Winne*, 37, 591.

Mortgage not fraudulent in law for stating more than real debt, nor for mortgagor’s continuing to sell. *Frost v. Warren*, 42, 204.

When provision for lien on after-acquired property valid. *Yates v. Olmsted*, 56, 632.

Mortgage as continuing security for future indebtedness, valid as against creditors, when free from fraud. *Brown v. Kiefer*, 71, 610.

### 4. Renewals.

Clerical error as to amount in renewal is fatal. *Ely v. Carnley*, 19, 496.

Filing necessary as against creditors, although mortgage has become absolute, if possession not taken. *Id.*

Mortgage on canal boat—how renewed—when satisfaction of judgment for conversion transfers title. *Marsden v. Cornell*, 62, 215.

New mortgage instead of renewal—bill of sale superseded—declarations of mortgagor as against mortgagee. *Walker v. Henry*, 35, 130.

### 5. Defaults.

Title after default, of property remaining in mortgagor’s possession, is in mort-

gagee. *Farmers' Bank of Washington Co. v. Cowan*, 2 Keyes, 217.

A chattel mortgage — what is — defeasance — conversion — accounting. *Bragelman v. Daue*, 69, 69.

Title on default vests in mortgagee. *Judson v. Easton*, 55, 664.

### 6. Rights and liabilities of parties.

A chattel mortgage given without specifying time of payment for a debt overdue conveys absolute title — the mortgagor's possession is that of a bailee. *Baltes v. Ripp*, 1 Abb. 78; 3 Keyes, 210; *Farmers' Bank of Washington v. Cowan*, 2 Abb. 88; 2 Keyes, 217.

Purchaser of mortgaged property may hold clear of mortgage upon oral agreement of mortgagee. *Rickerson v. Raeder*, 4 Abb. 60.

Husband is bound by mortgage of his personal property by his wife, he being present and assenting to execution. *Edger; ton v. Thomas*, 9, 40.

Mortgagee of chattels cannot maintain action for value of goods against purchaser under execution against mortgagor in possession. *Goulet v. Asseler*, 22, 225.

Mortgagor may not create lien on mortgaged property to prejudice of mortgagee — evidence of mortgage. *Bissell v. Pearce*, 28, 252.

Mortgagor's interest before default may be sold on execution — passes by sale in general terms. *Manning v. Monaghan*, 28, 585; *Hull v. Carnley*, 11, 501.

Chattel mortgagee cannot maintain conversion against purchaser from mortgagor in possession before default and demand although authorized to take possession at any time. *Hathaway v. Brayman*, 42, 322; 1 Am. Rep. 524.

Chattel mortgagor may redeem after forfeiture. *West v. Cary*, 47, 423.

Purchaser at sale subject to chattel mortgage and does not incur personal liability to pay. *Hamill v. Gillespie*, 48, 556.

When trustee for benefit of wife, and the wife chargeable with constructive notice of mortgage. *Reed v. Gannon*, 50, 345.

Action lies to foreclose chattel mortgage — when action is not of foreclosure, but to reach assets. *Briggs v. Oliver*, 68, 336.

Mortgage effectual as against purchaser from mortgagor with knowledge, although not filed. *Gildersleeve v. Landon*, 73, 609.

Power to mortgagor to sell and apply to debt or purchase new property to be subjected to renewed mortgages does not render void. *Brackett v. Harvey*, 91, 214.

A purchaser having actual notice takes subject to mortgage though not properly refiled. *Mack v. Phelan*, 92, 20.

Chattel mortgage on railroad property executed under laws of another State. *Nichols v. Mase*, 94, 160.

### 7. Possession

A mortgagor's possession is that of bailee where a chattel mortgage specifies no time of payment. *Baltes v. Ripp*, 1 Abb. 78; 3 Keyes, 280.

Agreement that mortgagor may remain in possession, manufacture and apply to debt, not fraudulent in law. *Farmers' Bk. of Washington Co. v. Cowan*, 2 Abb. 88; 2 Keyes, 207.

Where mortgagee, in pursuance of mortgage, takes possession before maturity, mortgagor's interest not liable to levy. *Mattison v. Baucus*, 1, 295.

Mortgagor's retention of possession is only prima facie evidence of fraud. *Thompson v. Blanchard*, 4, 303.

Mortgaged chattels in possession of mortgagor may be seized and sold on execution against him where he is entitled to possession for definite time, without recognition of mortgagee's lien. *Hull v. Carnley*, 11, 501.

When mortgagee may take possession — seizure on distress. *Conkey v. Hart*, 14, 22.

Mortgage of horse and wagon and stock of goods, mortgagor to remain in possession, void. *Mittnacht v. Kelly*, 3 Keyes, 407.

Sheriff not liable to mortgagee of chattels for ignoring his interest on sale,

where mortgagor was entitled to possession. *Hull v. Carnley*, 17, 202.

Permission that mortgagor may keep possession and retail goods for cash for mortgagee, not fraudulent in law. *Ford v. Williams*, 24, 359.

After default and reduction to possession, mortgagor has no leviable interest. *Galen v. Brown*, 22, 37.

So, before default, where mortgagee takes possession under danger clause. *Hall v. Sampson*, 35, 274.

Provision that mortgagor may retain possession till mortgagee deems himself insecure, is valid. *Frost v. Mott*, 34, 253.

Possession under unfilled mortgage must be actual and public. *Steele v. Benham*, 84, 634.

See EXECUTION; LOAN COMMISSIONERS; PARTIES; PLEADING; RECORDING ACT; SHIP AND SHIPPING; SURETY.

## MOTIONS AND ORDERS.

Giving leave to bring an action to review a judgment, when valid. *McCall v. McCall*, 54, 541.

Order on motion to set aside a judgment is not a "final order," within section 11, subdivision 2, Code of Procedure. *Sherman v. Felt*, 2, 186.

What is interlocutory order. *Mayor v. Schermerhorn*, 1, 423.

When order has force of judgment. *Dwight v. St. John*, 25, 203.

Effect of order as an adjudication—renewal of motion. *Riggs v. Pursell*, 74, 370.

Order for examination of defendant to enable plaintiff to make complaint must be by judge, and not by court at Special Term. *Heishon v. Knickerbocker Life Ins. Co.*, 77, 278.

Constitutional questions will not be determined on special motion. *People v. Tweed*, 63, 202.

Chambers order not invalidated by caption as of Special Term order. *Phinney v. Broschell*, 80, 544.

When order void, party not limited to appeal but may move to vacate. *Kamp v. Kamp*, 59, 212.

Motion does not lie at Special Term to set aside amendment of pleading by referee on trial. *Quimby v. Clafin*, 77, 270.

Motion by sheriff for directions as to disposition of moneys on executions—where may be made—pending action, when no bar. *Phillips v. Wheeler*, 67, 104.

See APPEAL; NEW TRIAL; PRACTICE; TRIAL.

## MUNICIPAL CORPORATION.

I. *Contracts of.*

II. *Ordinances.*

III. *Officers and acts of.*

IV. *Negligence.*

1. *As to streets.*

2. *As to sewers.*

3. *As to surface water.*

4. *Miscellaneous.*

5. *Liability over of third persons.*

V. *Appropriation of land by.*

VI. *Assessments.*

VII. *General matters.*

VIII. *Particular cities (except Brooklyn and New York).*

I. *Contracts of.*

When charter to be deemed part of contract—assessment to pay contractor—when action maintainable. *Hunt v. City of Utica*, 18, 442.

Where charter requires award of contract to lowest bidder on sealed bids, contract cannot be awarded upon comparison omitting substantial portion, and council may not confirm it. *Brady v. Mayor, etc.*, 20, 312.

When contractor for paving entitled to additional compensation. *Messenger v. City of Buffalo*, 21, 196.

Not liable on contract for repair of streets made without authority. *Donovan v. Mayor, etc.*, 33, 291.

Contract for gas, when valid. *Harlem Gas-light Co. v. Mayor, etc.*, 33, 309.

When resolution constitutes contract. *Argus Co. v. Mayor, etc.*, 55, 495; 14 Am. Rep. 296.

Contractor with, may assign contract. *Devlin v. Mayor, etc.*, 63, 8.

Contract ultra vires may be ratified by legislature. *Brown v. Mayor, etc.*, 63, 239.

When not liable for materials except on compliance with charter provisions. *McDonald v. Mayor, etc.*, 68, 23; 23 Am. Rep. 144.

Contract by resolution, when valid—error in municipal name—abandonment—quantum meruit—evidence—certificate of street superintendent. *Parr v. President, etc., of Greenbush*, 72, 463.

When not liable for expense of advertising not conducted as prescribed by charter. *Francis v. City of Troy*, 74, 333.

Liable in action for debt although it once offered to pay it—construction of charter of Buffalo as to interest on tax warrants. *Read v. City of Buffalo*, 74, 463.

May take, hold and prosecute notes given as security for defalcation of its treasurer—evidence of ownership. *City of Buffalo v. Bettinger*, 76, 393.

Doctrine of estoppel applies to, when. *Curnen v. Mayor*, 79, 511.

When may hire real estate. *Davies v. Mayor, etc.*, 83, 207.

Village liable for contracts of trustees acting as water commissioners under Laws of 1875, chapter 181, and for extra work done thereunder. *Fleming v. Village of Suspension Bridge*, 92, 368.

Character of trustees may be shown by parol—their certificate of indebtedness is competent—having power to make local improvements is liable for services of one employed to do work. *Woolsey v. Village of Rondout*, 4 Abb. 639.

Order on fund in hands of comptroller of city is assignment and notice—no acceptance necessary. *Hall v. City of Buffalo*, 1 Keyes, 193; 2 Abb. 301.

When action lies against, on contract—neglect to make assessment. *Baldwin v. City of Oswego*, 2 Keyes, 132.

## II. Ordinances.

When has no power to assume defense of suits or pay judgments. *Halstead v. Mayor, etc.*, 3, 430.

A common council may not delegate a power intrusted to it. *Thompson v. Schermerhorn*, 6, 92.

In passing ordinance for leveling and paving of streets must strictly follow statute. *Id.*

Ordinance that hoistways shall be inclosed is reasonable. *Mayor, etc. v. Williams*, 15, 502.

May not impose license fee of \$50 a year on street railway companies. *Mayor v. Second Ave. R. Co.*, 32, 261.

License fee of \$50 for city railway companies invalid. *Mayor v. Third Ave. R. Co.*, 33, 42.

Power of common council to canvass election returns. *Hadley v. Mayor, etc.*, 33, 603.

Ordinance concerning dead animals. *Underwood v. Green*, 42, 140.

When may authorize private branch railway track in city. *Clarke v. Blackmar*, 47, 150.

May be empowered to license cartmen and to forbid unlicensed cartmen. *City of Brooklyn v. Breslin*, 57, 591.

May not lay tax to pay railway aid bonds. *Weismer v. Village of Douglas*, 64, 91; 21 Am. Rep. 586.

Cannot delegate duty of maintaining sidewalks to superintendent of streets. *Birdsall v. Clark*, 73, 73; 29 Am. Rep. 105.

May not authorize citizen to inclose part of street—adverse possession. *St. Vincent Orphan Asylum v. City of Troy*, 76, 108; 32 Am. Rep. 286.

When may restrain construction of railroad on streets for non-compliance with charter. *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78, 524.

Where it cannot regulate penalty by ordinance, it has no power to sue for penalty—no flagman at crossing. *Long Island v. Long Island R.*, 79, 561.

Under power to regulate slaughterhouses, may prohibit within certain limits—violation of ordinance an indictable misdemeanor—not necessary to allege reasons for enactment—is not in restraint of trade. *Cronin v. People*, 82, 318; 37 Am. Rep. 564.

When may by ordinance prohibit peddling milk without license — corporation in city subject to, same as individual — violation of ordinance misdemeanor. *People v. Mulholland*, 82, 324; 37 Am. Rep. 568.

### III. Officers and acts of.

When liable for trespass of agents upon land. *Lee v. Village of Sandy Hill*, 40, 442.

Construction of act of 1872, chapter 161, as to wrongful acts of officers. *Ayers v. Lawrence*, 59, 192.

A member of a common council cannot recover for services to the city. *Smith v. City of Albany*, 61, 444.

In action by assignee of officer for salary, claim against officer for moneys unlawfully received by him may be set off — act of 1875, chapter 49, does not prevent. *Wood v. Mayor, etc.*, 73, 556.

Is under no implied obligation to pay officer for services. *Haswell v. Mayor, etc.*, 81, 255.

Common council liable for contempt in violating injunction against city. *People v. Dwyer*, 90, 402.

County held bound by acts of officers in continuing in possession of leased property after end of term. *Davies v. Mayor of New York*, 93, 250.

Not liable for misappropriation of funds of infant deposited with county treasurer by the latter. *Gray v. Supervisors of Tompkins*, 93, 603.

Attorney appearing for a municipal corporation will be presumed to be authorized. *Mayor of New York v. Ex. Fire Ins. Co.*, 3 Abb. 261.

### IV. Negligence.

#### 1. As to streets.

A city is not liable for an injury by the fall of a bridge erected under authority of a statute not constitutionally passed. *Mayor v. Dunciff*, 2, 165.

Not liable for consequential injury to adjacent owner in grading street, there

being no want of care or skill. *Radcliff's Ex'rs v. Mayor*, 4, 195.

Not liable for obstructions of street by citizens in absence of notice to officers. *Griffin v. Mayor, etc.*, 9, 456.

Liability of trustees of village for injury from unskilled construction of bridge. *Conrad v. Trustees of Village of Ithaca*, 16, 158.

City liable for injury from neglect to fence and light excavation in street at night although made by contractor. *Storrs v. City of Utica*, 17, 104.

Bound to maintain streets in safe condition for persons of imperfect vision. *Davenport v. Ruckman*, 37, 568.

Liability for defect in street — acceptance — constructive notice. *Requa v. City of Rochester*, 45, 129; 6 Am. Rep. 52.

When not liable for fall of awning. *Hume v. Mayor, etc.*, 47, 639.

Liability of city for injury by defective awning over sidewalk. *Hume v. Mayor, etc.*, 74, 264.

When bound to keep crosswalks in repair. *Hines v. City of Lockport*, 50, 236.

City charged with care of streets and walks is liable for negligence in care of sidewalks. *Diveny v. City of Elmira*, 51, 506.

Not liable for obstruction in street, unless it appears to have been made or suffered by its servants. *Gorham v. Trustees of Cooperstown*, 59, 660.

Icy sidewalk — when question for jury. *Todd v. City of Troy*, 61, 506.

Bound to repair its streets although another has agreed to perform that duty. *People v. City of Brooklyn*, 65, 349.

Injury from defective sidewalk — when question of fact. *Clemence v. City of Auburn*, 66, 334.

When liable for neglect to keep dock in safe condition. *Kennedy v. Mayor, etc.*, 73, 365; 29 Am. Rep. 169.

Duty to keep safe a piece of land which has been treated by it as a street although not legally laid out — low bridge. *Sewell v. City of Cohoes*, 75, 45; 31 Am. Rep. 418.

When village bound to repair streets — when chargeable with constructive notice

of defect—contributory negligence. *Weed v. Village of Ballston Spa*, 76, 329.

Liability for defect in street—fright of horse—proximate cause. *Ring v. City of Cohoes*, 77, 83; 33 Am. Rep. 574.

Not liable for negligence in not guarding approach to State canal bridge from city streets. *Carpenter v. City of Cohoes*, 81, 21; 37 Am. Rep. 468.

City liable to one injured by defect in street while traveling on Sunday. *Platz v. City of Cohoes*, 89, 219; 42 Am. Rep. 286.

City liable for injuries from dangerous excavations made by contractor in street. *Brusso v. City of Buffalo*, 90, 679.

Liable for injury from obstruction in street though without notice that it was dangerous—notice to policeman notice to city. *Rehberg v. Mayor of N. Y.*, 91, 137; 43 Am. Rep. 657.

Permitting nuisance created by contractor with it to remain, liable for injury therefrom. *Vogel v. Mayor of N. Y.*, 92, 10; 44 Am. Rep. 349, note.

City liable for injury from defect in street caused by stranger—notice. *Saulsbury v. Village of Ithaca*, 94, 27; 46 Am. Rep. 122.

Officers liable for negligence in repairing streets. *Bennett v. Whitney*, 94, 302.

When liable for injury by construction of private drain in street. *Wendell v. Mayor, etc.*, 4 Keyes, 261; 4 Abb. 563.

## 2. As to sewers.

Liable for injury by insufficiency and unskillful construction of culvert for natural stream. *Rochester White Lead Co. v. City of Rochester*, 3, 463.

Liable for injury to third person by negligence of workman employed by its officers to repair its sewers. *Lloyd v. Mayor, etc.*, 5, 369.

Not liable for injury by insufficient sewer. *Mills v. City of Brooklyn*, 32, 489.

In case of sewers, bound to reasonable care. *Barton v. City of Syracuse*, 36, 54.

Liable for injury by obstruction of sewer. *McCarthy v. City of Syracuse*, 46, 194.

When liable for obstruction of sewer—damages. *Nims v. Mayor, etc.*, 59, 500.

Not liable for sudden obstruction of sewer properly constructed. *Smith v. Mayor, etc.*, 66, 295; 23 Am. Rep. 53.

City liable for negligent discharge of duty of officers in constructing sewer. *Hardy v. City of Brooklyn*, 90, 435; 43 Am. Rep. 182.

City liable for negligent construction of sewers by private individual, by its consent, when it agreed to but did not supervise. *Wendell v. Mayor, etc.*, 4 Abb. 563; 4 Keyes, 261.

When liable for negligence in allowing lot-owners to connect with sewer, but not for negligence of employees of lot-owners. *Masterton v. Village of Mount Vernon*, 58, 391.

## 3. As to surface water.

Liable for diverting surface water from its natural course upon plaintiff's lot. *Byrnes v. City of Cohoes*, 67, 204.

In grading streets not bound to provide for escape of surface water from adjoining lots. *Lynch v. Mayor, etc.*, 76, 60; 32 Am. Rep. 271, note.

No right to collect and discharge surface water on lands of another. *Noonan v. Albany*, 79, 470; 35 Am. Rep. 540.

## 4. Miscellaneous.

Not liable for injuries to third persons by the negligence of its contractors, although the contract obliges the contractor to conform to further directions of the corporation. *Pack v. Mayor, etc.*, 8, 222.

Not liable for negligence of contractor in grading streets, although the work was to be under direction and to satisfaction of certain officers of city. *Kelly v. Mayor, etc.*, 11, 432.

When liable for torts of agents. *Buffalo & Hamburg Turnpike Co. v. City of Buffalo*, 58, 639.

Not liable for negligence of officer appointed by it by order of legislature and charged with public duties. *Maximilian v. Mayor, etc.*, 62, 160; 20 Am. Rep. 468.



Liability for negligence of officers in duties imposed by State. *New York, etc., Co. v. City of Brooklyn*, 71, 580.

Not liable for injury by fire department in parade ordered by city. *Smith v. City of Rochester*, 76, 506.

When not liable for injury in process of destroying buildings to arrest fire. *People v. Common Council of Buffalo*, 76, 558; 32 Am. Rep. 337.

Failure by city to complete public work according to proper plan adopted is. *Hardy v. City of Brooklyn*, 90, 435; 43 Am. Rep. 182.

Not liable for injury resulting from erroneous plan adopted by it for public work. *Urquhart v. City of Ogdensburg*, 91, 67.

When not liable for not enacting fire ordinances. *Cain v. City of Syracuse*, 95, 83.

May be excused by charter from liability in damages for act or omission of officers. *Gray v. City of Brooklyn*, 2 Abb. 267.

46-305

#### 5. Liability over of third persons.

Recovery over against contractor for negligence—conclusiveness of judgment against city. *City of Rochester v. Montgomery*, 72, 65.

Contractor for building sewer is not liable to city for omission to maintain lights and barriers, whereby a third person is injured, unless contract calls for such precautions. *City of Buffalo v. Holloway*, 7, 493.

Street railway company, indemnifying city against damages for its negligence, liable over—conclusiveness of judgment. *Mayor, etc., v. Troy & Lansingburgh R. Co.*, 49, 657.

#### V. Appropriation of land by.

Having acquired fee-simple of lands for public uses, may change the use. *Heyward v. Mayor, etc.*, 7, 314.

Cannot impeach its record of appropriation of land for street, except for want of jurisdiction, and that must be clearly proved. *Buel v. Trustees of Village of Lockport*, 8, 55.

A power "to purchase, hold and convey any estate, real or personal, for the public use of said corporation," does not authorize the holding of lands beyond its boundaries for a highway. *Riley v. City of Rochester*, 9, 64.

Under power to establish and regulate markets, may purchase market grounds on credit, and the debt is not a "funded debt" within Laws of 1853, chapter 603, section 5. *Ketchum v. City of Buffalo*, 14, 356.

May take and hold property for use of common schools. *Le Couteux v. City of Buffalo*, 33, 333.

When may be compelled to complete proceedings to acquire lands for public purpose. *People v. Common Council of Syracuse*, 78, 56.

Over-payment for land taken for city purposes—when and how recovered back—mistake and demand. *Mayor of N. Y. v. Erben*, 3 Abb. 255.

When action lies against, for amount due for lands appropriated for public purposes. *Ganson v. City of Buffalo*, 1 Keyes, 454.

#### VI. Assessments.

Town not liable for wrong action of tax officers. *Loirillard v. Town of Monroe*, 11, 392.

Liable to refund money collected on a void assessment—action of tort. *Howell v. City of Buffalo*, 15, 512.

May order further assessment for public improvement when first proves inadequate. *Meech v. City of Buffalo*, 29, 198.

Action does not lie against, to recover tax illegally assessed and collected. *Swift v. City of Poughkeepsie*, 37, 511.

Liability to refund illegal tax. *Bank of Commonwealth v. Mayor, etc.*, 43, 184.

#### VII. General matters.

When election by aldermen void. *People v. Bachelor*, 22, 128.

Not to be restrained by creditor without lien from alienation of its property. *Roosevelt v. Draper*, 23, 318.

May be authorized by legislature to subscribe for railroad stock, and to borrow and tax to pay for it. *People v. Mitchell*, 35, 551.

Affidavit under Laws of 1852, chapter 375, section 2, not conclusive evidence of assent of tax payers in action by bona fide holder. *People v. Mead*, 36, 224.

May recover over against contractor. *City of Brooklyn v. Brooklyn City R. Co.*, 47, 475; 7 Am. Rep. 469.

Cannot be compelled to become a stockholder in a railroad against its will. *People v. Batchelor*, 53, 128; 13 Am. Rep. 480.

When power to abate nuisance improperly exercised—filling up canal. *Babcock v. City of Buffalo*, 56, 268.

Property held for public use, not liable to mechanics' lien. *Leonard v. City of Brooklyn*, 71, 498; 27 Am. Rep. 80, note.

Action to determine title to office or restrain illegal acts of officers cannot be maintained by an individual. *Demarest v. Wickham*, 63, 320.

#### VIII. Particular cities.

(Except Brooklyn and New York.)

Albany—act of 1876, chapter 445, as to Western avenue, is constitutional. *People v. Banks*, 67, 568.

—provision that mayor shall biennially appoint is imperative without regard to length of time that present incumbent has served. *People v. Kilbourn*, 68, 479.

—regulating slaughter-houses (act 1870, chapter 77). *Cronin v. People*, 82, 318; 37 Am. Rep. 564.

—county jury act of 1881, unconstitutional as to grand but valid as to petit jurors. *People v. Petrea*, 92, 128.

—assessment lease—presumption as to regularity—constitutionality. *Hilton v. Bender*, 69, 75.

—city held liable on accounts audited and ordered paid by common council, though not originally bound. *Albany, etc., Bank v. City of Albany*, 92, 363.

Binghamton—charter does not take away common-law liability of officers for

negligence. *Bennett v. Whitney*, 94, 302.

Buffalo—assessment of taxes cannot be delegated by common council to clerk. *Davis v. Read*, 65, 566.

—power to take lands for canals, etc. *Matter of City of Buffalo*, 68, 167.

—city acquired fee, under act 1864, chapter 547. *Sweet v. Buffalo, etc., R. Co.*, 79, 293.

—seizure of chattels of one on lands assessed to another, when invalid. *Lake Shore, etc., Ry. Co. v. Roach*, 80, 339.

—act of 1875, chapter 2, valid. *Tiff v. City of Buffalo*, 82, 204.

—construction of charter as to presentation of claims. *Brusso v. City of Buffalo*, 90, 679.

—provisions of charter as to assessments for improvements—constitutional law. *Ganson v. City of Buffalo*, 2 Abb. 236.

Cohoes—construction of charter as to election of city officers. *People v. North*, 72, 124.

Elmira—resident and tax payer incompetent as a juror in action in which city is interested. *Diveny v. City of Elmira*, 51, 506.

Long Island City—construction of acts as to power to tax to pay interest on water bonds. *People v. Common Council of Long Island City*, 76, 20.

—assessment of lands owned by trustee. *Troubridge v. Horan*, 78, 439.

Newburgh—lease by city for water purposes, when void—ineffective ratification. *Smith v. City of Newburgh*, 77, 130.

Oswego—obligations not payable within a year—how construed. *Baldwin v. City of Oswego*, 1 Abb. 62.

Port Jervis—jurisdiction of police justice. *People v. Cox*, 76, 47.

Rochester—authority to aid a certain railroad—construction. *Clarke v. City of Rochester*, 28, 605.

—construction of charter as to assessment for bridge or cover over mill-race. *People v. Common Council of Rochester*, 54, 507.

—validity of contract for sewer improvement. *Lutes v. Briggs*, 64, 404.

Rochester—assessors for public improvement may not omit any lands designated by common council. *Hassen v. City of Rochester*, 65, 516.

—proceedings of water commissioners to acquire easement in Hemlock lake. *Matter of Application of Rochester Water Commissioners*, 66, 413.

—assessment for local improvements void for not including State lands. *Hasan v. City of Rochester*, 67, 528.

—water-works not taxable—but tax being paid to town, not recoverable in action. *City of Rochester v. Town of Rush*, 80, 302.

Saratoga Springs—construction of act of 1875, chapter 517, for settlement of floating debt—"warrant." *People v. Wood*, 71, 371.

Syracuse—proceedings to assess damage for taking lands for streets—commissioner being trustee of religious society liable to assessment—death of one commissioner—assessment for benefits—church property. *People v. Mayor, etc.*, 63, 291.

—act of 1881, chapter 559, relating to police force, constitutional. *People v. Whitlock*, 92, 191.

Troy—when mandamus will not issue to require designation of official newspapers. *People v. Common Council of Troy*, 78, 33; 34 Am. Rep. 500.

—validity of election for alderman—vacancy in office by resignation—meeting of common council—election of police commissioner—mandamus. *People v. Crissey*, 91, 616.

Yonkers—act of 1880, relieving city from liability upon issue of duplicate bonds to Manhattan Institution unconstitutional. *People v. Otis*, 90, 48.

Watertown—assessment for sewer—connecting drain with sewer does not estop owner from objecting—constitutionality. *City of Watertown v. Fairbanks*, 65, 588.

See CONSTITUTIONAL LAW; CORPORATION; EMINENT DOMAIN; MASTER AND SERVANT; NEGLIGENCE; OFFICE AND OFFICER.

## Murder.

See CRIMINAL LAW.

# N.

## Names.

See CRIMINAL LAW; INSURANCE; MISNOMER; PARTIES; PLEADING; TRADE-MARK; WILL.

## National Bank.

See BANK.

## Naturalization.

See ALIENAGE.

## Navigation.

See CANALS; INSURANCE; NEGLIGENCE; SHIP AND SHIPPING; WATER AND WATER-COURSE.

## NE EXEAT.

This court will not examine as to whether writ was abolished before Code of Civil Procedure. *Collins v. Collins*, 80, 24.

**NEGLIGENCE.**

- I. *Who may sue for.*
- II. *Special cases.*
  1. *Of carrier.* See CARRIER.
  2. *Of railroad company except as carrier.* See RAILROAD.
  3. *Of municipal corporation.* See MUNICIPAL CORPORATION.
  4. *In respect to water.*
  5. *Of owner or tenant of premises.*
  6. *Of master and servant.* See MASTER AND SERVANT.
  7. *In managing vessels.* See SHIP AND SHIPPING.
  8. *Miscellaneous cases.*
    - (a.) *Injury to person.*
    - (b.) *Injury to property.*
- III. *When question for jury.*
- IV. *Damages.*
  - V. *General matters.*
- VI. *Contributory negligence.*
  1. *Negligence not preventing recovery.*
  2. *Imputable negligence of third person.*
  3. *Of infant.*
  4. *Of traveler on public conveyances.*
  5. *In crossing railroad track.*
  6. *In traveling on highway.*
  7. *In managing vessels.* See SHIP AND SHIPPING.
  8. *Miscellaneous.*

I. *Who may sue for.*

Producing death—action by administrator—question of fact is for jury—no proof of pecuniary damage essential—evidence—exception. *Oldfield v. N. Y. & H. R. Co.*, 14, 810.

Father may recover as administrator for death of his son produced by. *McMahon v. Mayor, etc.*, 33, 642.

For injury by concurring negligence of two, injured party may recover against either. *Webster v. Hudson R. R. Co.*, 38, 260.

When action for fatal negligence in another State can be maintained here—administrator appointed here may maintain, without showing appointment of ad-

ministrator there. *Leonard v. Columbia Steam Nav. Co.*, 84, 48; 38 Am. Rep. 491.

Judgment for injury during life bars action for death. *Littlewood v. Mayor of New York*, 89, 24; 42 Am. Rep. 271.

Personal representative may recover for death of intestate without proof of damages—when question of fact—opinion as to reasonableness of length of stop of cars at station incompetent. *Keller v. New York Cent. R. Co.*, 2 Abb. 480.

Husband cannot maintain action for instantaneous killing of wife by negligence. *Green v. Hudson R. R. Co.*, 2 Keyes, 294.

II. *Special cases.*1. *Of carrier.*

See CARRIER.

2. *Of railroad company except as carrier.*

See RAILROAD.

3. *Of municipal corporations.*

See MUNICIPAL CORPORATIONS.

4. *In respect to water.*

By overflow of water in premises occupied in common—burden of proof. *Moore v. Goedel*, 34, 527.

Proximate and remote cause—breaking of dam—plaintiff's dam contributing. *Pollett v. Long*, 56, 200.

One collecting water which escapes and injures adjoining lands is liable without regard to negligence. *Mairs v. Manhattan, etc., Assoc.*, 89, 498.

See WATER AND WATER-COURSE.

5. *Of owner or tenant of premises.*

Owner of house, bound to keep passage-way in repair, is liable for injury by its want of repair. *Davenport v. Ruckman*, 37, 568.

Liability to licensee. *Nicholson v. Erie Ry Co.*, 41, 525.

Landlord and tenant liable for injury by coal-hole in sidewalk not properly covered *Irvine v. Wood*, 51, 224; 10 Am. Rep. 603.

When owner of premises liable to contractor's servant for defect in appliances furnished by owner. *Coughtry v. Globe Woolen Co.*, 56, 124; 15 Am. Rep. 387.

Owner liable for falling of building into highway—negligence presumed. *Cullen v. St. John*, 57, 567; 15 Am. Rep. 530.

Saw-mill owner must keep it safe for customers. *Ackert v. Lansing*, 59, 646.

Owner of machinery not dangerous to itself is not liable to servant of contractor for injury therefrom in his use of it. *King v. New York Cent., etc., R. Co.*, 66, 181; 23 Am. Rep. 37.

Dangerous premises used in necessary business—trespasser or licensee. *Victory v. Baker*, 67, 366.

When owner of land liable for injury by excavation on land which he has permitted public to use as an alley. *Beck v. Carter*, 68, 283; 23 Am. Rep. 175, note.

Action by school teacher for injury by want of repair of school-house—contributory negligence. *Bassett v. Fish*, 75, 303.

Proprietor of public hall bound to keep premises safe for persons lawfully there—contributory negligence—intoxication. *Camp v. Wood*, 76, 92; 32 Am. Rep. 282.

Omission of landlord to furnish fire-escapes—what sufficient to warrant finding of negligence. *Willy v. Mulledy*, 78, 310; 34 Am. Rep. 536.

When lot-owner not liable for accident by means of icy sidewalk. *Moore v. Gadsden*, 87, 84; 41 Am. Rep. 352.

In leaving elevator holes unguarded in buildings in New York. One tenant not liable for neglect of another. *Harris v. Perry*, 89, 308.

Contractor for convict labor not liable for injury from unguarded elevator hole used for his business in prison shop. *Cunningham v. Bay State Shoe, etc., Co.*, 93, 481.

See LANDLORD AND TENANT.

## 6. Of master and servant.

See MASTER AND SERVANT.

## 7. In managing vessels.

See SHIP AND SHIPPING.

## 8. Miscellaneous.

### (a.) Injury to person.

Architect or builder of a public work not liable to third persons injured by defects in its construction. *Mayor v. Cunliff*, 2, 165.

A dealer labeling and selling a poisonous drug as a harmless medicine is liable to one injured thereby although not purchasing directly from him. *Thomas v. Winchester*, 6, 397.

No distinction between slight and gross. *Wells v. New York Cent. R. Co.*, 24, 181.

Contractor liable for negligence of subcontractor. *Creed v. Hartman*, 29, 531.

Action for, does not lie against a carrier without affirmative proof of the defendant's negligence and absence of the plaintiff's negligence. *Deyo v. New York Cent. R. Co.*, 34, 9.

Canal contractor liable for negligence in repairs to one injured thereby. *Robinson v. Chamberlain*, 34, 389.

Omission to give notice of blast. *Driscoll v. Newark, etc., Co.*, 37, 637.

Manufacturer and vendor of a balance-wheel not liable for injury by defect in it to one using it with purchaser's consent. *Loop v. Litchfield*, 42, 351; 1 Am. Rep. 543.

Ditch across sidewalk—when conclusively negligent. *Sexton v. Zett*, 44, 430.

One refilling excavation in street bound to provide against settling of the earth after rain. *Johnson v. Friel*, 50, 679.

No action lies against manufacturer and seller of a steam boiler of defective materials and construction for injury by its explosion to a third person after acceptance by purchaser. *Losee v. Clute*, 51, 494; 10 Am. Rep. 638.

Concurrent, does not relieve. *Spooner v. Brooklyn City R. Co.*, 54, 230; 13 Am. Rep. 570.

Concurrent — recovery may be had against either. *Webster v. Hudson R. R. Co.*, 88, 260.

One liable for injury by negligence of himself and his contractor, where it is impossible to separate the injuries. *Slater v. Mersereau*, 64, 138.

Of master of vessel at quarantine in leaving poisonous disinfectant exposed where child drinks it — health officer not responsible. *Kennedy v. Ryall*, 67, 379.

Horse becoming frightened by want of repair of pier and backing off — question for jury. *Macanuley v. Mayor, etc.*, 67, 602.

In setting fire on one's own land. *Hays v. Miller*, 70, 112.

Proximate cause — fright of horse — absence of string-piece on dock. *Kennedy v. Mayor, etc.*, 73, 365; 29 Am. Rep. 169.

Turnpike company — liability for injury to traveler by stones on highway — notice — frightening horse — when notice to secretary is to company. *Eggleston v. Columbia Turnpike Co.*, 82, 278.

Open draw-bridge without gates — evidence — custom — opinion — contributory negligence. *Hart v. Hudson River Bridge Co.*, 84, 56.

Violation of ordinance does not show negligence per se. *Krupfle v. Knickerbocker Ice Co.*, 84, 488.

In testing boiler — contributory — standing near from curiosity. *Ochsenbein v. Shapley*, 85, 214.

Child playing in street if injured by defect therein may recover from one causing it. *McGuire v. Spence*, 91, 303; 43 Am. Rep. 668.

Druggist warning purchaser of nature of drug not liable for injury from overdose. *Wohlfahrt v. Beckert*, 92, 490; 44 Am. Rep. 406.

It is not negligent to drive at a "lively trot" in a city street. *Crocker v. Knickerbocker Ice Co.*, 92, 652.

When colonel of militia liable for shooting by regiment of spectator at parade. *Castle v. Duryee*, 2 Keyes, 169; 1 Abb. 327.

Owner of lot liable for leaving open post-holes on street line of lot. *Wright v. Saunders*, 1 Trans. App. 263.

### (b.) Injury to property.

When action lies for, in searching for assessments. *Morange v. Mix*, 44, 315.

Liability of cashier to bank for. *Commercial Bank of Albany v. Ten Eyck*, 48, 305.

When notary not negligent in protest. *Commercial Bank of Kentucky v. Varnum*, 49, 269.

Does not defeat recovery of money paid by mistake. *Lawrence v. American Nat. Bk.*, 54, 432.

Owner of goods intrusted to a bailee may recover of his employee for damage thereto by negligence of the employee. *Baird v. Daly*, 57, 236; 15 Am. Rep. 488.

Negligent payment by savings bank. *Allen v. Williamsburgh Savings Bank*, 69, 314.

When bank liable for, in collection of note. *Whiting v. City Bank of Rochester*, 77, 363.

Of bank in receiving check in payment of draft rendering it liable. *First Nat. Bk. v. Fourth Nat. Bk.*, 89, 412.

Neglect of officer to perform an official duty may amount to a refusal. *People v. Supervisors of New York*, 3 Abb. 566.

Agent to collect note, liable for omission to present and protest. *Coghlan v. Dinsmore*, 4 Trans. App. 386.

### III. When question for jury.

When question of fact. *Wolfkiel v. Sixth Ave. R. Co.*, 38, 49.

When nonsuit proper. *Hackford v. New York Cent., etc., R. Co.*, 53, 654.

Defendant's, in not repairing engine, question for jury. *Kirkpatrick v. N. Y. Cent. & H. R. R. Co.*, 79, 240.

To justify nonsuit, what must appear. *Stackus v. N. Y. Cent. & H. R. R. Co.*, 79, 464.

Question of contributory, for jury. *Hawley v. Northern Cent., etc., R. Co.*, 82, 370.

Approaching railroad crossing — no bell rung or whistle sounded — train neither seen nor heard — question of negligence for jury — rate of speed with other facts might tend to establish — plaintiff to act

as prudent man. *Salter v. Black River, etc., R. Co.*, 88, 42.

Engineer killed by derailling of engine — evidence as to condition of track conflicting — under the evidence whether derailment caused by defective track or breaking of wheel question for jury — request to charge as to inspection. *Durkin v. Sharp*, 88, 225.

Injury at railroad crossing — four tracks — on one track, saw train — attempted to cross — negligence and refusal to nonsuit proper. *Connolly v. New York Cent., etc., R. Co.*, 88, 346.

Facts justifying finding of, on part of railroad. *Schwier v. New York Cent., etc., R. Co.*, 90, 558.

All inferences to be drawn from the proof are for the jury. *Bernhard v. Rens. & Sar. R. Co.*, 1 Abb. 131.

Error of judgment when not negligence — where evidence is conflicting. *Id.*

What degree of negligence will justify a nonsuit. *Cook v. N. Y. Cent. R. Co.*, 1 Abb. 432.

The court will decide question of negligence only when the facts are undisputed. *Dickens v. N. Y. Cent. R. Co.*, 1 Abb. 504; 1 Keyes, 23.

#### IV. Damages.

Damages from loss of time must be proved. *Leeds v. Metropolitan G. L. Co.*, 90, 26.

Jury have no right to pass upon question of interest in action for death. *Manning v. Port Henry Iron Ore Co.*, 91, 664.

Damages actual and prospective allowable for death from — want of flagman at railroad crossing not. *Houghkirk v. Delaware, etc., Can. Co.*, 92, 219; 44 Am. Rep. 370.

In action after majority for injury to person during minority plaintiff cannot recover for loss of ability during minority followed by recovery of damages. *Traver v. Eighth Ave. R. Co.*, 4 Abb. 422.

#### V. General matters.

Under statute, chapter 256, Laws of 1849, immaterial whether death instantane-

ous or consequential. *Brown v. Buffalo & State Line R. Co.*, 22, 191.

Statute giving action for death by, does not apply extra-territorially. *Whitford v. Panama R. Co.*, 23, 465.

When joint judgment proper. *Wylde v. Northern R. Co. of New Jersey*, 53, 156.

Footmen and drivers have equal rights in streets. *Brooks v. Schwerin*, 54, 343.

Action for injury in April, 1877, held governed by the three years' limitation of Code of Civil Procedure, section 383, subdivision 5. *Watson v. Forty-second St., etc., R. Co.*, 93, 522.

#### VI. Contributory negligence.

##### 1. Negligence not preventing recovery.

When person getting freight at railway station not to be deemed guilty of contributory. *Newson v. New York Cent. R. Co.*, 29, 383.

Not contributory unless aiding the injury. *Haley v. Earle*, 30, 208

To risk one's own life to save another is not, in law. *Eckert v. Long Island R. Co.*, 43, 502; 3 Am. Rep. 721.

In making mistake does not prevent recovery. *Duncan v. Berlin*, 46, 685.

Instinctive effort to escape impending danger is not. *Coulter v. American Merch. Un. Ex. Co.*, 56, 585.

Sudden peril — evidence of action of others. *Troomley v. Cent. Park, etc., R. Co.*, 69, 158; 25 Am. Rep. 162, note.

One personally injured by negligence of another, bound to use ordinary care for his restoration, but not responsible for following erroneous medical advice. *Lyons v. Erie Ry. Co.*, 57, 489.

One injured while protecting property from negligence of another is not guilty of contributory negligence. *Reuter v. Starin*, 73, 601.

Action by school teacher for injury by want of repair of school-house — contributory negligence. *Bassett v. Fish*, 75, 303.

2. *Imputable negligence of third person.*

For parent to send out a child of eight years without a protector is not. *Drew v. Sixth Ave. R. Co.*, 26, 49.

Of parent, when attributable to child. *Mangam v. Brooklyn R. Co.*, 38, 455.

Of parent attributable to young child. *Downs v. N. Y. Cent. R. Co.*, 47, 83.

Of parent—when not imputable to child—on part of child. *Ihl v. Forty-second Street, etc., R. Co.*, 47, 317; 7 Am. Rep. 450.

Of parent in case of child. *Cosgrove v. Ogden*, 49, 255; 10 Am. Rep. 361.

Of parent immaterial unless child is negligent. *McGary v. Loomis*, 63, 104; 20 Am. Rep. 510.

When child not chargeable with, of parent. *Fallon v. Cent. Park, etc., R. Co.*, 64, 13.

One riding with another by invitation on highway not chargeable with his negligence. *Robinson v. N. Y. Cent. R. Co.*, 66, 11; 23 Am. Rep. 1.

Of driver of vehicle not chargeable to one riding with him by invitation, in favor of negligent railway company—sudden peril. *Dyer v. Erie Ry. Co.*, 71, 228.

Parent cannot recover for injury to infant child carelessly allowed alone in street if child was negligent. *Honegsberger v. Second Ave. R. Co.*, 2 Abb. 378.

Of attendant of infant, question of fact—railroad company liable for defect in borrowed car—violator of public ordinance is negligent. *Jetter v. N. Y. & Harlem R. Co.*, 2 Abb. 458.

3. *Of infant.*

Is question of fact. *Thurber v. Harlem, etc., R. Co.*, 60, 326.

Bound only to care reasonable for one of his age. *Byrne v. N. Y. Cent., etc., R. Co.*, 83, 620.

Chargeable with some degree of care—running in front of moving train negligence. *Wendell v. N. Y. Cent., etc., R. Co.*, 91, 420.

Care required by boy ten years old. *Barry v. N. Y. Cent., etc., R. Co.*, 92, 289; 44 Am. Rep. 377.

Of child in action by parent for injury to child. *Honegsberger v. Second Ave. R. Co.*, 1 Keyes, 570.

4. *Of traveler on public conveyance.*

Alighting from street car. *Mulhado v. Brooklyn City R. Co.*, 30, 370.

Attempt to leave train on seeing collision inevitable, not—“standing or riding on platform.” *Buel v. N. Y. Cent. R. Co.*, 31, 314.

Not for passenger to stand on platform of car in motion when no room inside. *Willis v. Long Island R. Co.*, 34, 670.

Not for passenger to stand on platform of crowded car by direction of conductor. *Sheridan v. Brooklyn & Newtown R. Co.*, 36, 39.

Not necessarily negligent to ride on platform of crowded street car. *Clark v. Eighth Ave. R. Co.*, 36, 135.

Not per se negligent for passenger to go from one car to another on moving train at direction of brakeman. *McIntyre v. New York Cent. R. Co.*, 37, 287.

Not, to prepare to leave a street car in motion. *Nichols v. Sixth Ave. R. Co.*, 38, 131.

Standing on railway track between cars to attend to a call of nature, is. *Van Schaick v. Van Santvoord*, 43, 527.

Getting off moving train by order of brakeman, not. *Filer v. New York Cent. R. Co.*, 49, 42.

Getting off moving train. *Burrows v. Erie Ry. Co.*, 63, 556.

Boarding slowly moving train is. *Philips v. Rensselaer & Sar. R. Co.*, 49, 177.

Not, to stand on foot board of public stage sleigh. *Spooner v. Brooklyn City R. Co.*, 54, 230; 13 Am. Rep. 570.

When owner of steamboat not liable for death of passenger falling overboard by slipping under gangway rail. *Dougan v. Champlain Trans. Co.*, 56, 1.

When getting off train in slow motion is negligence—negligence of parent attributable to child. *Morrison v. Erie Ry. Co.*, 56, 302.



When passenger justified in getting off moving train. *Filer v. New York Cent. R. Co.*, 59, 351.

Brakeman riding on engine in accordance with custom. *Sprong v. Boston & Albany R. Co.*, 58, 56.

Conductor of freight train struck by projecting roof of depot while climbing on top of car. *Gibson v. Erie Ry. Co.*, 63, 449; 20 Am. Rep. 552.

Boy getting on front platform of street car, not. *Maher v. Central Park, etc., R. Co.*, 67, 52.

Standing on platform of crowded street car and not holding on rail, not. *Ginna v. Second Ave. R. Co.*, 67, 596.

Passenger getting off moving train at brakeman's direction — questions for jury. *Filer v. New York Cent. R. Co.*, 68, 124.

Standing near gangway of steamboat not. *Cleveland v. New Jersey Steamboat Co.*, 68, 306.

Getting on street car in motion not, per se — evidence of habit. *Eppendorf v. Brooklyn, etc., R. Co.*, 69, 195; 25 Am. Rep. 171.

Of passenger leaving cars at station, crossing track without looking for trains — question of fact. *Brassell v. New York Cent., etc., R. Co.*, 84, 241.

When not, per se for passenger to stand on front platform of street car. *Nolan v. Brooklyn City, etc., R. Co.*, 87, 63; 41 Am. Rep. 345, note.

Standing on platform — struck by train — cars projecting over platform — right to assume not exposed to danger — question for jury, no error to refuse to charge request as to guarding against improper construction of cars. *Dobiecki v. Sharp*, 88, 203.

##### 5. In crossing railroad track.

It is not per se negligent for a horse and cart to turn to the left on meeting a street railway car in a city. *Hegan v. Eighth Ave. R. Co.*, 15, 380.

Of one injured at railway crossing, fatal to recovery. *Steves v. Oswego & Syracuse R. Co.*, 18, 422.

Fatal to action for — when nonsuit proper — duty to look out for trains at highway and railroad crossing, and to drive at moderate rate of speed on approaching. *Wilds v. Hudson River R. Co.*, 24, 480.

On part of traveler driving across railway in cities. *Wilds v. Hudson River R. Co.*, 29, 315.

Produced by other party's, not chargeable — foot passenger on highway crossing railroad. *Beisiegel v. New York Cent. R. Co.*, 34, 622.

Crossing railway without looking for trains is negligent. *Gonzales v. New York & H. R. Co.*, 38, 440.

Party crossing railroad bound to look. *Wilcox v. Rome, etc., R. Co.*, 39, 358.

One approaching railway crossing must look for trains, although no warning given. *Havens v. Erie Ry. Co.*, 41, 296; *Baxter v. Troy & Boston R. Co.*, 41, 502.

One crossing railway track bound to look both ways. *Gorton v. Erie Ry. Co.*, 45, 660.

Duty of traveler on highway at railroad crossing — must use his eyes and ears. *Davis v. New York Cent., etc., R. Co.*, 47, 400.

When absence of, not shown — boy crossing railway. *Reynolds v. New York Cent., etc., R. Co.*, 58, 248.

Absence of accustomed flagman at railroad crossing of highway does not relieve traveler on highway from duty of care. *McGrath v. New York Cent., etc., R. Co.*, 59, 468; 17 Am. Rep. 359.

Duty of traveler on highway to look for train at railway crossing — presumption — excessive speed. *Massoth v. Delaware & Hudson Canal Co.*, 64, 524.

Driving on street railway track. *Adolph v. Cent. Park, etc., R. Co.*, 65, 554.

Accident at highway and railroad crossing — case of contributory negligence. *Salter v. Utica, etc., R. Co.*, 75, 273.

Case of contributory negligence at highway and railroad crossing. *Cordell v. N. Y. Cent., etc., R. Co.*, 75, 330.

Failure to stop on approaching railroad in carriage not, per se. *Kellogg v. N. Y. Cent. & H. R. R. Co.*, 79, 72.

Failure to let down buggy-top when crossing track not contributory as matter of law. *Stackus v. N. Y. Cent. & H. R. R. Co.*, 79, 464.

Traveler approaching railroad crossing—bound to look and listen—when it appears train might have been seen or heard—absence of evidence that it might—jury may find did not. *Smedis v. Brooklyn, etc., R. Co.*, 88, 13.

In crossing railroad with team, stopping on the track—not looking for train. *Brooks v. Buffalo & Niagara Falls R. Co.*, 1 Abb. 211.

#### 6. In traveling on highway.

Trying to pass street obstruction. *Griffin v. Mayor, etc.*, 9, 456.

Rights and duty of footman in crossing street. *Barker v. Savage*, 45, 191; 6 Am. Rep. 66.

Footman crossing street must not attempt to get ahead of vehicles in a hurry. *Belton v. Baxter*, 54, 245; 13 Am. Rep. 578.

Question of, in one driving on street. *Gillespie v. City of Newburgh*, 54, 468.

When question of fact—foot passenger crossing street. *Belton v. Baxter*, 58, 411.

Walking on icy sidewalk in night is not, per se. *Evans v. City of Utica*, 69, 166; 25 Am. Rep. 165.

In crossing bridge met loaded wagon—stepped aside and fell from bridge—no railing—not negligence per se to walk in traveled track when foot-path obstructed by snow and ice. *Morrell v. Peck*, 88, 398.

Not contributory negligence to cross a street at a place other than the crossing. *Brusso v. City of Buffalo*, 90, 679.

Driving into hole in street—charge. *Minick v. City of Troy*, 83, 514.

Open drawbridge without gates—contributory. *Hart v. Hudson R. R. Co.*, 84, 56.

Testing boiler—standing near from curiosity. *Ochsenbein v. Shapley*, 85, 214.

#### 7. In managing vessels.

See SHIP AND SHIPPING.

#### 8. Miscellaneous.

Burden of proof on plaintiff to show freedom from contributory—need not directly contribute. *Button v. Hudson R. Co.*, 18, 248.

When absence of contributory negligence may be inferred. *Johnson v. Hudson River R. Co.*, 20, 65.

Of passenger in being miscarried. *Barker v. New York Cent. R. Co.*, 24, 599.

Defendant is entitled to instruction on contributory negligence where there is evidence of such on part of plaintiff's servant. *Owen v. Hudson River R. Co.*, 35, 516.

What is not, in action against telegraph company for mistake. *Leonard v. New York, etc., Tel. Co.*, 41, 544; 1 Am. Rep. 446.

On part of owner of stolen property does not bar recovery from innocent purchaser. *Pease v. Smith*, 61, 477.

Of owner of team employed to scrape snow from railroad and relying on foreman to advise of coming trains. *Bradley v. New York Cent. R. Co.*, 62, 99.

Question for jury. *Sheehy v. Burger*, 62, 558.

Absence of, may appear from circumstances as well as directly—presumption of self preservation. *Morrison v. New York Cent., etc., R. Co.*, 63, 643.

Concurrent, of surgeon. *Sauter v. New York Cent., etc., R. Co.*, 66, 50; 23 Am. Rep. 18.

Going with light into room where gas is escaping is. *Lanigan v. New York Gas-light Co.*, 71, 29.

Burden of proof on plaintiff—action for injury to horse—character of horse. *Hale v. Smith*, 78, 480.

Absence of, may be inferred from circumstances—when question of fact. *Hart v. Hudson River Bridge Co.*, 80, 622.

Degree of care by reason of previous knowledge of defect. *Palmer v. Dearing*, 93, 7.

Of passenger in respect to mistake in checking baggage held question for jury. *Isaacson v. New York Cent., etc., R. Co.*, 94, 278; 46 Am. Rep. 142.

When evidence is conflicting, is question for jury. *Cook v. New York Cent. R. Co.*, 3 Keyes, 476.

See AGENCY; ANIMALS; ATTORNEY AND CLIENT; BANK; CARRIER; CORPORATION; EXECUTOR AND ADMINISTRATOR; EVIDENCE; LANDLORD AND TENANT; MASTER AND SERVANT; MISTAKE; MUNICIPAL CORPORATION; OFFICE AND OFFICER; RAILROADS; TRUSTS AND TRUSTEES.

## NEGOTIABLE INSTRUMENTS.

- I. *Consideration.*
- II. *Delivery.*
- III. *Acceptance.*
- IV. *Transfers of bills, notes and checks.*
  1. *What constitutes negotiability.*
  2. *Notes payable conditionally.*
  3. *Indorsement.*
- V. *Demand.*
- VI. *Protest.*
- VII. *Days of grace.*
- VIII. *Rights of bona fide holders for value.*
- IX. *Rights and liabilities of parties.*
  1. *Maker.*
  2. *Payee.*
  3. *Joint makers.*
  4. *Warranty.*
  5. *Surety.*
  6. *Guaranty.*
  7. *Agent.*
- X. *Accommodation paper.*
- XI. *Discounts.*
- XII. *Payment.*
- XIII. *Actions on.*
- XIV. *Evidence.*
- XV. *Alteration.*
- XVI. *Stolen paper, forgery, fraud and duress.*
- XVII. *Checks.*
- XVIII. *Bills.*

### I. *Consideration.*

Breach of contract forming consideration is no defense against indorsees for value with notice of contract but not of breach. *Davis v. McCreedy*, 17, 230.

Check imports consideration — party. *Fish v. Jacobsen*, 1 Keyes, 539.

Inadequacy of consideration no defense per se. *Earl v. Peck*, 64, 596.

Restrictive indorsement — consideration presumed. *Hook v. Pratt*, 78, 371; 34 Am. Rep. 539, note.

The rule that consideration of antecedent debt does not cut off equities, in respect to negotiable instrument obtained by fraud, does not apply to money so obtained. *Stephens v. Board, etc.*, 79, 183; 35 Am. Rep. 511.

Surrender of old indorsement constitutes valuable consideration for new note. *Goodwin v. Conklin*, 85, 21.

Mutual promises sufficient to sustain note in hands of purchaser at discount — effect of memorandum on note. *Maas v. Chatfield*, 90, 303.

Voluntary cancellation and surrender of note without consideration releases same. *Larkin v. Hardenbrook*, 90, 333; 43 Am. Rep. 176.

Suspension of prosecution on another note valid consideration for note. *Meltzer v. Doll*, 91, 365.

Statement in note that it was for money lent, is not conclusive — note for future services becomes binding on rendition, although no agreement to render, and amount of note greater than value. *Miller v. McKenzie*, 95, 575.

### II. *Delivery.*

Negotiable instrument may be delivered conditionally — evidence competent to show that it was mere memorandum. *Seymour v. Cowing*, 4 Abb. 200; 1 Keyes, 532.

Delivery to take effect at maker's death and to be returned on his demand — when effectual. *Worth v. Case*, 42, 362.

Negotiable instrument may be delivered conditionally as between the parties. *Benton v. Martin*, 52, 570.

Check not operative until delivery. *Gale v. Miller*, 54, 586.

"Refusal" to deliver within R. S. 769, § 1, an affirmative act also wrongful — what not refusal. *Matteson v. Moulton*, 79, 627.

III. *Acceptance.*

An acceptance by "L., president of R. Co.," in the absence of proof of authority to accept, does not bind the company. *Moss v. Livingston*, 4, 208.

A check before acceptance works no assignment of or lien upon the drawer's funds in the drawee's hands. *Chapman v. White*, 6, 412.

Delivery of acceptance in blank as to amount binds acceptor to bona fide holder for any amount inserted. *Day v. Saunders*, 3 Keyes, 347.

Certification of check equivalent to acceptance of draft. *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 16, 125.

Acceptor or indorser may show that acceptance or indorsement was for accommodation as basis for proving usury. *Clark v. Sisson*, 22, 312.

Promise to accept equivalent to acceptance. *Johnson v. Clark*, 39, 216.

Acceptance warrants genuineness of drawer's signature. *National Park Bk. v. Ninth Nat. Bk.*, 46, 77; 7 Am. Rep. 310.

When bank not bound by unauthorized acceptance of assistant cashier. *Pope v. Bank of Albion*, 57, 126.

When order not to be deemed accepted by a conditional letter — equitable assignment — revocation. *Shaver v. Western Union Tel. Co.*, 57, 459.

Acceptance of time draft fraudulently diverted, on agreement for payment of debt past due, does not constitute bona fide holder. *Moore v. Ryder*, 65, 438.

Request by one partner to another to pay his note and deduct from profits — acceptance binds only to amount of profits. *Munger v. Shannon*, 61, 251.

IV. *Transfer of bills, notes and checks.*1. *What constitutes negotiability.*

Instrument payable to individuals, "trustees" of an unincorporated association, "or their successors in office," is a promissory note. *Davis v. Garr*, 6, 124.

And the individuals named may sue although others have succeeded them. *Id.*

Order by president on treasurer of corporation to pay money to a third is a promissory note. *Fairchild v. Ogdensburgh, etc., R. Co.*, 15, 337.

Check payable to "bills payable or order" is payable to bearer. *Mechanics' Bank v. Straiton*, 3 Keyes, 365.

Where municipal bonds issued under Laws of 1853, chapter 283, are negotiable — evidence. *Bank of Rome v. Village of Rome*, 19, 20.

Promise by railroad company payable in money or stock negotiable. What sufficient notice of non-payment. *Hodges v. Shuler*, 22, 114.

Warrant of municipal corporation, when negotiable. *Bull v. Sims*, 23, 570.

Railroad bonds payable to A. or his assigns are negotiable and not subject to equities. *Brainerd v. New York & Harlem R. Co.*, 25, 496.

Negotiable note for insurance premiums is commercial paper. *Farmers' Bank v. Maxwell*, 32, 579; *Brookman v. Metcalf*, 32, 591.

Bill payable in gold dollars is negotiable — recovery should be for amount in gold dollars and costs in legal tender. *Chrysler v. Renois*, 43, 209.

Certificate of stock of a corporation is not negotiable paper. *Weaver v. Burden*, 49, 286.

Certificate of deposit to order is negotiable — demand — laches. *Pardee v. Fish*, 60, 265; 19 Am. Rep. 176.

Note payable "on return of this receipt" is negotiable — indemnity, when sued as lost. *Frank v. Wessels*, 64, 155.

Interest coupons payable to bearer at specified time and place are negotiable although detached from bonds. *Evertson v. National Bank of Newport*, 66, 14; 23 Am. Rep. 9.

2. *Notes payable conditionally.*

Note payable at certain time or conditionally — evidence — consideration. *Genesee College v. Dodge*, 26, 213.

Construction and effect of notes upon condition — election. *Oatman v. Taylor*, 29, 649.

### 3. Indorsement.

A guaranty on the back of a promissory note is not an indorsement. *Brown v. Curtis*, 2, 225.

Indorser, not charged, paying by mistake may recover back. *Lake v. Artisans' Bank*, 1 Trans. App. 71.

Indorser by partner not in firm business and for his own accommodation — indorsee with notice cannot hold firm — notice. *Fielden v. Lahens*, 2 Abb. 111.

Indorser of non-negotiable note may be treated as guarantor or maker. *Richards v. Warring*, 4 Abb. 47.

Indorser of non-negotiable paper liable without notice. *Cromwell v. Hewitt*, 40, 491.

Indorser before delivery. *Spies v. Gilmore*, 1, 321.

Demand and notice necessary to charge indorser. *Cayuga County Bank v. Warden*, 1, 413.

An indorser is not discharged by the indorsee's surrender of collateral security without his consent. *Pitts v. Congdon*, 2, 352.

An indorsement, whether made before or after dishonor, is negotiable without words of negotiability. *Leavitt v. Putnam*, 3, 494.

Special indorsement for collection, when sufficient to give notice of ownership. *Warner v. Lee*, 6, 144.

An officer of a corporation indorsing a note payable thereto with addition of his official description is not liable personally. *Babcock v. Beman*, 11, 200.

Indorser does not waive notice of presentment and non-payment by taking security from maker. *Seacord v. Miller*, 13, 55.

Indorser bound to charge his prior indorser — holder owes no duty. *Spencer v. Ballou*, 18, 327.

Transferee under indorsement by cashier of bank entitled although bank had no interest. *Bank of Genesee v. Patchin Bank*, 19, 312.

Second indorser having paid note, maker paid first indorser, and second indorser gave him time — maker not discharged. *Carr v. Lewis*, 20, 138.

Indorsers of duly protested note, selling it without erasing indorsement, are bound to pay without notice of non-payment. *St. John v. Roberts*, 31, 441.

Indorser not discharged by release of judgment against maker as against lands in which he proves to have no interest. *Bydenburgh v. Bingham*, 38, 371.

When indorser designates the place for sending notice of protest it must be followed. *Bartlett v. Robinson*, 39, 187.

When indorser cannot compel bank to apply deposit to payment. *National Bank of Fishkill v. Speight*, 47, 668.

Indorser before indorsement by payee is simply surety to payee. *Phelps v. Vischer*, 50, 69; 10 Am. Rep. 433.

Valid extension of time of payment without consent of accommodation indorser releases him. *Scoville v. Landon*, 50, 686.

What is due diligence to find indorser's address. *Gautrey v. Doune*, 51, 84.

Diligence to find indorser's residence under act of 1857, chapter 416, section 3. *Requa v. Collins*, 51, 144.

Indorsement before inception fraudulently procured — when available to bona fide holder. *Pothier v. Adriance*, 51, 322.

Restricted indorsement — words must be clear. *Fassin v. Hubbard*, 55, 465.

Indorser not released by the holder's agreement to carry the note by renewal. *Second Nat. Bank of Oswego v. Poucher*, 56, 348.

Indorser not discharged by maker's application of the money to another demand of the holder at his request. *Id.*

Indorsement before payee may be shown to have been intended as first indorsement — when assignment of claim against bankrupt maker does not cut off claim against indorser. *Coulter v. Richmond*, 59, 478.

Indorser not discharged by non-presentment of usurious renewal note. *Leary v. Miller*, 61, 488.

Indorser of note purporting to be made by a firm cannot deny the partnership —

fraudulent diversion — burden of proof. *Dalrymple v. Hillenbrand*, 62, 5; 20 Am. Rep. 438.

Indorser of note held by bank not discharged by maker's general deposit with bank after maturity of note — optional with bank to apply. *National Bank of Newburgh v. Smith*, 66, 271; 23 Am. Rep. 47, note.

Indorser discharged by binding agreement to extend maker's time of payment. *Pomeroy v. Tanner*, 70, 547.

Indorser cannot compel holder to resort to securities. *First Nat. Bk. of Buffalo v. Wood*, 71, 405; 27 Am. Rep. 66.

Agreement between indorser and assignee in bankruptcy of maker — when does not affect cause of action against wrongful transferee. *Comstock v. Hier*, 73, 269; 29 Am. Rep. 142.

Arrangement suspending right of action on, releases indorser. *Green v. Bates*, 74, 333.

Agreement to carry paper — when not defense for indorser. *National Bank of Gloversville v. Place*, 86, 444.

Indorser for identification of payee of draft does not guarantee genuineness — he is entitled to notice, etc. *Susquehanna Valley Bank v. Loomis*, 85, 207; 39 Am. Rep. 652.

### V. Demand.

When demand and notice necessary to charge foreign indorser. *Spies v. Gilmore*, 1, 321.

Requisites of demand of payment — notice — inquiry for indorser's residence. *Hunt v. Maybee*, 7, 266.

Demand at bank door after hours by notary, who was also teller, sufficient. *Bank of Syracuse v. Hollister*, 17, 46.

On demand note with interest, indorser remains liable until demand at any time. *Merritt v. Todd*, 23, 28.

When maker of note has removed from State, no demand at his late residence necessary. *Foster v. Julien*, 24, 28.

Leaving note at bank where payable, maker having no funds there, on last day of grace, sufficient demand. *Merchants' Bank v. Elderkin*, 25, 178.

Demand, when to be made in case of removal "out west." *Adams v. Leland*, 30, 309.

Demand of payment — place of payment not specified — what sufficient. *Holtz v. Boppe*, 37, 634.

Note payable on demand with interest, transferred three months after date, is subject to equities. *Herrick v. Woolverton*, 41, 581; 1 Am. Rep. 461.

Waiver of demand, when implied. *Sheldon v. Horton*, 43, 93; 3 Am. Rep. 669.

Demand where no place specified — waiver of presentment. *Meyer v. Hibsher*, 47, 265.

Collaterals referred to in note — when must be presented on demand of note in order to charge indorser. *Ocean Nat. Bank of New York v. Fant*, 50, 474.

Where firm of makers is dissolved by bankruptcy, demand of one partner sufficient where no place of payment is named — notice need only reasonably identify note. *Gates v. Beecher*, 60, 518; 19 Am. Rep. 207.

Note dated in 1874 "payable on demand after date" presented in 1878 — dishonored by delay — indorser discharged. *Crim v. Starkweather*, 88, 339; 42 Am. Rep. 250.

### VI. Protest.

Demand and notice sufficient without formal protest. *Coddington v. Davis*, 1, 186.

Waiver of protest waives demand and notice. *Id.*

Notice that note had been protested for non-payment equivalent to notice of demand. *Cayuga Co. Bank v. Warden*, 1, 413.

No precise form of notice of non-payment necessary, and misdescription may be aided by proof. *Id.*

Sufficiency of protest — evidence, notary's certificate. *Seneca Co. Bank v. Neass*, 3, 442.

Notice of protest — error in description may be cured by evidence — joint payees, several notices. *Cayuga Co. Bank v. Warden*, 6, 19.

Notice of non-payment may be sent to place where indorser has an office and

receives letters, although he resides and receives letters elsewhere. *Montgomery County Bank v. Marsh*, 7, 481.

Waiver of protest by one under commission as an habitual drunkard is void. *Wadsworth v. Sharpsteen*, 8, 388.

Protest—sufficiency of notice, where several notes alike. *Cook v. Litchfield*, 9, 279.

Notice of protest—sufficiency of description and statement. *Younge v. Lee*, 12, 551.

Where indorser lives at place of payment, notice of non-payment cannot be served by mail addressed to his place of business in another town. *Van Vechten v. Pruyn*, 13, 549.

Notice of protest—regularity of service. *Lawrence v. Miller*, 16, 235.

Parties to protested paper may provide for taking up, without altering their legal status toward each other. *Freeland v. Van Campen*, 1 Keyes, 39.

Notice of non-payment, not stating maker's name, invalid. *Home Ins. Co. v. Green*, 19, 518.

Notice by holder of non-payment—his inability to learn proper place does not excuse subsequent indorser who knew it. *Beale v. Parrish*, 20, 407.

Due diligence in notifying indorser of non-payment. *Farmers' Bank of Bridgeport v. Vail*, 21, 485.

One seal sufficient for notary's certificates of protest and service of notice of non-payment. *Olcott v. Tioga R. Co.*, 27, 546.

Notice of protest—description of note—printed signature sufficient—evidence. *Bank of Cooperstown v. Woods*, 28, 545, 561.

Notice of protest—delay caused by indorser's use of initials immaterial. *Manufacturers and Traders' Bank v. Hazard*, 30, 226.

Notary's certificate of protest—intentments in favor of. *McAndrew v. Radway*, 34, 511.

Notice of protest must identify note and state non payment and protest. *Artisans' Bank v. Backus*, 36, 100.

Evidence of protest—opinion of genuineness of signature—acting on other

signatures. *Bank of Commonwealth v. Mudgett*, 44, 514.

Dissolution of partnership by war does not affect prior indorsement by firm—notice of protest to agent constituted before war is valid—estoppel—agreement between indorsers. *Hubbard v. Matthews*, 54, 43; 13 Am. Rep. 562.

When service of notice of protest on agent valid. *Fassin v. Hubbard*, 55, 465.

Assent of indorser to continue his liability after dishonor waives want of protest. *Ross v. Hurd*, 71, 14; 27 Am. Rep. 1.

Diligence in mailing notice of protest. *Smith v. Poillon*, 87, 590; 41 Am. Rep. 402.

## VII. Days of grace.

A bank check payable at a future day is entitled to grace notwithstanding the contrary usage of the bank. *Bowen v. Newell*, 8, 190.

Grace is regulated by law of place of payment. *Cowen v. Newell*, 13, 290.

Maturity of note without grace. *Roehner v. Knickerbocker Life Ins. Co.*, 63, 160.

## VIII. Rights of bona fide holders for value.

Purchase in good faith from agent fraudulently misappropriating gives title—burden of proof on holder. *Case v. Mechanics' Banking Association*, 4, 166.

Maker of note may recover against one who has wrongfully negotiated it to a bona fide holder before inception. *Decker v. Mathews*, 12, 313.

Diversion of note by maker does not destroy bona fide character of holding. *Younge v. Lee*, 12, 551.

Acceptance in blank valid in hands of bona fide holder although filled up in excess of amount authorized. *Griggs v. Howe*, 2 Keyes, 574.

One issuing acceptance in blank is bound to bona fide holder, although blank is filled with amount greater than authorized. *Van Duzer v. Howe*, 21, 531.

Bank passing check to credit of depositor and permitting him to draw proceeds is holder for value. *Market Bank v. Hartshorne*, 3 Keyes, 137.

Indorser of a note made by married women and void as to them is bound to bona fide purchaser. *Erwin v. Downs*, 15, 575.

Judgment creditor taking note as security and discontinuing proceedings supplementary is holder for value. *Boyd v. Cummings*, 17, 101.

Case of bona fide holding notwithstanding diversion. *Essex County Bank v. Russell*, 29, 673.

Taking note in payment of one already due, makes holding for value. *Brown v. Leavitt*, 31, 113.

Taking for collateral security is for value. *Bank of New York v. Vanderhorst*, 32, 553.

Indorsee of unrestricted accommodation note as collateral for antecedent debt of payee is holder for value. *Grocers' Bank v. Penfield*, 69, 502; 25 Am. Rep. 231.

Test of bona fide holding is honesty, without regard to diligence or negligence. *Magee v. Badger*, 34, 247.

Parties liable to bona fide holder in manner, order and extent as they appear. *Hoge v. Lansing*, 35, 136.

Receiving note of third person for a precedent debt, without relinquishing any security or right, does not constitute a bona fide holding. *Lawrence v. Clark*, 36, 128.

Transfer for inadequate price not sufficient to impeach sale. *Brown v. Penfield*, 36, 473.

Surrender of old over-due note is parting with value. *Pratt v. Coman*, 37, 440.

Fraudulent diversion no defense against a bona fide holder. *First Nat. Bk. of Anglica v. Hall*, 44, 395; 4 Am. Rep. 698.

Diversion—burden of proof of good faith—good faith. *Farmers and Citizens' Nat. Bk. v. Noxon*, 45, 762.

Who is bona fide purchaser of stolen bonds. *Seybel v. National Currency Bk.*, 54, 288; 13 Am. Rep. 583.

Transfer as security for indefinite extension does not constitute holding for value. *Atlantic Nat. Bank v. Franklin*, 55, 235.

What does not constitute bona fide holding—absence of evidence of title. *Muller v. Pondir*, 55, 325; 14 Am. Rep. 259.

Maker estopped as to bona fide holder from alleging his intention to sign an entirely different obligation, when he did not read it. *Chapman v. Rose*, 56, 137; 15 Am. Rep. 401.

Case of sale or pledge of note to bona fide holder. *Platt v. Beebe*, 57, 339.

Paying part in money and surrendering past due note for balance, constitutes holding for value. *Mechanics and Traders' Nat. Bk. v. Crow*, 60, 85.

When negotiable instruments stolen, owner may reclaim them or property bought with proceeds, unless in hands of bona fide purchaser. *Newton v. Porter*, 69, 133; 25 Am. Rep. 152.

Indorsee before maturity is supposed to hold bona fide for value, although instrument was for accommodation. *Harger v. Worrall*, 69, 370; 25 Am. Rep. 206.

Check given for illegal fee not void in hands of bona fide transferee—has inception only from delivery. *Cowing v. Altman*, 71, 435; 27 Am. Rep. 70.

Giving note is not paying value—transfer after default of interest. *Cowee v. Cornell*, 75, 91; 31 Am. Rep. 428.

When fraudulent diversion of accommodation note is shown, burden of bona fides is cast on holder—offer of evidence. *Nickerson v. Ruger*, 76, 279.

Transfer for value—surrender of note for another by a third person. *Nickerson v. Ruger*, 84, 675.

Title to note cannot be assailed by maker on ground that transfer to plaintiff was made in fraud of payee's creditors. *Sullivan v. Bonesteel*, 79, 631.

Parting with value—surrender of dishonored check of third person not. *Phoenix Ins. Co. v. Church*, 81, 218; 37 Am. Rep. 494.

One who has paid to a bona fide holder a note given voluntarily to compound a felony cannot recover therefor from the transferor. *Haynes v. Rudd*, 83, 251.

Transfer for antecedent debt is for value—on last day of grace is before maturity. *Continental Nat. Bank v. Townsend*, 87, 8.

Bona fide holder of note for value without notice before maturity protected.



against payments by defendants. *Ward v. Howard*, 88, 74.

### IX. *Rights and liabilities of parties.*

#### 1. *Maker.*

Maker and his guarantor not discharged by holder's extending time of payment for a third in consideration of a new indorsement by him. *Kennedy v. Goss*, 38, 330.

Maker of note bound by his written statement that it is business paper, although untrue. *Lynch v. Kennedy*, 34, 151.

#### 2. *Payee.*

Payable to fictitious payee, deemed payable to bearer. *Mechanics' Bank v. Straiton*, 1 Trans. App. 201.

Payee may enforce check given by A. at request of B. to pay B.'s debt. *Fish v. Jacobsohn*, 2 Abb. 132.

Drawee liable to genuine payee although he has innocently paid to one holding in good faith under indorsement by another of same name. *Graves v. American Exchange Bank*, 17, 205.

When payee not entitled to draft as against acceptor paying it. *Streever v. Bank of Fort Edward*, 34, 413.

Payee is first indorser without reference to position of his name—not to be rendered liable by any act of payee after default in giving notice. *Bacon v. Burnham*, 37, 614.

Action by payee against indorser—requisites to recovery. *Meyer v. Hibsher*, 47, 265.

Possession by payee's executor of undorsed note payable to testator's order is evidence of ownership. *Scoville v. Landon*, 50, 686.

When a married woman makes a note, authorizing payee to add any thing to make it "right, legal and proper," he may add a clause charging her separate estate. *Taddiken v. Cantrell*, 69, 597; 25 Am. Rep. 253.

When payee may recover from indorser—evidence that indorsement was intended as security. *Jaffray v. Brown*, 74, 398.

#### 3. *Joint makers.*

Estate of deceased joint maker who was a mere surety is discharged. *Getty v. Binsee*, 49, 385; 10 Am. Rep. 379.

Joint and several notes signed by three, with "surety" added to last—evidence competent to show real relations of signers. *Sayles v. Sims*, 73, 551.

A judgment by confession against one joint maker of a promissory note prior to the Code of Civil Procedure, section 1278, merged the note. *Candee v. Smith*, 93, 349.

#### 4. *Warranty.*

Implied warranty on sale of negotiable instrument—estoppel as to usury—former judgment. *Fake v. Smith*, 2 Abb. 76.

Indorser liable as for warranty of antecedent forged signatures without presentment or protest. *Turnbull v. Bowyer*, 40, 456.

If seller declines to warrant genuineness none can be implied. *Bell v. Dagg*, 60, 528.

On transfer of note without indorsement there is an implied warranty against usury. *Delaware Bank v. Jarvis*, 20, 226.

No implied warranty against usury, on transfer of note without indorsement, when transferor is ignorant of usury. *Littauer v. Goldman*, 72, 506; 28 Am. Rep. 171.

#### 5. *Surety.*

A note being executed by A., the principal debtor, and B., and by C. as surety, C., prima facie, is not surety for both A. and B. *Sisson v. Barrett*, 2, 406.

Surety subscribing a draft is not liable to the acceptor who had agreed to accept for accommodation of principal, nor to another subscribing as his surety without his knowledge. *Wright v. Garlinghouse*, 26, 539.

Surety signing after transfer but in pursuance of maker's agreement to transfer is bound. *McNaught v. McClaghry*, 42, 22; 1 Am. Rep. 487.

Indorser as security to plaintiff, when released by his breach of agreement and destroying maker's ability to pay. *Bookstaver v. Jayne*, 60, 146.

When draft given by a surety on settlement of action is conclusive against him. *Kidder v. Horrobin*, 72, 159.

### 6. Guaranty.

Mere neglect of the holder to sue the maker does not discharge a guarantor. *Brown v. Curtiss*, 2, 225.

A guaranty indorsed on a promissory note given for the maker's debt is valid although expressing no consideration. *Durham v. Manrow*, 2, 533; *Hall v. Farmer*, 2, 553.

A guaranty written below a promissory note, is no part of the note. *Brewster v. Silence*, 8, 207.

Indorser of non-negotiable note liable as maker or guarantor. *Richards v. Warring*, 1 Keyes, 576.

Innocent payee may enforce guaranty of note, although maker obtained it by fraud. *McWilliams v. Mason*, 31, 294.

Drawee of draft only guarantees genuineness of drawer's signature and not of body of instrument. *White v. Continental Nat. Bank*, 64, 316; 21 Am. Rep. 612.

Indorser for identification of payee of draft does not guarantee genuineness — he is entitled to notice, etc. *Susquehanna Valley Bank v. Loomis*, 85, 207; 39 Am. Rep. 652.

### 7. Agent.

Joint-stock company estopped by recognition of its agent's indorsements — notice to agent binds company. *Bank of Auburn v. Putnam*, 3 Keyes, 343.

Notes in consideration of weekly payments — business and not accommodation paper. *McSpedon v. Troy City Bank*, 2 Keyes, 35.

Bona fide holder of check certified by teller in violation of duty, for accommodation of drawer, and when there were no funds, may still recover of bank. *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 14, 623.

A note signed "D. H., agent for the Churchman," does not bind the principal. *De Witt v. Walton*, 9, 571.

Holder as collateral has title, although transferred by agent in breach of duty to his principal. *Belmont Branch Bank v. Hoge*, 35, 65.

Agent in possession of unindorsed note, payable to principal's order has no implied authority to take payment. *Double-day v. Kress*, 50, 410; 10 Am. Rep. 502.

### X. Accommodation paper.

Accommodation indorser liable to transferee for antecedent debt from maker. *Seneca Co. Bank v. Neass*, 3, 442.

Accommodation indorser — conflict of laws. *Cook v. Litchfield*, 9, 279.

Note given for prior note is on consideration to charge accommodation indorser. *Spencer v. Ballou*, 18, 327.

Note made for accommodation impliedly given without restriction of use. *Agawam Bank v. Strever*, 18, 502.

One who for accommodation indorses a note before the payee is liable as indorser. *Moore v. Cross*, 19, 227.

Accommodation indorser cannot set up breach of warranty of quality of goods for which note was given. *Gillespie v. Torrance*, 25, 306.

Corporation bound by its accommodation indorsement. *Mechanics' Banking Ass'n v. New York & Saugerties White Lead Co.*, 35, 505.

Accommodation indorser not liable to transferee after maturity. *Chester v. Dorr*, 41, 279.

Fraudulent diversion of accommodation paper immaterial as to innocent purchaser. *Park Bank v. Watson*, 42, 490; 1 Am. Rep. 573.

Where one sells accommodation notes at a discount, as business paper, the buyer may recover purchase-money. *Webb v. Odell*, 49, 583.

Accommodation indorser liable to innocent purchaser, although note diverted from purpose. *Merchants' Nat. Bk. of Syracuse v. Comstock*, 55, 24; 14 Am. Rep. 168.

When holder gets title from payee after maturity he cannot enforce against accommodation maker. *Lancey v. Clark*, 64, 209; 21 Am. Rep. 604.

Accommodation indorser entitled to costs and expenses of suit against maker's estate, conducted in name of holder, notwithstanding act of 1858, chapter 314, section 3. *Thompson v. Taylor*, 72, 32.

When survivor liable on note made in firm name by deceased partner for accommodation — renewal after death, and action on renewal, when not payment. *First Nat. Bk. of Chittenango v. Morgan*, 73, 593.

Accommodation indorsement for special purpose — diversion and transfer for antecedent debt — indorser may recover from transferee, having paid it to his bona fide transferee for value — damages. *Comstock v. Hier*, 73, 269; 29 Am. Rep. 142.

Accommodation indorser for corporation cannot set up usury — act of 1850, chapter 172. *Stewart v. Bramhall*, 74, 85.

When accommodation surety bound by execution after delivery of note. *Harlington v. Brown*, 77, 72.

Holder owes no active duty to accommodation indorser to protect his interests — execution against maker — pledge from maker. *Smith v. Erwin*, 77, 466.

Notes payable to order of maker or fictitious person — validity against all having knowledge of facts — what facts necessary — accommodation indorser liable without indorsement of payee. *Irving Nat. Bank v. Alley*, 79, 536.

### XI. Discount.

Commercial paper discounted by corporation not having authority void — money may be recovered without sanctioning illegality. *Pratt v. Short*, 79, 437; 35 Am. Rep. 531.

Purchase of, for less than face, is discount under act 1838, chapter 260 — does not invalidate title. *Atlantic State Bank v. Savery*, 82, 291.

### XII. Payment.

Check for draft not payment unless paid — laches — presentment through clearing

house next day, valid when customary. *Turner v. Bank of Fox Lake*, 4 Abb. 434.

When check is not payment. *Turner v. Bank of Fox Lake*, 3 Keyes, 425.

Giving check not payment of draft in absence of agreement — negligence in presenting check. *Burkhalter v. Second Nat. Bank*, 42, 538.

When check is payment of draft — negligence in presenting. *Smith v. Miller*, 43, 171; 3 Am. Rep. 690.

Having funds at place and time of payment does not amount to payment if note is not presented. *Hills v. Place*, 48, 520; 8 Am. Rep. 568.

Accommodation maker bound by transfer in payment of or as security for antecedent debt. *Schepp v. Carpenter*, 51, 602.

Certification of check is payment as between holder and drawer. *First Nat. Bank of Jersey City v. Leach*, 52, 350; 11 Am. Rep. 708.

Leaving place of payment blank authorizes bona fide holder to fill it. *Redlich v. Doll*, 54, 234; 13 Am. Rep. 573.

Payable at bank, must be presented during banking hours. *Salt Springs Nat. Bank v. Burton*, 58, 430; 17 Am. Rep. 265.

Giving of check presumed payment of outstanding note. *National Bank v. Wells*, 79, 498.

If check given to another, lost and paid to finder or fraudulent holder, debtor not discharged, unless check received in absolute payment of debt. *Thomson v. Bank of North America*, 82, 1.

Where paper is indorsed by one of a firm and delivered in payment of individual indebtedness, bona fide holder may recover of firm on indorsement. *Atlantic State Bank v. Savery*, 82, 291.

Not given in fraud of creditors — action to recover from bona fide holder to whom paid not maintainable. *Solinger v. Earle*, 82, 393.

Tender of payment may be made on any day of grace. *Wyckoff v. Anthony*, 90, 442.

Payment by one maker of note will not bar statute of limitation as to others. *Littlefield v. Littlefield*, 91, 203; 43 Am. Rep. 663.

XIII. *Actions on.*

Action not maintainable on instrument when detained in another State. *Van Alstyne v. Nat. Com. Bk. of Albany*, 7 Trans. App. 241; 4 Abb. 449.

Action on destroyed note, how maintainable. *Des Arts v. Leggett*, 16, 582.

Action does not lie to compel surrender of note paid but not taken up. *Fowler v. Palmer*, 62, 533.

In action by indorser against prior indorser, defendant may prove that all were by agreement co-sureties — estoppel — insolvency — parties. *Easterly v. Barber*, 66, 433.

XIV. *Evidence.*

Possession of a note indorsed in blank is prima facie evidence of ownership for consideration, and is not rebutted by proof that it was not transferred until after maturity. *James v. Chalmers*, 6, 209.

Giving note is prima facie evidence of settlement in full and indebtedness to its amount. *Lake v. Tysen*, 6, 461.

A check drawn on and paid by a bank is no evidence of the drawer's indebtedness to the bank. *White v. Ambler*, 8, 170.

Agreement to release indorser — when no evidence for jury. *East River Bank v. Kennedy*, 4 Keyes, 279.

Where note pledged for liability "incurred," evidence admissible to show that there was none at the time. *Agaroom Bank v. Strever*, 18, 502.

Transfer by insolvent company — when valid — evidence. *Marine Bank of New York v. Clements*, 31, 33.

Possession is prima facie proof of ownership. *Bedell v. Carl*, 33, 581.

But it is only prima facie proof. *Hayes v. Hathorn*, 74, 486.

Where ownership is denied, and alleged to be in another, evidence competent to show that such other, who had previously sued, was not owner. *Hatters' Bank v. Phillips*, 38, 128.

Transfer for precedent notes surrendered is valid — parol evidence of old notes competent. *Chrysler v. Renois*, 43, 209.

Evidence of duress in obtaining note from maker admissible in suit by transferee. *First Nat. Bk. v. Green*, 43, 298.

"Cashier," added to payee's name, imports that the bank is payee. *First Nat. Bk. of Angelica v. Hall*, 44, 395; 4 Am. Rep. 698.

Maker may prove that he signed as surety to show discharge by extension to principal — when renewal extends time. *Hubbard v. Gurney*, 64, 457.

Question of fact as to payment of note by renewal — unfilled agreement to indorse renewal. *Auburn City Nat. Bk. v. Hunsiker*, 72, 252.

When bank cannot allege mistake in certifying note to have been paid. *Whiting v. City Bank of Rochester*, 77, 363.

When cause of action for conversion of draft or for money paid by mistake not made out. *Southwick v. First Nat. Bk. of Memphis*, 84, 420.

When action lies for conversion of drafts transferred by wrongful act of State's agent — agency — estoppel — damages. *People v. Bank of North America*, 75, 547.

XV. *Alteration.*

When a bill was fraudulently altered after issue by changing the amount and drawee's name, the drawer having paid it, may recover back the money, not having been negligent and having given prompt notice of discovery. *Bank of Commerce v. Union Bank*, 3, 230.

Holder may fill up blank date with any day within month. *Page v. Morrell*, 3 Keyes, 117.

Change of date is material alteration. *Rogers v. Vosburgh*, 87, 228.

Alteration — adding additional indorser is not. *McCarughey v. Smith*, 27, 39.

Adding maker to several note not material alteration. *Brownell v. Winnie*, 29, 400.

Bonds — evidence — alteration of numbers — constructive notice — bona fide holding. *Birdsall v. Russell*, 29, 220.

Separation of contemporaneous memorandum from note avoids it even in hands

of innocent purchaser. *Benedict v. Cowden*, 49, 396; 10 Am. Rep. 382.

Inserting "to bearer" in place of "to order of" is material alteration—intent. *Booth v. Powers*, 56, 22.

Adding "with interest" material alteration. *McGrath v. Clark*, 56, 34.

#### XVI. *Stolen paper, forgery, fraud and duress.*

Action to recover money paid by drawee on forged indorsement, not maintainable. *Coggill v. American Exchange Bank*, 1, 113.

Instrument to induce violation of official duty void between parties, and in hands of transferee with notice. *Devlin v. Brady*, 36, 531.

Title to stolen negotiable instrument not impaired by negligence. *Welch v. Sage*, 47, 143; 7 Am. Rep. 423.

Married woman's note obtained by duress not for benefit of her estate nor in her business, void even in hands of innocent holder. *Loomis v. Ruck*, 56, 462.

Where thief or finder erases the indorsement and personating the payee forges his signature and transfers, no title passes. *Colson v. Arnot*, 57, 253; 15 Am. Rep. 496.

United States treasury note indorsed for redemption being stolen, and the indorsement being erased, prior to maturity, holder gets no title. *Dinsmore v. Duncan*, 57, 573; 15 Am. Rep. 534.

When payment of forged certificate of deposit may be recovered. *Allen v. Fourth Nat. Bank*, 59, 12.

Instrument given for loan of proceeds of stolen property valid in hands of transferee after maturity. *Warren v. Haight*, 65, 171.

Purchaser of stolen negotiable bonds, in good faith, protected—evidence of bad faith and unusual conduct competent. *Dutchess Co. Mut. Ins. Co. v. Hackfield*, 73, 226.

Liability as to money paid by mistake on forged paper. *Bank of Brit. North Amer. v. Merchants' Nat. Bank*, 91, 106; *Frank v. Lanier*, 91, 112.

#### XVII. *Checks.*

Check is not assignment. *Tyler v. Gould*, 48, 682.

Order is not assignment of debt. *Noe v. Christie*, 51, 270.

Check in ordinary form is not assignment of fund. *Attorney-General v. Continental Life Ins. Co.*, 71, 325; 27 Am. Rep. 55.

Laches in notifying loss of check—application of payment. *Shipsey v. Bowery Nat. Bank*, 59, 485.

Check payable to order and delivered by payee without indorsement—certification by drawee is binding. *Freund v. Importers and Traders' Nat. Bank*, 76, 352.

Laches in presenting check—damages. *First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 77, 320; 33 Am. Rep. 618.

Check dishonored when transferred—presentment for payment delayed—neither discharges drawer. *Cowing v. Altman*, 79, 167.

Check on parol sale of land—when valid. *Raubitschek v. Blank*, 80, 478.

Assignment of deposit may be made by parol on giving of check. *Risley v. Phoenix Bank of the City of New York*, 83, 318; 38 Am. Rep. 421, note; affirmed, 30 Alb. L. J. 30.

Check governed by law of place of payment. *Hibernia Nat. Bank v. Lacombe*, 84, 367; 38 Am. Rep. 518.

#### XVIII. *Bills.*

Suit on draft cannot be maintained without producing it on trial, although it is wrongfully detained in another State by one claiming title under forged indorsement. *Van Alstyne v. Nat. Com. Bank*, 4 Abb. 449; 7 Trans. App. 241.

Draft prior to acceptance gives holder no lien on drawer's funds in hands of drawee. *Winter v. Drury*, 5, 525.

When principal bound by agent's drafts fraudulently issued for accommodation of a third party. *Exchange Bank v. Montearth*, 26, 505.

Delay in presenting sight draft excused by loss of draft and procuring duplicate. *Benton v. Martin*, 31, 382.

Duplicate draft issued in place of lost original—no liability on, if liability on first discharged by neglect. *Benton v. Martin*, 40, 345.

Drafts secured by bill of lading—delivery of bill of lading. *Magoun v. Sinclair*, 66, 30.

No implied warranty that draft is drawn against funds, or that not accommodation paper. *People's Bank of City of New York v. Bogart*, 81, 101.

Release of drawer as such does not discharge claim of accommodation acceptor for money paid. *Pearce v. Wilkins*, 2, 469.

A bill of exchange does not operate as an assignment to the payee of the drawer's funds in the drawee's hands. *Cowperthwaite v. Sheffield*, 3, 243.

Where the owner of a draft sends it for collection and credit on his account, and at the same time draws at sight against the fund, title to the draft passes and protects bona fide receivers of the proceeds. *Clark v. Merchants' Bank*, 2, 380.

Question of inquiry for drawer's residence is mixed one of fact and law—when one of fact arises. *Carroll v. Upton*, 3, 272.

Party taking up a protested bill for the honor of the drawer, without seeing it, may recover the amount on discovery that it is a forgery. *Goddard v. Merchants' Bank*, 4, 147.

Although in consequence of his action notice of protest was not given until too late. *Id.*

Formerly a bill was prima facie evidence to sustain money counts. *Black v. Caffé*, 7, 281.

Contract as between indorsee and drawer of bill drawn and indorsed in foreign country but payable here, regulated by law of this State. *Everett v. Vendryes*, 19, 436.

Drawer or indorser of bill specifying no place of payment except by address to the drawer at a certain city, not discharged by acceptance payable at a particular bank in that city. *Troy City Bank v. Lauman*, 19, 477.

If acceptance is refused, no further demand necessary to charge drawer or indorser. *Plato v. Reynolds*, 27, 586.

When bill is that of corporation and not of president individually. *Olcott v. Tioga R. Co.*, 27, 546.

Acceptor cannot set up, as against a transferee, that bill was property of a bank and transferred by cashier without authority. *City Bank of New Haven v. Perkins*, 29, 554.

Bill payable to cashier is deemed to belong to bank, and passes by such indorsement. *Bank of State of New York v. Muskingum Branch of Bank of State of Ohio*, 29, 619.

Delay in presenting bill by request of drawer is excusable. *Sheldon v. Chapman*, 31, 644.

Holder of protested bill bound only to notify his immediate indorser. *West River Bank v. Taylor*, 34, 128.

What is foreign bill—usage as to presentment—days of grace. *Commercial Bank of Kentucky v. Varnum*, 49, 269.

Possession of bill by acceptor gives no presumptive right to transfer. *Central Bank of Brooklyn v. Hammett*, 50, 158.

Bill is good consideration for note—neglect to present non-negotiable bill relieves drawer if he is prejudiced thereby. *Newman v. Frost*, 52, 422.

Insolvency of maker or drawer does not excuse non-presentment. *Smith v. Miller*, 52, 545.

When order is not bill of exchange. *Ehrichs v. De Mill*, 75, 370.

See AGENCY; BANK; GIFT; MARRIAGE; PARTNERSHIP; SURETY; USURY.

## NEW LOTS.

Duration of office of police commissioners in. *Bergen v. Powell*, 94, 591.

## NEW TRIAL.

Motion for, when and where to be made, when feigned issues are tried by jury. *Chapin v. Thompson*, 80, 275.

Affidavits on motion for, on ground of newly-discovered evidence, must state character of the evidence. *Adams v. Bush*, 1 Abb. 7.

When exceptions not open for consideration in motion for new trial. *Chapin v. Thompson*, 89, 270.

When proceedings regarded as motion for new trial on minutes, with consent to judgment, and waiver of new trial. *Sayles v. Sims*, 73, 551.

Court of Oyer and Terminer cannot grant. *Quimbo Appo v. People*, 20, 531.

Of course, allowable only in ejectment. *Shumway v. Shumway*, 42, 143.

Motion for, in ejectment, when from the papers it is uncertain what are the actual facts, will be denied. *Sacia v. O'Connor*, 79, 260.

Must be granted for admission of improper and material evidence, although there was sufficient competent evidence to same point. *Williams v. Fitch*, 18, 546.

Must be granted for admission of incompetent evidence unless it appears that it was harmless. *Wilson v. Wilson*, 4 Keyes, 413; 4 Abb. 621.

Admission of improper evidence not cured by direction of judge to disregard it. *Erben v. Lorillard*, 19, 299.

Granted for errors of law and on exception—rule not changed by section 999 of Code of Civil Procedure. *Standard, etc. v. Amazon*, 79, 506.

When a refusal of judge to allow a question to be put to a witness is ground for. *Pratt v. Strong*, 3 Abb. 620.

Should not be granted for incorrect ruling as to damages where jury have found for defendant. *Marchy v. Shults*, 29, 346.

Will not be granted where the evidence is wholly insufficient. *Bronson v. Tuthill*, 1 Abb. 206.

Will not be ordered if no possible proof under the issue can entitle the respondent to judgment. *Burkhardt v. McClellen*, 1 Abb. 263.

Cannot be ordered subject to admission of certain evidence. *Bruce v. Davenport*, 3 Keyes, 472.

Excessive damages—court may refuse to set aside verdict if plaintiff will consent

to deduction. *Sears v. Conover*, 4 Abb. 179.

When judgment against several is erroneous as to one it must be set aside as to all. *Arthur v. Griswold*, 55, 400.

Order granting, is appealable to Court of Appeals. *Clarke v. Brooks*, 1 Abb. 355.

See APPEAL; EVIDENCE; PLEADING; PARTIES; TRIAL.

## NEW YORK CITY.

- I. *Statutes relating to, and construction.*
- II. *Powers, etc., of city and boards.*
  1. *City and common council.*
  2. *City boards.*
- III. *Property rights of city.*
- IV. *Officers of city, powers, etc.*
  1. *Appointment, removal and vacancies.*
  2. *Salary and compensation.*
  3. *Miscellaneous.*
- V. *Taxation.*
- VI. *Assessments for improvements.*
- VII. *Street improvements, etc.*
- VIII. *Contracts by city and boards.*
- IX. *Negligence.*
- X. *Appropriation of lands by.*
- XI. *Surrogate and sheriff.*
- XII. *Miscellaneous.*

### I. *Statutes relating to, and construction.*

Metropolitan police law construed. *People v. Draper*, 15, 532.

Construction of act of March 27, 1821, for extension of Battery. *People v. Vanderbilt*, 26, 287; 28, 396.

Vessel receiving gunpowder on freight exempt from penalties under chapter 291, Laws of 1846, section 20. *Cathcart v. Fire Department of City of New York*, 26, 529.

Metropolitan fire district act valid. *People v. Pinckney*, 32, 377.

Construction of fire limits act, Laws of 1849, chapter 84, section 20. *New York Fire Dept. v. Buhler*, 35, 177.

Laws of 1865, chapter 381, as to sewers—application of. *Matter of Protestant Episcopal School*, 46, 178.

Statutes as to Court of Oyer and Terminer construed. *Smith v. People*, 47, 330.

Sewerage and drainage—construction of Laws of 1865, chapter 381. *Matter of N. Y. Prot. Epis. Pub. School*, 47, 556.

Act of 1872, chapter 580, not unconstitutional. *Matter of Delancey*, 52, 80.

Construction of act of 1869, chapter 876, section 7, as to paying claims of fire companies—action to recover excess paid cannot be maintained by State. *People v. Fields*, 58, 491.

Act of 1844, chapter 315, article 4, section 8, as to summary judgments upon forfeited recognizances. *People v. Quigg*, 59, 83.

Contract void under act of 1870, chapter 383, made valid by act of 1871, chapter 5, section 1, as to regulating and grading Tenth avenue. *Brown v. Mayor*, etc., 63, 239.

Act of 1873, chapter 335, vesting appointment of commissioner of juries in common council, is constitutional. *People v. Dunlap*, 66, 162.

Act annexing towns from Westchester county—election of justice. *People v. Flanagan*, 66, 237.

Act of 1832, chapter 158, section 1, as to ordinances as evidence on trial. *Porter v. Waring*, 69, 250.

Act to prohibit dramatic performances on Sunday is constitutional. *Neuendorff v. Duryea*, 69, 557; 25 Am. Rep. 235, note.

Legislature may abolish board and office of assistant aldermen. *Demarest v. Mayor*, etc., 74, 161.

Act of 1869, chapter 569, section 4, as to sheriff's fees, is valid. *Richards v. Richards*, 76, 186.

Act of 1874, chapter 545, relating to Marine Court, not repealed by act of 1875, chapter 479. *Gordon v. Hartman*, 79, 221.

Union Theo. Sem. (act 1870, chapter 129), act of 1848, chapter 319, made applicable to—devise to corporation—will to be made two months before death. *Kerr v. Dougherty*, 79, 327.

Act of 1874, chapter 604, for laying out, valid. *Matter of Application of Dept. of Pub. Parks*, 86, 437.

Act of 1855, chapter 337, in reference to Courts of Sessions in—does not affect 2 R. S. 209, §§ 5, 6, as to removal of indictments. *Leighton v. People*, 88, 117.

Construction of Laws of 1871, chapter 625, in relation to protection of elevator openings. *Harris v. Perry*, 89, 308.

Laws of 1870, chapter 593, as to Eighth avenue improvement, unconstitutional. *Matter of Blodgett*, 89, 392.

Statutes imposing percentage tax on insurance companies for benefit of exempt fireman's fund are not unconstitutional nor repealed by Laws of 1880, chapter 542, etc. *Trustees of Exempt Fireman's Fund v. Roome*, 93, 313; 45 Am. Rep. 317.

Act of 1883, prohibiting manufacture of tobacco in tenement-houses, unconstitutional. *Matter of Paul*, 94, 497.

## II. Powers, etc., of city and boards.

### 1. City and common council.

Power to build and extend piers—"slip" space between docks. *Thompson v. Mayor*, etc., 11, 115.

Has no right to permit a steam railroad in the streets. *Davis v. Mayor*, etc., 14, 506.

Cannot grant franchise of operating railway in streets for indefinite period. *Milhan v. Sharp*, 27, 611.

Common council may not authorize crib or pier in harbor. *People v. Vanderbilt*, 28, 396.

Cannot confer gratuitous grant to construct and maintain a street railway—confirmation by legislature—acceptance of grant by corporation—statute of limitations. *Coleman v. Second Ave. R. Co.*, 38, 201.

Common council may determine rent of city's real estate. *Schanck v. Mayor*, etc., 69, 444.

### 2. City boards.

Board of Health (R. S., pt. 1, ch. 14, tit. 1-5) cannot sue or be sued. *Gardner v. Board of Health*, 10, 409.

Power of board of health to abate nuisance and bind city by contract therefor. *Gregory v. Mayor*, etc., 40, 273.



Board of health providing for drainage of land—act of 1871, chapter 566—by means other than sewers—expense on lands benefited—no authority to fill in lands. *Matter of Van Buren*, 79, 384.

Powers of board of apportionment and audit. *People v. Board of Apportionment*, 52, 224.

By act of 1867, chapter 697, power of common council in specified streets, was vested in Central Park commissioners. *Fearing v. Irwin*, 55, 486.

Finance department has no power of supervision or review over supervisors by acts of 1857, chapter 590, section 6, 1870, chapter 190, section 6. *People v. Green*, 56, 466.

Mandamus cannot issue to comptroller until auditor has allowed vouchers. *People v. Green*, 56, 476.

Power of commissioners of public charities to bind to apprenticeship. *People v. Weissenbach*, 60, 385.

Power of supervisors to hire armories. *Ford v. Mayor, etc.*, 63, 640.

County canvassers have power to designate newspapers to publish election returns. *Hankins v. Mayor, etc.*, 64, 18.

Supervisors may furnish Ludlow street jail. *Schenck v. Mayor, etc.*, 67, 44.

Kingsbridge within jurisdiction of Central Park commissioners. *Hogan v. Mayor, etc.*, 68, 17.

Board of health cannot recover a penalty for omission of owner of premises to comply with special order. *Health Department of City of New York v. Knoll*, 70, 530.

Power of Central Park commissioners and commissioners of public works to improve streets—power of common council to dispense with letting contracts in prescribed manner cannot be delegated. *Matter of Petition of Emigrant Indus. Sav. Bank*, 75, 388.

Excise commissioners properly appointed under general act of 1870, chapter 175. *People v. Morrison*, 78, 84.

Decision of board of aldermen that a person is not a member is not conclusive as against the people. *People v. Hall*, 80, 117.

Decision of board of assistant aldermen as to election of members does not oust

the courts of jurisdiction. *McVeany v. Mayor, etc.*, 80, 185; 36 Am. Rep. 600.

Department of public works may construct sewer—notice of assessment may be given by publication. In *Matter of Petition of DePeyster*, 80, 565.

### III. Property rights of city.

Rights in land under water at East and North rivers—conflicting grants for wharfage—act of April 3, 1798. *Furman v. Mayor, etc.*, 10, 567.

Right to wharf on its own lands. *Marshall v. Guion*, 11, 461.

Fee of streets in, is in trust for use by all people of the State—street may be used for horse railway without compensation to owners. *People v. Kerr*, 27, 188.

Lease of wharf—rights of lessee. *Comm'rs of Pilots v. Clark*, 33, 251.

May make or pave street in manner or material not admitting of competitive bids notwithstanding act of 1870, chapter 137, section 104. *Matter of Petition of Dugro*, 50, 513.

Authority to take leases. *People v. Green*, 64, 499.

Title to tide-way. *Towle v. Remsen*, 70, 303.

Has no title to land under water between piers—vessel fastened to pier is not “lying at anchor.” *Walsh v. New York Floating Dry Dock Co.*, 77, 448.

When acquired title by adverse possession. *Sherman v. Kane*, 86, 57.

Wharfage rights granted by city include appurtenant access to wharf, right granted cannot be impaired except upon compensation. *Langdon v. Mayor of New York*, 93, 129.

Boundary between New York and Kings counties is actual low-water line on Brooklyn side. *Atlantic Dock Co. v. City of Brooklyn*, 3 Keyes, 444; 1 Abb. 24.

### IV. Officers of city, powers, etc.

#### 1. Appointment, removal and vacancies.

Governor cannot fill vacancy in office of street commissioner. *People v. Conover*, 17, 64.

Metropolitan police act as amended by chapter 259, section 69, Laws of 1860 — how office of patrolman vacated under. *People v. Board of Metropolitan Police*, 26, 316.

Comptroller's power to appoint commissioner of taxes. *People v. Woodruff*, 32, 355.

Common council may appoint district janitor under act of 1869, chapter 876, section 11. *Sullivan v. Mayor, etc.*, 53, 652.

When offices incompatible — vacancy. *People v. Green*, 58, 295.

Police justices may be appointed in. *Wenzler v. People*, 58, 516.

Removal of inspector of election under act of 1872, chapter 675, section 13, how made. *Gardner v. People*, 62, 299.

Appointment and removal of clerks of District Court. *People v. Flynn*, 62, 375.

Appointment of additional clerk by common council — fixing salary. *Costello v. Mayor, etc.*, 63, 48.

Power of sheriff to appoint attendants in Court of Oyer and Terminer. *Day v. Mayor, etc.*, 66, 592.

Council to health department vacates office by accepting office of chief supervisor of election. *Davenport v. Mayor, etc.*, 67, 456.

Member of police force not removable without public trial. *People v. Board of Police Comm'rs*, 67, 475.

Removal of policeman — acting as policeman when ineligible is not "conduct unbecoming an officer." *People v. Board of Police*, 72, 415.

Removal of clerk of fire department — what is "cause" for. *People v. Board of Fire Comm'rs*, 72, 445.

Power of fire department to remove subordinates not "regular clerks" — construction of "regular clerks." *People v. Board of Fire Comm'rs*, 73, 437.

Removal of assistant clerk of District Court — judgment of ouster — clerk does not lose his office by being elected to assembly or accepting other clerical positions — "city or county office." *People v. Murray*, 73, 535.

Requisites of charges for removal of member of fire department. *People v.*

*Board of Fire Comm'rs of New York*, 77, 153.

Commission of public works — power to appoint janitors. *Kennedy v. Mayor*, 79, 361.

When decision of fire commissioners, dismissing member of the department, cannot be reviewed on certiorari. *People v. Board, etc.*, 82, 358.

Charter (act 1873, chapter 335) officers removable at pleasure of mayor — sole judge of propriety of its exercise. *People v. Mayor*, 82, 491.

Commissioner of public works has exclusive power to appoint janitors of district court-houses. *Fagan v. Mayor, etc.*, 84, 348.

Removal of clerk under charter, Laws 1873, chapter 335 — discharged because clerkship abolished, no funds to pay for services. *Phillips v. Mayor*, 88, 245.

Fire commissioners, public officers not agents of — if wrongfully remove member of department, city not liable. *Terhune v. Mayor*, 88, 247.

Misconduct of police officer justifying removal from office. *People v. Jourdan*, 90, 53.

Clerk of department no longer needed may be removed without notice. *Langdon v. Mayor of N. Y.*, 92, 427.

Board of police — upon certiorari to review dismissal of policeman error of law only can be considered — board not a court limited by Constitution — rule 131 of board held valid under city charter. *People v. Police Commissioners*, 93, 97.

Removal of subordinates by heads of departments must be for cause and on notice but may be without formal trial or regular evidence. *People v. Thompson*, 94, 451.

## 2. Salary and compensation.

Appraisers appointed by commissioners of sinking fund may recover compensation from city — agreement of comptroller for — estoppel by letter. *Muller v. Mayor, etc.*, 63, 353.

Board of apportionment may not fix salaries of clerks of District Courts. *Whitmore v. Mayor, etc.*, 67, 21.

Increase of salaries of city judge and commissioner of juries, when valid—holding over—interest. *Taylor v. Mayor, etc.*, 67, 87.

Corporation counsel entitled to compensation in street opening cases in addition to salary. *O'Gorman v. Mayor, etc.*, 67, 486.

Alderman cannot draw salary as supervisor. *Billings v. Mayor, etc.*, 68, 413.

Power of police board to fix salary of police surgeon—cannot reduce amount fixed by law—bound to obey mandamus to draw requisition, although comptroller may have no fund subject thereto. *People v. Board of Police*, 75, 38.

As to salary of police officers under act of 1870, chapter 137, section 47. *People v. Smith*, 77, 347.

Salary of attendant of Supreme Court may not be increased while in office. *Rowland v. Mayor, etc.*, 83, 372.

Powers of auditor—rejection of claim allowed by trustees of College of City of New York for salary of deceased teacher subsequent to death is proper. *People v. Jackson*, 85, 541.

Act of 1873, chapter 538—office abolished—removal—cannot recover salary. *Fitch v. Mayor*, 88, 500.

Police patrolman entitled to salary while entitled to office—board cannot deduct from salary for sickness—history of legislation of police force given, and statutes collated. *People v. French*, 91, 265.

Board of education—sickness does not affect right of clerk to salary—estoppel from knowledge of officers. *O'Leary v. Board of Education of New York*, 93, 1; 45 Am. Rep. 156.

Policeman has not vested right to pension under Laws of 1871, chapter 126. *People v. Matsell*, 94, 179.

### 3. Miscellaneous.

Notice to comptroller is notice to the city. *Field v. Mayor, etc.*, 6, 179.

Governor of alms-house may not purchase city's real estate. *Roosevelt v. Draper*, 23, 318.

Commissioner of records constitutionally created—on death of one power survives to survivors. *People v. Palmer*, 52, 83.

Jurisdiction of fire marshal in investigating origin of fires—act of 1873, chapter 335. *Harris v. People*, 64, 148.

Authority of health officer of port of New York over vessels in quarantine—act of 1850, chapter 275. *Kennedy v. Ryall*, 67, 379.

Clerks of Eighth District Court appointed in May, 1872, have term of six years. *People v. Leask*, 67, 521.

City auditor before 1874—could not reduce amount of claims—when mandamus proceedings not an adjudication. *Lanigan v. Mayor, etc.*, 70, 454.

Legislature may shorten term of aldermen in office—salary. *Long v. Mayor, etc.*, 81, 425.

Appointed under act of 1873, chapter 338, accepting added duties, although he might properly have declined, is chargeable for proper performance. *People v. Campbell*, 82, 247.

Superintendent of telegraph in fire department is not "head of bureau" nor "regular clerk." *People v. Board of Fire Commissioners*, 86, 149.

Comptroller may move, through counsel other than the corporation counsel, to vacate judgments obtained by collusion or fraud. *Baldwin v. Mayor*, 1 Abb. 75.

May employ additional counsel. *Mayor, etc. v. Exchange Fire Ins. Co.*, 3 Trans. App. 206.

### V. Taxation.

Exemption of hospital from taxation valid. *People v. Commissioners of Taxes*, 47, 501.

Powers of commissioners of taxes as to change of assessment and taxation of corporations. *People v. Commissioners of Taxes*, 91, 593.

State taxes in, uncollected, payable by county. *Mayor of New York v. Davenport*, 92, 604.

Commissioners of taxes under Laws of 1870, chapter 382, section 8, and the department succeeding them under charter

of 1873, cannot exempt property not exempt by law from taxation. *People v. Campbell*, 93, 196.

#### VI. Assessment for improvements.

May regulate a street at its own expense and afterward assess therefor — mode of assessment — demand — levy. *Manice v. Mayor, etc.*, 8, 120.

For widening street is lien on lots like mortgage — defective proceedings to enforce do not discharge. *Mayor, etc. v. Colgate*, 12, 140.

Paving contract — crosswalks — proposals — assessments — deduction. *Matter of Petitions of Eager*, 46, 100.

For local improvement, invalid where the commissioner of public works does not certify the expense. *Matter of Petition of Cameron*, 50, 502.

For sewer under act of 1872, chapter 580, valid. *Matter of Petition of Mayer*, 50, 504.

Burden of showing fraud in, under act of 1858, chapter 338, is on applicant — single publication of resolution. *Matter of Petition of Basford*, 50, 509.

Proceedings to vacate assessment under act of 1858, chapter 338. *Matter of Delancey*, 52, 80.

Void without publication of resolution, although no official papers had been designated. *Matter of Smith*, 52, 526.

When owner may object to assessment for repaving. *Matter of Petition of Astor*, 53, 617.

When assessment for sewer becomes a lien on land. *Dowdney v. Mayor, etc.*, 54, 186.

Act of 1872, chapter 580, section 7, as to vacating assessments, applies to suits as well as special proceedings. *Lennon v. Mayor, etc.*, 55, 361.

For reflagging — “party aggrieved” — designation of newspapers. *Matter of Phillips*, 60, 16.

Act of 1858, chapter 338, as to vacating assessments, does not apply to assessments under R. L. 1813, chapter 84, section 178, as to opening and widening streets. *Matter of Arnold*, 60, 26.

Omission to publish resolution or report of committee of either board of council for repaving street is fatal to assessment. *Matter of Petition of Little*, 60, 343.

Omission to publish resolution or report of either board of council is fatal to assessment for repaving — designation of newspaper — new trial. *Matter of Petition of Anderson*, 60, 457.

For repaving — designation of official newspaper — “party aggrieved” — lessee — evidence — laying crosswalks is “paving.” *Matter of Burke*, 62, 224.

Report of commissioners having been confirmed no action lies to vacate assessment for street opening. *Dolan v. Mayor, etc.*, 62, 472.

For grading Sixth avenue under act of 1865, chapter 564 — commissioners not all meeting — deposit by comptroller for expenses. *Astor v. Mayor, etc.*, 62, 567.

For street opening under act of 1869, chapter 890 — objection must be raised before confirmation of commissioners' report. *Astor v. Mayor*, 62, 580.

Sewer assessment — acquiring title to street — two sewers in one contract — rehearing. *Matter of Ingraham*, 64, 310.

Against religious society — void when general tax-roll does not show the property and its valuation. *Matter of Petition of Second Ave. Meth. Epis. Church*, 66, 395.

Not entered in title book, lien within covenant in deed. *DePeyster v. Murphy*, 66, 622.

For repaving — certificate of absence of fraud curing irregularities — act of 1874, chapter 313, not retroactive. *Matter of Petition of Peugnet*, 67, 441.

For construction of sewer is in jurisdiction of department of public works. *Matter of Petition of Zborowski*, 68, 88.

On re-letting — bond of former contractor should be first enforced and the amount applied in diminution — fraud — remedy. *Eno v. Mayor, etc.*, 68, 214.

Limitation to half general tax valuation — property exempt from taxation not exempt from assessment — last valuation is binding — assessment valid up to one-half. *Matter of Petition of St. Joseph's Asylum*, 69, 353.

Exceeding half value of property, under act of 1872, chapter 580, is void — apportionment on several lots assessed together. *Matter of Petition of Cram*, 69, 452.

Burden to show that it exceeds half the value of the property is on petitioner — but when that is shown the assessment must be set aside unless the city shows precise true valuation. *Matter of Petition of Hebrew, etc., Society*, 70, 476.

Petition to vacate assessment for repaving — when delay of petitioner not fatal. *Matter of Petition of Lord*, 78, 109.

To vacate assessment for repaving, actual payment of former assessment must be proved. *Matter of Petition of Willett*, 70, 490.

Cannot be vacated after payment — act of 1858, chapter 338. *Matter of Petition of Lima*, 77, 170.

Basis of valuation in 1873 — act of 1840, chapter 326. *Matter of Petition of Schell*, 76, 432.

What amounts to "actual fraud," sufficient to vacate — acts of 1874, chapters 312, 313. *Matter of Petition of N. Y. Prot. Epis. Pub. School*, 75, 324.

When mortgagee is "party aggrieved" by fraud in assessment for local improvement — what is single improvement — separate assessments — judicial notice of custom. *Matter of Petition of Walter*, 75, 354.

For reflagging sidewalk void unless work petitioned for. *Matter of Petition of Garvey*, 77, 523.

Powers of board for correction of assessments — city not liable for their negligence or omission. *Tone v. Mayor, etc.*, 70, 157.

May grade street at its own expense before assessment — action of assessors and board of revision — ordinance not assailable because benefit does not equal expenditure — construction of assessors' report. *Matter of Petition of Roberts*, 81, 62.

Work done without a contract, charter, act 1873, chapter 335, section 91, error, and assessment therefor illegal. *Matter of Robbins*, 82, 131.

Withdrawing item from competition invalidates assessment when work to be let to

lowest bidder. *Matter of Manhattan Savings Bank*, 82, 142.

Will not be vacated because of omission of strip of land of which no valuation appeared, assessors having no power to value or assess — if record does not disclose petitioner assessed, fatal to application to vacate. *Matter of Churchill*, 82, 283.

By Central Park commissioners for change of street grade — when consent of adjoining owners not necessary. *Matter of Petition of Walter*, 83, 538.

Not "taxation" — basis of assessment — assessment for sewer not vitiated by omission of sewer from map. *Roosevelt Hospital v. Mayor, etc.*, 84, 108.

For sewer — when invalid. *Matter of Petition of Merriam*, 84, 596.

For change of street grade — "substantial error" — erroneous principle — area. *Matter of Petition of Cruger*, 84, 619.

For grading — when park commissioners and successors cannot lay without action of common council. *Matter of Petition of Deering*, 85, 1.

For paving — "prior pavement" — burden on petitioner to show erroneous. *Matter of Petition of Brady*, 85, 268.

Under act of 1872, chapter 580 — failure of commissioners to take oath — effect of certificate that contract is free from fraud. *Matter of Petition of Kimball*, 85, 302.

Under act of 1872, chapter 580 — when appearing and objecting before board of revision does not conclude from instituting proceedings to set aside. *Matter of Application of Lange*, 85, 307.

For sewer — act of 1870, chapter 383, section 27, constitutional — certificate of commissioner of public works as to expense, when invalid. *Matter of Metropolitan Gas-light Co.*, 85, 526.

For paving — subsequent grantee subject to, is "party aggrieved" — burden on petitioner to show erroneous. *Matter of Petition of Gantz*, 85, 536.

Corrected by deducting illegal item — interest. *Matter of Petition of Pelton*, 85, 651.

Vacating for irregularities — omission to file map — Laws 1872, chapter 872, constitutional. *Matter of Upson*, 89, 67.

Construction of Laws 1871, chapter 226, section 4, etc., as to establishment of grade of streets — validity of assessment. *Matter of Mutual L. Ins. Co.*, 89, 530.

For sewers — items chargeable in — engineer and surveyor's fees — sufficiency of notice. *Matter of Lowden*, 89, 548.

Presumption as to assessment for improvements is in favor of legality — burden on petitioner to establish irregularity. *Matter of Voorhis*, 90, 668; *Matter of Brady*, 85, 268.

Contract for public work, under section 91 of charter of 1873 — powers of department of public works under section 73 — assessment for sewerage. *Matter of Blodgett*, 91, 117.

Evidence of fraud in contract for improvement invalidating assessment — extravagant prices for work. *Matter of Righter*, 92, 111.

Act of 1873, chapter 528, section 4, held to authorize construction of sewer on Tenth avenue by day's work and to be constitutional — assessment reduced for fraud. *Matter of Leake, etc.*, *Orphan Home*, 92, 116.

Petitioner to vacate assessment has no right to relief from voluntary payments. *Matter of Hughes*, 93, 513.

Act of 1880, chapter 550, sections 2 and 8, as to assessments for local improvements, does not debar the owner from contesting an assessment on the ground that it is void. *Chase v. Chase*, 95, 373.

#### VII. Street improvements, etc.

Proposal for regulating street not binding until approved by common council — notice — security for performance of contract. *Smith v. Mayor, etc.*, 10, 504.

Designation of official newspapers under tax levy acts of 1863, 1867 and 1868 — effect of. *Petition of Astor*, 50, 363.

Designation of official newspapers valid until new one made, under act of 1870, chapter 388, section 1. *Matter of Folsom*, 56, 60.

Under charter of 1870, publication of resolutions and ordinances for improve-

ments in one newspaper was sufficient. *Matter of Petition of Conway*, 62, 504.

When no legal designation of official newspapers has been made, resolution for local improvement is unauthorized — "repaving street" — street includes sidewalk and gutters. *Matter of Petition of Burmeister*, 76, 174.

First pavement of carriage-way in street where sidewalks have been paved is not a "repavement." *Matter of Petition of Grube*, 81, 139.

Opening street not effectually dedicated — easement — award — sharing of — adverse possession — purchaser on execution sale — assignment by purchaser. *Matter of Eleventh Ave.*, 81, 436.

Proposals for local improvement — when may contingently fix price for part of work — "substantial error." *Matter of Petition of Marsh*, 83, 431.

Change of street grade — when work not "in progress." *Matter of Petition of Weil*, 83, 543.

#### VIII. Contracts by city and boards.

Plans for market — employment of architect — awarding contract. *Peterson v. Mayor, etc.*, 17, 449.

Comptroller not compellable to pay claim until audited — may require detailed statement. *People v. Flagg*, 17, 584.

What constitutes contract for work — modification when unauthorized — quantum meruit. *Bonesteel v. Mayor, etc.*, 22, 162.

Commissioner of public works, in prosecuting improvements for distribution of Croton water, need not advertise for proposals as provided in respect to city contracts. *Greene v. Mayor, etc.*, 60, 303.

When contract by commissioner of public works for sewer materials is valid. *Nelson v. Mayor, etc.*, 63, 535.

Payments on contracts of board of education, how regulated. *Dannat v. Mayor, etc.*, 66, 585.

When not liable for materials except on compliance with conditions of charter. *McDonald v. Mayor, etc.*, 68, 23; 23 Am. Rep. 144.

Not liable for services on employment of county court-house commissioners.

*Miller v. Mayor, etc.*, 76, 151.

When may hire real estate. *Davies v. Mayor, etc.*, 83, 207.

Certificate of commissioners, under act of 1872, chapter 580, that award of contract for paving is free from fraud, does not validate award under invalid ordinance rescinded before 1872. *Baird v. Mayor, etc.*, 83, 254.

When action maintainable against, under contract with police department for cleaning streets. *Swift v. Mayor, etc.*, 83, 528.

Assignment of claims against, not at the time enforceable, held valid. *Jones v. Mayor of New York*, 90, 387.

Lease to county held renewed by continuance of officers in possession after termination of term. *Davies v. Mayor of New York*, 93, 250.

Work without contract to be authorized by common council can only be such as is necessary to complete particular jobs, and must be authorized beforehand. *Haughwout v. Mayor, etc.*, 2 Abb. 344.

Contract for cleaning streets must precede work. *Haughwout v. Mayor, etc.*, 2 Keyes, 419.

### IX. Negligence.

Bound to keep its streets safe for travel and liable for negligence therein. *Hutson v. Mayor, etc.*, 9, 163.

Not liable for obstruction of street by citizens not notified to officers. *Griffin v. Mayor, etc.*, 9, 456.

Not liable for negligence of commissioner of public charities *Maximilian v. Mayor, etc.*, 62, 160; 20 Am. Rep. 468.

Not liable for negligence of commissioners of department of public instruction. *Ham v. Mayor, etc.*, 70, 459.

Not liable for injury by obstruction in Hudson river in front of pier. *Seaman v. Mayor, etc.*, 80, 239; 36 Am. Rep. 612.

Board of education not liable for injury by defect in school yard. *Donovan v. Board of Education*, 85, 117.

Limitation of three years applies to action for injury from icy streets—thirty days' exemption from suit by charter does not extend time of statute. *Dickinson v. Mayor of New York*, 92, 584.

### X. Appropriation of lands by.

Award for value of property taken for street improvement—over-payment on, by mistake, recoverable. *Mayor, etc. v. Erben*, 38, 305.

Title of owner of lands condemned for street opening not divested until corporation takes possession or until fifteen months elapse. *Detmold v. Drake*, 46, 318.

Under act of 1813, chapter 86, section 178, as to taking land for streets, compensation must be made for buildings as well as land—waiver by owner. *Schuchardt v. Mayor, etc.*, 53, 202.

Acquiring fee for street improvement—suspension—interest on award. *Hamersley v. Mayor, etc.*, 56, 533.

On an award of damages to "unknown owners" for street improvements the real owners may recover. *Fisher v. Mayor, etc.*, 57, 344.

Department of public works may discontinue proceedings for laying out parade ground—act of 1871, chapter 628. *Matter of Military Parade Ground*, 60 319.

Lot-owners entitled to damages for change of grade by park commissioners. *People v. Green*, 64, 606.

Award of damages for street widening—action to recover—limitation—confirmation—evidence—presumption of payment. *Fisher v. Mayor, etc.*, 67, 73.

Sewer cannot be built through private lands without owner's consent—when premises held not to be a street. *Matter of Petition of Rhinelander*, 68, 105.

Award of commissioners for street improvement conclusive on city—"unknown owners"—adverse possession—champer. *Matter of Application of Department of Parks*, 73, 560.

Compensation must be made for lands appropriated for drainage. *Matter of Petition of Cheesebrough*, 78, 232.

Award for damages changing grade of street — right of party named disputed — amount to be paid to chamberlain subject to order of court — city cannot pay after knowledge of dispute — no defense against true owner. *Hatch v. Mayor*, 82, 436.

Award of damages for widening street — assignment — vacating and new award and assignment — ascertainment of persons entitled not essential. *Spears v. Mayor, etc.*, 87, 359.

Control of court as to payment of compensation awarded for lands taken by city. *Matter of Mayor of New York*, 90, 390.

Owners of property on old Bloomingdale road entitled to compensation for closing — assessment for improvement in closing road valid. *Matter of Barclay*, 91, 430.

Acceptance of an award for damages as full payment waives claim for interest. *Cutter v. Mayor of N. Y.*, 92, 166.

In action on award for damages under act of 1813 inequity of award no defense. *De Peyster v. Mali*, 92, 262.

### XI. Surrogate and sheriff.

Surrogate's power to appoint referee to examine executor's account. *Buchan v. Rintoul*, 70, 1.

Power of surrogate to award allowances for counsel fees in lieu of costs. *Noyes v. Children's Aid Society*, 70, 481.

Surrogate — election to fill vacancy supplies only unexpired term — mandamus to compel notice of election for full term. *People v. Parr*, 86, 512.

Fees of sheriffs and referees on foreclosure sales. *Schermerhorn v. Prouty*, 80, 317.

Fees of sheriff in attachments issued before Code of Civil Procedure. *Woodruff v. Imperial F. Ins. Co.*, 90, 521.

### XII. Miscellaneous.

Supervisors may be compelled to pay expenses of district attorney in prosecuting for violations of Sunday liquor law — mandamus. *People v. Board of Supervisors*, 32, 473.

Prohibition of resolutions until after publication, mandatory. *In re Petition of Douglass*, 46, 42.

Order confirming report of commissioners under Laws of 1869, chapter 890, may be set aside on motion for irregularity, mistake or fraud. *Matter of Application of Mayor, etc.*, 49, 150.

Lis pendens under act of 1871, chapter 625, does not impair lien of prior mortgage. *Mitchell v. Smith*, 53, 413.

To recover excess paid to fire companies in New York city under act of 1869, chapter 876, section 7, not maintainable by State. *People v. Fields*, 58, 491.

Land-owner contracting for excavation on his own land must request license to enter on adjoining land to support walls. *Dorrity v. Rapp*, 72, 307.

Ordinance for street improvement, passed without prior publication of resolution, estops the city as to contracts made and performed under it. *Moore v. Mayor, etc.*, 73, 238 ; 29 Am. Rep. 134.

When wreck not within harbor — "main sea." *People v. Supervisors of Richmond County*, 73, 393.

Under charter (act 1870, chapter 137), each board of aldermen to cause notice of introduction of resolution or ordinance to be published before final action. *Matter of De Pierris*, 82, 243.

Mechanics' lien law of 1875 for New York not repealed by general lien law of 1880. *McKenna v. Edmondstone*, 91, 231.

Lien by materialman on fund due contractor from city applies only to liability for materials for that contract. *Quinlan v. Russell*, 94, 350.

Usage of banks in the city of New York regarding commercial paper — bona fide holder. *Market Bank v. Hartshorne*, 3 Abb. 173.

Mandamus to compel issue by common council of "market stock." *People v. Common Council of City of N. Y.*, 3 Keyes, 81.

Rights of upland owners in tide-way — comptroller's deed — requisites. *Mayor, etc. v. Hart*, 95, 442.

See ASSESSMENT ; CONSTITUTIONAL LAW ; MUNICIPAL CORPORATION ; OFFICE AND OFFICER ; TAXATION.



**Nolle Prosequi.**

See CRIMINAL LAW ; MALICIOUS PROSECUTION.

**Non-Imprisonment Act.**

See INSOLVENCY.

**Nonsuit.**

See FORMER ADJUDICATION ; JUDGMENT ; TRIAL.

**NOTARY.**

Intendments in favor of certificate of protest. *McAndrew v. Radway*, 34, 511.

Protected for protest on day directed by employer. *Bank of Kentucky v. Varnum*, 49, 269.

See BANK ; EVIDENCE ; NEGLIGENCE ; NEGOTIABLE INSTRUMENT.

**NOTICE.**

Presumption as to, to purchaser, of conflicting right. *Williamson v. Brown*, 15, 354.

What is constructive, of fraud, to purchaser of land. *Baker v. Bliss*, 39, 70.

When purchaser of land not chargeable with constructive. *Cambridge Valley Bank v. Delano*, 48, 326.

Constructive notice of possession not applicable to uninhabited dwelling-house. *Brown v. Volkening*, 64, 76.

Constructive notice of prior lien by knowledge of facts — cases on constructive notice collated. *Ellis v. Horrman*, 90, 466.

Possession of land by one not holding record must be visible and unequivocal to constitute notice. *Pope v. Allen*, 90, 298.

Occupancy of land under contract of purchase, constructive notice of contract. *Trustees of Union College v. Wheeler*, 61, 88.

Notice to purchaser of existence of liens charges him with notice of all incumbrances which inquiry would disclose. *Reed v. Gannon*, 50, 345. Same principle, *Dunn v. Hornbeck*, 72, 80.

See AGENCY ; APPEAL ; BANK ; CARRIER ; CORPORATION ; ESTOPPEL ; EVIDENCE ; JUDGMENT ; MASTER AND SERVANT ; MUNICIPAL CORPORATION ; NEGLIGENCE ; NEGOTIABLE INSTRUMENT ; NOTICE OF PENDENCY ; PRACTICE ; RECORDING ACT.

**NOTICE OF PENDENCY.**

Service of summons does not constitute, as to third persons. *Leitch v. Wells*, 48, 585.

Does not apply to personal property. *Id.*; *Holbrook v. New Jersey Zinc Co.*, 57, 616.

When cloud on title. *Brown v. Goodwin*, 75, 409.

Ineffectual where plaintiff knows of previous transfer. *Lamont v. Cheshire*, 65, 30.

Court may not cancel, pending action. *Mills v. Bliss*, 55, 139.

Unnecessary in ejectment even as against purchaser pendente lite. *Sheridan v. Andrews*, 49, 478.

Custody of the res when proceedings are in rem as constructive notice. *Tracey v. Corse*, 58, 143.

Doctrine has no extra-territorial application — authorities on lis pendens collated. *Holbrook v. New Jersey Zinc Co.*, 57, 616.

Good in foreclosure when any of defendants served. *Fuller v. Scribner*, 76, 190.

Purchaser from fraudulent holder of land with notice of suit to set aside, has no relief for improvements. *Patterson v. Brown*, 32, 81.

See MORTGAGE — Foreclosure.

**NUISANCE.**

Animals dying in city not necessarily a nuisance. *Underwood v. Green*, 42, 140.

One blasting rock on his own land is liable for injury by fragments thrown on another's land, although not negligent. *Hays v. Cohoes Co.*, 2, 159.

And evidence of care is inadmissible, there being no claim of exemplary damages. *Tremain v. Cohoes Co.*, 2, 163.

Brick burning, when is. *Campbell v. Seaman*, 63, 568; 20 Am. Rep. 567.

Storing gunpowder, when nuisance per se. *Heeg v. Licht*, 80, 579; 36 Am. Rep. 654, note.

Jarring of machinery. *McKeon v. See*, 51, 300; 10 Am. Rep. 659.

Tannery—who may maintain action for—evidence. *Francis v. Schoellkopf*, 53, 152.

Created by contractor with city—when city liable. *Vogel v. Mayor of N. Y.*, 92, 10; 44 Am. Rep. 349, note.

Action for obstruction of street not maintainable without special injury. *Davis v. Mayor, etc.*, 14, 506.

Open coal-hole in sidewalk is—action lies against owner of premises for injury by—municipal license to maintain, no defense. *Clifford v. Dam*, 81, 52.

Insufficient flagstone on sidewalk over area. *Congreve v. Smith*, 18, 79.

Liability not discharged by fact that stone was broken by wrong-doers. *Congreve v. Morgan*, 18, 84.

Lot-owner not liable to one injured by failure to remove ice from sidewalk—violation of city ordinance. *Moore v. Gadsden*, 93, 12.

Highway bridge across railroad of less width than highway is not. *People v. New York, etc., R. Co.*, 89, 266.

Courts of this State have no jurisdiction over, on New Jersey shore of New York bay. *People v. Central R. Co. of N. J.*, 42, 283.

Telegraph cable in navigable river. *Blanchard v. Western Union Tel. Co.*, 60, 510.

When water conductor, discharging on sidewalk, not. *Wenzlich v. McCotter*, 87, 122; 41 Am. Rep. 358.

Action lies to abate a dam poisoning the atmosphere to injury of adjoining owner

—estoppel. *Adams v. Popham*, 76, 410.

Crib or pier in New York harbor is. *People v. Vanderbilt*, 28, 396.

Obstructing stream by dam not as to one not navigating. *Groat v. Moak*, 94, 115.

When produced by separate and independent acts of several, each liable only to the extent of his own act. *Chipman v. Palmer*, 77, 51; 33 Am. Rep. 566.

Where legislature transfer turnpike to railroad company without compensation to owners of fee, they may maintain successive actions of damages. *Mahon v. New York Cent. R. Co.*, 24, 658.

Successor to property on which another has erected a nuisance is liable for damage by its continuance, after notice to abate. *Brown v. Cayuga & Susquehanna R. Co.*, 12, 486.

When action lies for one erected by previous owner. *Conhocton Stone Road v. Buffalo, etc., R. Co.*, 51, 573; 10 Am. Rep. 646.

One who knowingly maintains, responsible as one who creates. *Wasmer v. Delaware, etc., R. Co.*, 80, 212; 36 Am. Rep. 608, note.

One who does not own soil of street, not responsible for nuisance erected by others on sidewalk in front of his premises. *English v. Brennan*, 60, 609.

Acceptance of nuisance created by contractor renders acceptor responsible. *Vogel v. Mayor, etc.*, 92, 10; 44 Am. Rep. 349, note.

In case for, possession of premises sufficient—construction of declaration. *Cornes v. Harris*, 1, 223.

When bridge may not be abated as, though motive for erecting unlawful. *Chenango Bridge Co. v. Paige*, 83, 179, 38 Am. Rep. 407.

Coal-hole in sidewalk by permission of authorities is, unless properly made and covered. *Irvine v. Wood*, 51, 224; 10 Am. Rep. 603.

See INJUNCTION; MUNICIPAL CORPORATION; NEGLIGENCE; NEW YORK CITY; WATER AND WATER-COURSES.

## O.

## Oath.

See AFFIDAVIT ; CRIMINAL LAW ; EVIDENCE ; OFFICE AND OFFICER ; WITNESS.

## OFFICE AND OFFICER.

- I. *Who are public officers.*
- II. *Rights and duties of.*
- III. *Powers of.*
- IV. *Liabilities of.*
- V. *Bond of.*
- VI. *Removal of.*
- VII. *Tenure of office.*
- VIII. *De facto officer.*

I. *Who are public officers.*

Deputy county clerk is a public officer, and his certificate of a copy of a judgment docket is good without showing the absence of the clerk. *Miller v. Lewis*, 4, 553.

Agent of municipal corporation is not officer of State. *People v. Conover*, 17, 64.

Metropolitan police act of 1857 construed. *People v. Metropolitan Police Board*, 19, 188.

Commissioner of highways not "judicial officer." *People v. Wheeler*, 21, 82.

When title to office will not be tested by mandamus. *People v. Lane*, 55, 217.

What is sufficient written appointment — nomination to common council. *People v. Fitzsimmons*, 68, 514.

Assistant clerk of District Court in New York, not "city or county office." *People v. Murray*, 73, 535.

Representative in congress holds a "public office" — vacancy in aldermanship by election to congress — mandamus. *People v. Common Council of Brooklyn*, 77, 503 ; 33 Am. Rep. 569.

Right to office may still be tried by action in nature of quo warranto — decision of aldermen of New York city not conclusive against people. *People v. Hall*, 80, 117.

In quo warranto, plaintiffs have affirmative — certificate only prima facie evidence — may go back of returns — evidence of voters as to how they voted, competent. *People v. Thacher*, 55, 525 ; 14 Am. Rep. 312.

When title to office will not be tested by mandamus — attorney-general refusing to bring quo warranto. *Matter of Gardner*, 68, 467.

Burden of proof on relator in quo warranto. *People v. Perley*, 80, 624.

II. *Rights and duties of.*

Officer protected by regular process. *Ruckman v. Cowell*, 1, 505.

One justifying taking of property under legal process must show that he was an officer and had lawful authority to take the property. *Cofley v. Rose*, 2, 115.

Officer justifying under execution as against claimant under alleged fraudulent sale by defendant must prove judgment as well as execution. *Sheldon v. Van Buskirk*, 2, 473.

Salary not property in any sense — may be changed except in cases in which constitution has expressly forbidden it. *Conner v. Mayor, etc.*, 5, 285.

Municipal officer can recover compensation only in case and manner provided by charter. *Baker v. City of Utica*, 19, 326.

Deputy street commissioner in New York city, kept out of office, cannot recover fees from the city. *Smith v. Mayor, etc.*, 37, 518.

Policeman illegally removed, not bound to report for duty. *People v. Board of Police*, 39, 506.

Appraisers in proceedings under eminent domain must all be present at determination. *Board of Water Comm'rs v. Lansing*, 45, 19.

Salary ceases when the property and franchises of the corporation are sold with officer's consent. *Long Island Ferry Co. v. Terbell*, 48, 427.

Deputy superintendent of insurance succeeds in case of vacancy in office of superintendent and is entitled to salary. *People v. Hopkins*, 55, 74.

When offices incompatible. *People v. Green*, 58, 295.

Duty of disbursing, ministerial — money appropriated — cannot refuse to apply — only question is whether for purpose claimed — legislative ratification of illegal contract. *People v. Schuyler*, 79, 189.

Assuming duties, responsible for proper performance — want of skill or efficiency sufficient ground of removal — not responsible for inefficiency to assistants not having power to appoint — evidence must justify removal. *People v. Campbell*, 82, 247.

Sickness does not take away right to salary — discretion of. *O'Leary v. Board of Education of New York*, 93, 1; 45 Am. Rep. 156.

### III. Powers of.

Agreement with sheriff for enlargement of arrested party, not in conformity with statute, void as to officer, but not as to plaintiff in process. *Winter v. Kinney*, 1, 365.

Act of public officer ultra vires may be adopted by party to be benefited. *Farmers' Loan and Trust Co. v. Walworth*, 1, 433.

Tax warrant in due form protects officer even if tax is unlawful. *Chegary v. Jenkins*, 5, 376.

Overseers of poor cannot contract to indemnify those of another town for support of paupers. *Overseers, etc. v. Overseer, etc.*, 15, 341.

Authority to designate State paper, continuing. *Weed v. Tucker*, 19, 422.

Commissioners of excise cannot delegate authority. *Board of Excise v. Sackrider*, 35, 154.

Director of corporation may not act in auditing his own bill. *Butts v. Wood*, 37, 317.

A public contracting board advertising for bids for one kind of pavement cannot award for another. *People v. Board of Improvement*, 43, 227.

When pledge of bonds as security for enlistments, void as taken colore officii, and without consideration. *Richardson v. Crandall*, 48, 348.

Officer may not assign his future salary. *Bliss v. Lawrence*, 58, 442; 17 Am. Rep. 273.

Process apparently valid but really void, available for defense but not for aggression. *Clearwater v. Brill*, 63, 627.

Commissioners for town bonding may not use town funds in individual business. *Bissell v. Saxton*, 66, 55.

Attorney-general cannot be compelled to bring suit to try title. *People v. Fairchild*, 67, 334.

Superintendent of poor — vacancy, how filled. *People v. Comstock*, 78, 356.

Three public officers meet and agreeing on terms and details of contract — when let, one absent, one of others signed absentee's name — contract valid. *Boots v. Washburn*, 79, 207.

Appropriation to pay salary to one — two claiming — how right to, determined. *Kennedy v. Mayor*, 79, 361.

Officer of municipal corporation cannot recover compensation for services, unless it is given by law. *Haswell v. Mayor, etc.*, 81, 255.

Where compensation of State employee is fixed by statute, it cannot be reduced by his superior officer, and acceptance of reduced amount will not estop him from claiming the full compensation. *Kehn v. State*, 93, 291.

### IV. Liabilities of.

Chamberlain of city of New York no liable for refusing to pay a sum ordered, unless shown to have unappropriated and applicable funds. *Huff v. Knapp*, 5, 65.

Officer issuing void warrant, is not liable for its execution after return day, nor for receipt of money collected under it, unless he knew that the collection was after return day. *Van Rensselaer v. Kidd*, 6, 331.

Assessors taxing one not a resident of the town or ward are liable in damages for collection of tax. *Mygatt v. Washburn*, 15, 316.

Assessors not personally liable for errors. *Barhyte v. Shepherd*, 35, 238.

School officers when not liable for costs. *Clarke v. Tunnickiff*, 38, 58.

Assessors are civilly liable for excess of power or unauthorized acts. *Clark v. Norton*, 49, 243.

Superintendent of canal repairs liable for improper act in repairing, etc. *Hicks v. Dorn*, 42, 47.

Ministerial officer liable to action for refusal to do duty — supervisor refusing to present reassessment in highway proceedings — damages. *Clark v. Miller*, 54, 528.

Public officers not chargeable for misconduct of predecessors. *Vose v. Reed*, 54, 657.

Board of education of union free school district not individually liable for negligence. *Bassett v. Fish*, 75, 303.

Superintendent of school buildings and trustees in New York city not liable for negligence of workmen in repairs. *Donovan v. McAlpin*, 85, 185; 39 Am. Rep. 649.

Public officer not liable for injury not directly due to his neglect of duty. *Fitzpatrick v. Slocum*, 89, 358.

Members of a city council are not liable to bidder for contract for loss from their act in awarding contract to another though the award was unlawful and known to them to be so. *East River Gas-light Co. v. Donnelly*, 93, 557.

Individually liable to one injured by misfeasance in repairing streets. *Bennett v. Whitney*, 94, 302.

#### V. Bond of.

What indemnity may be taken by public officer. *Griffiths v. Hardenbergh*, 41, 464.

Increased duties imposed on, do not release bondsmen. *Supervisors of Monroe v. Clark*, 92, 391.

#### VI. Removal of.

Power to remove for "cause" — on notice and reasonable grounds — specific charge to be proved — represented by counsel —

proceedings subject to review by certiorari — practice on. *People v. Nichols*, 79, 582.

Restitution on reversal of judgment of removal from office. *People v. Livingston*, 80, 66.

#### VII. Tenure of office.

Term of justice of peace to fill vacancy — when begins and when ends. *People v. Keeler*, 17, 370.

County judge cannot act after seventy years of age. *People v. Brundage*, 78, 403.

Legislature may shorten term of aldermen in office. *Long v. Mayor, etc.*, 81, 425.

The constitutional limit of certain offices to pleasure of appointing [power, applies only where power is continuous. Constitution, article 10, section 3. *Bergen v. Powell*, 94, 591.

#### VIII. De facto.

Official character of municipal officers may be shown by de facto acts. *Woolsey v. Trustees of Rondout*, 2 Keyes, 603.

Acts of justice of peace de facto not assailable collaterally. *Read v. City of Buffalo*, 3 Keyes, 447.

Officer de jure cannot recover salary when it has been paid to officer de facto, but may recover unpaid salary although services were rendered by officer de facto. *Dolan v. Mayor, etc.*, 68, 274; 23 Am. Rep. 168.

Payment to, de facto defense to action by officer de jure. *Terhune v. Mayor, etc.*, 88, 247.

For services rendered by officer de facto of a city, after adjudication against him, officer de jure may recover salary unless the city has paid it to officer de facto — delay of officer de jure no defense. *McVeany v. Mayor, etc.*, 80, 185; 36 Am. Rep. 600.

See various specific heads.

#### OPINION.

Of judges — how far concurrence deemed to extend. *James v. Patten*, 6, 9.

See APPEAL; EVIDENCE.

**ORDER.**

Acceptor of conditional order drawn on a fund may not defeat condition and set it up as defense. *Risley v. Smith*, 64, 576.

For delivery of goods — what amounts to acceptance. *Briggs v. Sizer*, 30, 647.

On money due on contract, when equitable assignment. *Ehrichs v. De Mill*, 75, 370.

On fund, when equitable assignment. *Brill v. Tuttle*, 81, 454; 37 Am. Rep. 515.

Acceptance of order for money — effect of, as admission. *Richardson v. Carpenter*, 46, 660.

See ASSIGNMENT; BILL OF LADING; NEGOTIABLE INSTRUMENT; SALE.

As to orders of court, see MOTIONS AND ORDERS.

**P.****PARDON.**

Does not authorize dismissal of defendant's writ of error. *Eighmy v. People*, 78, 330.

**PARENT AND CHILD.**

Law of domicile of parents when married determines legitimacy of child. *Miller v. Miller*, 91, 315; 43 Am. Rep. 369.

Deposit in savings bank by parent in trust for child held to create trust. *Willis v. Smyth*, 91, 297.

Undertaking by father of bastard to pay mother for support not unlawful. *Hook v. Pratt*, 78, 371; 34 Am. Rep. 539, note.

Mother's consent to binding of child does not need justice's certificate — Shaker usages no ground for taking away child from them. *People v. Gates*, 43, 40.

Lease by former as agent to latter not constructively fraudulent. *Lingke v. Wilkinson*, 57, 445.

Step-father cannot maintain action for seduction of step-daughter out at service. *Bartley v. Richtmyer*, 4, 38.

Step-child, in absence of agreement, cannot recover against step-father for excess of value of service over education and support. *Williams v. Hutchinson*, 3, 312.

Parent cannot recover for injury to infant child carelessly allowed alone in street if child was negligent. *Honegsberger v. Second Ave. R. Co.*, 2 Abb. 378.

Negligence of parent immaterial unless child is negligent. *McGarry v. Loomis*, 63, 104; 20 Am. Rep. 510.

Negligence — imputable — of child. *Ihl v. Forty-second St., etc., R. Co.*, 47, 317; 7 Am. Rep. 450.

When child not chargeable with contributory negligence of parent as matter of law — question for jury. *Fallon v. Cent. Park, etc., R. Co.*, 64, 13.

Action for enticing child to enlist — ratification — knowledge — evidence — burden of proof. *Caughey v. Smith*, 47, 244.

Father's estate liable on promise to provide in his will for support of his illegitimate child. *Todd v. Weber*, 95, 181.

See GIFT; HABEAS CORPUS; INFANCY; MARRIAGE; SEDUCTION; WILLS.

**PARTIES.**

- I. Generally.
- II. Proper parties.
- III. Necessary parties.
- IV. Not necessary parties.
- V. Parties defendant.
- VI. Representative parties.
- VII. Elective parties.
- VIII. Defect of parties.
  1. Generally.
  2. Non-joinder of parties.
  3. Mis-joinder of parties.
- IX. Real party in interest.

X. *Corporations.*XI. *Practice.*XII. *Joint action.*I. *Generally.*

When one of several associates liable alone after accounting with and credit by his fellows. *Secor v. Law*, 4 Abb. 188.

One joint owner employing agent for all to collect may alone sue him for accounting. *Noe v. Christie*, 51, 270.

Joinder of two causes of action not affecting all defendants demurrable. *Nichols v. Drew*, 94, 22.

II. *Proper parties.*

One charged with fraudulently procuring a will is proper party to bill to set it aside, although has no interest—may be charged with costs. *Brady v. McCosker*, 1, 214.

A single creditor may sue on a statutory bond to several attaching creditors conditioned to pay each his proper amount and to be held for common benefit. *Pearce v. Hitchcock*, 2, 388.

In foreclosure, one claiming adversely and prior to mortgage not proper defendant. *Corning v. Smith*, 6, 82.

Attorney holding legal title to chose in action might, before the Code, maintain action on it in his own name. *Poor v. Guilford*, 10, 273.

Holder and payee of check may sue, when. *Fish v. Jacobson*, 1 Keyes, 539.

In action for specific performance of contract to convey land, prior mortgagees not proper parties. *Chapman v. West*, 17, 125.

Sheriff may sue on bond of indemnity taken by deputy and running to sheriff, without assignment. *Stillwell v. Hurbert*, 18, 374.

Husband not proper, in action by wife concerning her separate property—objection how raised. *Palmer v. Davis*, 28, 242.

Principal and agent may be joined in action for latter's negligence in absence of former. *Phelps v. Wait*, 30, 78.

One claiming and defending title of tenant in possession is proper defendant in ejectment—estoppel—declarations. *Abeel v. Van Gelder*, 86, 513.

Rebel cannot maintain action. *Sanderson v. Morgan*, 39, 231.

In action by attorney for lien on client's judgment, judgment debtor proper party. *Adams v. Fox*, 40, 577.

Assignee for creditors can sue in his individual name—claim due assignor. *Hoagland v. Trask*, 48, 686.

Creditor may sue alone to enforce liability of stockholder of manufacturing company. *Weeks v. Love*, 50, 568.

Husband and wife may join in action for fraud in inducing conveyance of husband's lands. *Simar v. Canaday*, 53, 298; 13 Am. Rep. 523.

When supervisor may sue railroad commissioners to account. *Griggs v. Griggs*, 56, 504.

Grantee under deed containing mistaken boundaries may be joined in action for reformation—restraining suit in ejectment. *Bush v. Hicks*, 60, 298.

Where owner's insurance is payable to incumbrancer the latter may sue alone. *Cone v. Niagara Falls Fire Ins. Co.*, 60, 619.

Transferee of bill of lading may sue carrier in his own name. *Merchants' Bank of Canada v. Union R., etc., Co.*, 69, 373.

Husband may sue for paraphernalia paid for by him. *Curtis v. Delaware, etc., R. Co.*, 74, 116; 30 Am. Rep. 271.

Conditional guarantor proper party defendant in action to foreclose mortgage before Code of Civil Procedure. *Vanderbilt v. Schreyer*, 91, 392.

In action for relief from sale of trust property to trustee, mortgagee from trustee proper party. *Dodge v. Stevens*, 94, 209.

Next of kin may sue for share of estate in hands of third person—infant may sue for moneys belonging to him. *Segelken v. Meyer*, 94, 473.

To enforce promise by father to third parties to provide by will for their disbursements in support of his illegitimate child, the child is the proper plaintiff. *Todd v. Weber*, 95, 181.

III. *Necessary parties.*

When mortgagee necessary party to action to compel satisfaction of assigned mortgage. *Ranger v. Goodrich*, 4 Abb. 1.

On judgment creditor's bill to reach mortgage fraudulently assigned, the assignee is necessary, although non-resident. *Gray v. Schenck*, 4, 460.

In suit by receiver under creditor's bill against trustees of judgment debtor, the latter is necessary. *Vanderpool v. Van Valkenburgh*, 6, 190.

Where mortgage runs to "A., executor of B.," etc., the administrator, with the will annexed, of B. must join the personal representatives of A. *Peck v. Mallams*, 10, 509.

Foreclosure by action is inoperative as to a judgment creditor not made defendant. *Brainard v. Cooper*, 10, 356.

Proceedings for forcible entry and detainer of a church must be in name of the society. *People v. Fulton*, 11, 94.

In quo warranto for office, claimant must be joined as plaintiff — requisites of complaint. *People v. Ryder*, 12, 433.

When trustees for benefit of creditors necessary in foreclosure. *Bard v. Poole*, 12, 495.

Tenants in common must all join in trespass — defect apparent on complaint must be objected to by demurrer. *Depuy v. Strong*, 3 Keyes, 603.

When obligee necessary, in action to reform. *Nevius v. Dunlap*, 33, 676.

Judgment creditor necessary to bill to set aside fraudulent assignment for creditors. *Lawrence v. Bank of Republic*, 35, 320.

Creditor owning judgment against husband and wife necessary in foreclosure against wife. *Morris v. Wheeler*, 45, 708.

All interested in breach of trust are necessary — judgment absolute must not be rendered for such defect. *Sherman v. Parish*, 53, 483.

In ejectment for land held in common — non-consent to sue — grant of land in possession of third — death of one of grantors. *Hasbrouck v. Bunce*, 62, 475.

When pledgor of mortgage forecloses, pledgee must be made party plaintiff or defendant. *Simson v. Satterlee*, 64, 657.

When wife is joint tenant with husband she is necessary defendant with him in ejectment. *Stewart v. Patrick*, 68, 450.

Judgment debtor necessary to action by receiver to set aside fraudulent assignment of chose in action. *Miller v. Hall*, 70, 250.

Mortgage on land devised by passive trust — judgment creditor necessary party to foreclosure — if not, purchaser released. *Verdin v. Slocum*, 71, 345.

Lessee of leased road necessary, on proceedings to acquire right to cross its track. *Matter of Boston & Hoosac*, 79, 69.

Stockholders' action against directors of National bank for negligence in duties of trust, receiver and bank necessary parties defendant. *Brinckerhoff v. Bostwick*, 88, 52.

Grantor necessary party to foreclosure of deed intended as mortgage. *Dodd v. Neilson*, 90, 243.

In any proceeding by one partner after death of copartner for an accounting, a surviving partner is. *Arnold v. Arnold*, 90, 580.

IV. *Not necessary parties.*

When captain is not necessary, in action against charterer. *Ward v. Whitney*, 8, 442.

Dormant partner need not be joined. *Cookingham v. Lasher*, 2 Keyes, 454.

On absolute assignment of debt, parol agreement that assignor is to share does not make him necessary party. *Durgin v. Ireland*, 14, 322.

Assignor of account not to be required to be made party to enforce accounting. *Allen v. Smith*, 16, 415.

Applicant for discontinuance of highway is not — the public, real party in interest. *People v. Wheeler*, 21, 82.

Prior mortgagee unnecessary to foreclosure. *Hancock v. Hancock*, 22, 568.

In action by remainderman for injury to inheritance, life tenant need not join. *Van Deusen v. Young*, 29, 9.



Joinder of husband in action for injury to wife's separate property is unnecessary but not fatal. *Ackley v. Tarbox*, 31, 564.

Husband not necessary to action against wife for fraud in sale of her real estate. *Baum v. Mullen*, 47, 577.

Creditors, legatees and next of kin not necessary to accounting between executors, unless accounting final. *Wood v. Brown*, 34, 337.

Mortgagor's wife not necessary to foreclosure. *Kay v. Whittaker*, 44, 565.

In action by preferred stockholders for payment of dividend common stockholders not necessary. *Thompson v. Erie Ry. Co.*, 45, 468.

Outgoing partner, assigning interest, not necessary to action for collection of debt due firm. *Phillips v. Clark*, 48, 677.

Non-resident associate in joint enterprise not necessary to action for accounting. *Angell v. Lawton*, 76, 540.

Trustee of "express trust" (Code of Procedure, section 113) need not join with him those beneficially interested in claim. *Wetmore v. Hegeman*, 88, 69.

Where money paid into court, one liable to pay not necessary defendant. *Johnson v. Stimmel*, 89, 117.

#### V. Parties defendant.

Several transferees may be joined as defendants in action by several creditors in action to set aside several fraudulent conveyances. *Reed v. Stryker*, 4 Abb. 26.

It is unnecessary to join all parties to a bill of exchange as defendants to bring case within statute permitting bill to be given in evidence under money counts. *Black v. Caffé*, 7, 281.

Joinder of defendants in action to compel accounting by assignee for creditors. *Haines v. Hollister*, 64, 1.

#### VI. Representative parties.

Trustees must all join as plaintiffs. *Thatcher v. Candee*, 4 Abb. 387.

Executor of deceased partner cannot be joined with surviving partner to collect

partnership indebtedness. *Richter v. Poppenhausen*, 42, 373.

In interest — representatives of deceased indorser and maker may be joined with maker of note. *Eaton v. Alger*, 47, 345.

When personal representatives of deceased joint defendant improperly substituted. *Hauck v. Craighead*, 67, 432.

Suing as executors instead of trustees immaterial. *Ducker v. Rapp*, 67, 464.

Public administrator — when may sue on special administrator's bond — act of 1837, chapter 460. *Dayton v. Johnson*, 69, 419.

Receiver of corporation may sue to set aside collusive judgment against corporation. *Whittlesey v. Delaney*, 73, 571.

When cestui que trust cannot be struck out of action against trustee. *Stanton v. King*, 76, 585.

In action for accounting of executor and distribution — administratrix of deceased remainderman necessary. *Peyser v. Wendt*, 87, 322.

Personal representatives of deceased mortgagor liable for deficiency are proper parties to foreclosure. *Glacius v. Fogel*, 88, 434.

Action by plaintiff individually and as administrator on different claims constitutes misjoinder. *Fliess v. Buckley*, 90, 286.

In action by executor to recover property of estate converted with his consent, he is not a necessary defendant. *Wetmore v. Porter*, 92, 76.

#### VII. Elective parties.

Sheriff and deputy may be joined for trespass of deputy. *Waterbury v. Westervelt*, 9, 598.

When ejectment lies against joint trespassers without election. *Pearce v. Ferris*, 10, 280.

Several appealing from common order of commissioners of highways, appeals being heard together, one is not liable for all of referee's fees. *Disoway v. Winant*, 3 Keyes, 412.

Holders of spurious stock certificates, when may be joined in action for cancella-

tion. *New York & N. H. R. Co. v. Schuyler*, 17, 592.

For personal injury by negligence of several, all or any may be sued. *Creed v. Hartman*, 29, 591.

Action for injury by negligence of employee of firm may be brought against one or all. *Roberts v. Johnson*, 58, 613.

One whose property has been sold under void attachments of several, may sue one or all. *Whele v. Butler*, 61, 245.

Insurance effected in name of agent for known principal may be enforced by either. *Pitney v. Glens Falls Ins. Co.*, 65, 6.

In action ex delicto may sue one, some or all. *Hun v. Cary*, 82, 65 ; 37 Am. Rep. 546.

Where carriers have contracted jointly to carry freight, action of negligence may be maintained against one alone. *Holtsapple v. Rome, etc., R. Co.*, 86, 275.

### VIII. Defect of party.

#### 1. Generally.

For apparent defect of parties remedy is by demurrer. *De Puy v. Strong*, 37, 372 ; *Potter v. Ellice*, 48, 321.

When objection cannot be raised on appeal. *Potter v. Ellice*, 48, 321.

Defect of plaintiff must be taken by answer or demurrer — if not, deemed waived. *Davis v. Bechestein*, 69, 440 ; 25 Am. Rep. 218, note.

#### 2. Non-joinder of parties.

One who has staked money illegally may recover his specific proportion without joining other contributors. *Ruckman v. Pitcher*, 1, 392.

Non-joinder of defendants must be raised by demurrer or answer. *Hurlbert v. Dean*, 2 Abb. 428.

Non-joinder of plaintiffs must be raised by answer or demurrer. *Donnell v. Walsh*, 33, 43 ; *Merritt v. Walsh*, 32, 685.

Married woman may maintain ejectment without joining husband. *Darby v. Calahan*, 16, 71.

Non-joinder of tenant of adverse claimant, how waived — estoppel. *Finnegan v. Carraher*, 47, 493.

#### 3. Misjoinder.

Personal representative of deceased partner may not be joined with surviving partner as defendant, unless latter unable to respond. *Voorhis v. Childs' Exr.*, 17, 354.

Misjoinder of defendants no ground of nonsuit as to all. *McIntosh v. Ensign*, 28, 169.

Misjoinder of plaintiffs must be raised by demurrer. *Fisher v. Hall*, 41, 416. See *Allen v. City of Buffalo*, 38, 230.

Misjoinder of defendants must be raised by demurrer or answer. *Hier v. Staples*, 51, 136.

Misjoinder of plaintiffs — motion must be for dismissal only as to those having no cause of action — new trial. *Simar v. Canaday*, 53, 298 ; 13 Am. Rep. 523.

Two claiming land, the one against the other, cannot jointly maintain ejectment against a third. *Hubbell v. Lerch*, 58, 237.

### IX. Real party in interest.

Indorsee, without consideration paid, when real party in interest — counterclaim or set-off. *Cummings v. Morris*, 25, 625.

Assignee of chose in action is, under Code of Procedure, section 111. *Allen v. Brown*, 44, 228 ; *Meeker v. Claghorn*, 44, 349.

Surviving partner is, in action on demand belonging to partnership. *Daby v. Ericsson*, 45, 786.

Assignee is, if the assignment is valid as against the assignor. *Sheridan v. Mayor, etc.*, 68, 30.

Party in interest, not of record, not "party to action" — Code of Civil Procedure, section 870. Seeley v. Clark, 78, 220.

### X. Corporations.

Action on behalf of religious society to recover lands must be in name of corpo-

ration, without joining trustees individually. *Van Deuzen v. Trustees of Pres. Cong.*, 4 Abb. 465.

When action to restrain trustees of religious society must be brought against them as individuals — act of 1870, chapter 257. *Davis v. Trustees of First Cong. Soc.*, 65, 278.

Agent of foreign corporation may sue in his own name on stock note payable to him as agent. *Considerant v. Brisbane*, 22, 389.

Consolidation of railroad companies — parties to action to enforce contract to pay dividends. *Chase v. Vanderbilt*, 62, 307.

When stockholder may sue officer of corporation for conversion of stock — corporation must be made defendant. *Greaves v. Gouge*, 69, 154.

In action to restrain incorporation of village, the incorporation having taken effect, village itself or the trustees are necessary parties. *People v. Clark*, 70, 518.

Stockholders are not parties to application for receiver of corporation — relationship of judge. *Matter of Dodge & Stevenson Manufg. Co.*, 77, 101; 33 Am. Rep. 579.

In action to vacate charter of railroad, lessee of road is entitled to be made party. *People v. Albany & Vt. R. Co.*, 77, 232.

### XI. Practice.

Adverse party may be examined on oath to obtain facts to frame complaint. *Glenney v. Stedwell*, 64, 120.

Order for party to appear for examination before trial must be served personally — on attorney insufficient — contempt. *Tebo v. Baker*, 77, 33.

Pleadings admitted, to action, sole owners — precludes objection others should have been made. *Prentice v. Janssen*, 79, 478.

Court may substitute assignee of claim party plaintiff after judgment — may proceed without appointment of administrator of original plaintiff. *Schell v. Devlin*, 82, 333.

When new, may be brought in by supplemental complaint. *Prouty v. Lake Shore, etc., R. Co.*, 85, 272.

### XII. Joint action.

Fraudulent vendee and his assignee for creditors liable to joint action by vendor to recover possession. *Nichols v. Michael*, 23, 264.

Joint, lies against lessor and his guarantor. *Carman v. Plass*, 23, 286.

See various specific heads.

## PARTITION.

Parol, when valid — doctrine of, between tenants in common discussed. *Wood v. Fleet*, 36, 499.

County Court has jurisdiction of, of lands in county. *Doubleday v. Heath*, 16, 80.

Whether partition or sale is question for Supreme Court. *Howell v. Mills*, 56, 226.

Court may direct sale of whole in one parcel when interests promoted. *Prentice v. Janssen*, 79, 478.

Not maintainable by naked trustee. *Baldwin v. Humphrey*, 44, 609.

Wife may maintain against husband. *Moore v. Moore*, 47, 467; 7 Am. Rep. 466.

Requisites of service of summons by publication. *Van Wyck v. Hardy*, 4 Abb. 496.

Unknown owners cannot be brought in by publication of summons only. *Sandford v. White*, 56, 359.

Land held in fee, for life, and in remainder — rule as to alienation — partition impracticable — interest in specific parcels — judgment as to rate of estimation. *Warfield v. Crane*, 4 Abb. 525; 4 Keyes, 448.

Remaindermen and reversioners cannot institute partition against others of like estates. *Sullivan v. Sullivan*, 66, 37.

Adverse possession by one tenant in common is a bar. *Florence v. Hopkins*, 46, 182.

By tenant in common — compensation for improvements — rents are lien — discretion to order sale. *Scott v. Guernsey*, 48, 106.

Of unoccupied lands, may be maintained by one tenant in common taking by de-

scent, though not in possession. *Beebee v. Griffing*, 14, 235.

Tenants in common — estoppel. *Austin v. Ahearne*, 61, 6.

By tenants for life — parties — conclusiveness of judgment — vested remainder in fee of an infant may be sold. *Jenkins v. Fahey*, 73, 355.

When judgment concludes contingent interests of persons not in being. *Monarque v. Monarque*, 80, 320.

One having present interest for life of another and a contingent remainder in fee may maintain — judgment effectual to bar interests of persons not in being. *Brevevoort v. Brevevoort*, 70, 136.

Or sale bars future contingent interests not in esse. *Mead v. Mitchell*, 17, 210.

Sale bars future contingent interests of persons not in being — effect of acquiescence. *Clemens v. Clemens*, 37, 59.

When judgment cuts off claim of dower. *Jordan v. Van Epps*, 85, 427.

Guardian for non-resident infant defendant may be appointed without service of summons or notice. *Golendorf v. Goldschmidt*, 83, 110.

Omission of guardian ad litem to file bond is a mere irregularity. *Croghan v. Livingston*, 17, 218.

Not defeated by lunacy of an owner — proceedings — amendment. *Rogers v. McLean*, 34, 536.

Issues of fact triable by jury. *Hewlett v. Wood*, 62, 75.

Actions for, not between same parties, cannot be consolidated. *Mayor v. Coffin*, 90, 312.

Referee to report on liens may pass on validity of mortgage on share of a party. *Halsted v. Halsted*, 55, 442.

Duty of referee to pay taxes and assessments — remedy of purchaser — motion papers — laches. *Weseman v. Wingrove*, 85, 353.

Infant's share of proceeds of sale — what is proper investment by chamberlain of New York — mortgage — taxes — foreclosure. *Chesterman v. Eyland*, 81, 393.

Purchaser on sale in action by tenant in common of remainder gets good title. *Blakely v. Calder*, 15, 617.

When purchaser excused from taking title by reason of lien of legacies. *Jordan v. Poillon*, 77, 518.

Purchaser at sale cannot refuse to take title on ground that pleadings did not correctly state interest of the parties. *Noble v. Cromwell*, 3 Abb. 382.

When purchaser cannot be compelled to take title by doubtful adverse possession. *Shriver v. Shriver*, 86, 575.

When right of way is reserved on, it must be made reasonably convenient. *Bakeman v. Talbot*, 31, 366.

Action abates by death of one tenant in common — no estoppel of heirs by sale — improvements by purchaser. *Requa v. Holmes*, 26, 338.

See JUDICIAL SALE ; TENANCY.

## PARTNERSHIP.

- I. *Partnership agreements.*
- II. *What constitutes partnership.*
- III. *Firm name.*
- IV. *Powers of partners.*
- V. *Sales of partnership property by one member.*
- VI. *Rights and liabilities of partners.*
- VII. *Partnership assets.*
- VIII. *Actions between partners.*
- IX. *New firm.*
- X. *Member of two firms.*
- XI. *Limited partnership.*
- XII. *Surviving partner.*
- XIII. *Retiring partner.*
- XIV. *Silent partner.*
- XV. *Dissolution of partnership.*
- XVI. *Practice.*

### I. *Partnership agreements.*

Between two firms for joint adventure — all liable as partners on contract by one firm with third parties. *Smith v. Wright*, 4 Abb. 274.

Between carriers for division of freights not. *Merrick v. Gordon*, 20, 93.

Between partners to pay ten per cent interest on overdrafts is not usurious. *Payne v. Freer*, 91, 43.

II. *What constitutes partnership.*

Agreement of proprietors of connecting stage routes for division of receipts does not constitute, as between the parties. *Pattison v. Blanchard*, 5, 186.

Test of, as between parties. *Salter v. Ham*, 31, 321.

Distinguished from mere ownership in common. *Baldwin v. Burrows*, 47, 199.

One who is to share profits, but not losses, is partner as to third persons, although his name does not appear. *Manhattan Brass and Mfg. Co. v. Sears*, 45, 797; 6 Am. Rep. 177; *Ontario Bk. v. Hennessey*, 48, 545; *Leggett v. Hyde*, 58, 272; 17 Am. Rep. 214.

An employee receiving a share of profits as compensation for services, is not thereby a partner. *Burckle v. Eckhart*, 3, 132.

Share in profits for services does not constitute. *Lewis v. Greider*, 51, 231.

Sharing profits as compensation for services on money loaned does not constitute — contract for loan. *Richardson v. Hughitt*, 76, 55; 37 Am. Rep. 267, note.

Agreement for percentage of profits for service does not constitute — form of action. *Smith v. Bodine*, 74, 30.

Agents of line of steamships of different owners, when not. *Snelling v. Howard*, 51, 373.

Agreement to share profits and loss of business of furnishing recruits is partnership. *Marsh v. Russell*, 66, 288.

When trustees of manufacturing company cannot be charged as partners on expiration of charter. *Central City Savings Bank v. Walker*, 66, 424.

Investing in real estate — when not as to third parties. *Curry v. Fowler*, 87, 33; 41 Am. Rep. 343.

Parol agreement between two or more to buy land — deed taken in name of one, is it a? *Williams v. Gillies*, 75, 197.

Agreement that lender of money is to receive share of profits in payment does not make him a partner unless payment depends on profits — evidence. *Eager v. Crawford*, 76, 97.

A third person is not constituted a partner by agreement with one of a firm

to share his profits and losses. *Burnett v. Snyder*, 76, 344; 81, 550; 37 Am. Rep. 527.

Agreement to manufacture and sell for commission on net proceeds is not — accounting. *Walker v. Spencer*, 86, 162.

III. *Firm name.*

Partners may bind themselves by different firm names in different places. *Wright v. Hooker*, 10, 51.

When not entitled to use, on dissolution. *Morgan v. Schuyler*, 79, 490; 35 Am. Rep. 543, note.

Fictitious name — husband and wife — wife may be described as "Co." *Zimmerman v. Erhard*, 83, 74; 38 Am. Rep. 396.

IV. *Powers of partners.*

One partner cannot bind firm by accommodation indorsement in favor of holder with notice. *Fielden v. Lahens*, 2 Abb. 111; 3 Trans. App. 218.

Authority of one partner to sign firm name as accommodation sureties for a third person may be inferred from circumstances. *Butler v. Stocking*, 8, 408.

Partner bound by promise to pay note indorsed by copartner in firm name without authority, having knowledge of facts. *Commercial Bank v. Warren*, 15, 577.

Trade-mark an asset, but either partner entitled to use on dissolution — assignment of business and stock in trade does not transfer, though partnership name continued under statute. *Hazard v. Caswell*, 93, 259; 45 Am. Rep. 198.

V. *Sales of partnership property by one member.*

Sale of partnership property by one partner — warranty of same — action, how brought. *Cookingham v. Lasher*, 1 Abb. 436.

Either member of a partnership may secure a partnership creditor by a transfer of property. *McClelland v. Remsen*, 3 Abb. 74; 3 Keyes, 454; *Mabbett v. White*, 12, 442; *Van Brunt v. Applegate*, 44, 544.

One partner may transfer all the firm effects in consideration of promise to pay the firm debts though not due where no fraud — protest of partner immaterial. *Graser v. Stellwagen*, 25, 315.

Creditor at large cannot raise question of fraud on such transfer. *Id.*

A sealed instrument executed by one partner for the firm, without sealed authority, may be ratified by simultaneous or subsequent assent of the other partners. *Smith v. Kerr*, 3, 144.

Where one partner secretly buys in his own name the reversion of a lease of premises occupied by the firm, while his copartner is negotiating, with his concurrence, to buy it for the firm, he will be held a trustee for the firm. *Anderson v. Lemon*, 8, 236; *Mitchell v. Reed*, 61, 123; 19 Am. Rep. 252; 84, 556.

New lease by one partner to himself, without knowledge of the other partner, of premises used by firm, inures to firm. *Struthers v. Pearce*, 51, 357.

Sale of interest embraces balance in bank unknown at time. *Cram v. Union Bk. of Rochester*, 4 Keyes, 558.

Where one partner retiring assigns his interest to the other, the latter may transfer it in payment of his individual debts. *Dimon v. Hazard*, 32, 65.

Authority of partners as to negotiable paper — constructive notice. *Chemung Canal Bk. v. Bradner*, 44, 680.

Liable on check drawn by one partner on partnership fund deposited in his name. *Crocker v. Colwell*, 46, 212.

One party to joint adventure can dictate as to security. *Gordon v. Boppe*, 55, 665.

Promissory note made by firm — member indorsed it with own name, and that of another firm of which he was member, and delivered in payment of individual debt — bona fide holder may recover of latter firm on indorsement. *Atlantic State Bank v. Savery*, 82, 291.

What is authority from one partner to another to execute general assignment for creditors. *Welles v. March*, 30, 344.

When not bound for loan by one partner for firm uses. *Gibbs v. Bates*, 43, 192.

Transfer by one partner of an insolvent firm of partnership property for his own debt, although by consent of the others, is void as against firm creditors — effect of dissolution and continuance by part. *Menagh v. Whitwell*, 52, 146; 11 Am. Rep. 683.

On sale of his interest by one partner to stranger who takes his place in firm, retiring partner becomes simple surety for firm debts to extent of assets. *Morss v. Gleason*, 64, 204.

Payment by one partner of judgment against firm — when he cannot enforce it against copartners. *Booth v. Farmers and Mech. Nat. Bk.*, 74, 228.

Assignment for creditors by part only of firm cannot be attacked by creditors of assignors because other partners did not join. *Adee v. Cornell*, 93, 572.

## VI. Rights and liability of partners.

Both partners are presumptively liable for the trespass of a wrongful levy ordered by one. *Chambers v. Clearwater*, 1 Abb. 341; 1 Keyes, 310.

Liable to accommodation acceptor for payment of draft for rent of premises used by firm. *Pearce v. Wilkins*, 2, 469.

Note of firm no discharge of debt unless shown to have been so taken. *Davis v. Allen*, 3, 168.

One partner advancing money to other after dissolution to pay joint debts may enforce a note given therefor, and evidence to show an agreement to share the debts is inadmissible. *Gridley v. Dole*, 4, 486.

Innocent partners responsible for false representation of copartner. *Griswold v. Haven*, 25, 595.

When stockholders carrying on business of former corporation are liable as. *Nat. Bk. of Watertown v. Landon*, 45, 410.

Cannot be held for money loaned to partner on his sole credit although used for firm purposes. *National Bk. of Salem v. Thomas*, 47, 15.

Cause of action in favor of part of the firm for fraud does not pass by general assignment by firm. *Calkins v. Smith*, 48, 614; 8 Am. Rep. 575.

Rights of mortgagee of one partner's interest in partnership real estate. *Hiscock v. Phelps*, 49, 97.

Execution against one partner is subordinate to a later execution against all the members of the firm. *Eighth Nat. Bk. of City of New York v. Fitch*, 49, 539.

All members of partnership for dealing in lands are liable for fraud of one. *Ochester v. Dickerson*, 54, 1; 13 Am. Rep. 150.

Partner liable civilly for fraud of co-partner — discharge in bankruptcy no defense. *Bradner v. Strang*, 89, 299.

When incoming partner not liable on lease put into the business by the other. *Durand v. Curtis*, 57, 7.

One authorizing use of his name as partner, for value, liable as such, although creditor ignorant of agreement and did not give him credit. *Poillon v. Secor*, 61, 456.

One partner buying another's interest and assuming the firm debts becomes principal and the other surety as to firm creditors. *Colegrove v. Tallman*, 67, 95; 23 Am. Rep. 90.

Levy on partnership property on execution against one partner, how to be made — division by partners when not unlawful. *Atkins v. Saxton*, 77, 195.

Accounting — construction of articles — when loss of capital to be equally borne. *Jones v. Butler*, 87, 613.

## VII. Partnership assets.

Real estate purchased with firm funds and held in common is regarded as personality in paying firm debts. *Collumb v. Read*, 24, 505.

Real estate bought with firm funds in name of one partner is partnership property — evidence — statute of uses and trusts not applicable. *Fairchild v. Fairchild*, 64, 471.

May be exempt from execution. *Stewart v. Brown*, 37, 350.

In bank. *Julian v. Watson*, 43, 571.

Purchase of judgment for — assignment. *Thursby v. Lidgerwood*, 69, 198.

Interest of partner in, is his share after payment of debts. *Staats v. Bristow*, 73, 264.

## VIII. Actions between partners.

In an equitable action between partners a referee's finding of facts is conclusive, if any evidence to sustain. *Barker v. White*, 1 Abb. 95.

When action may be maintained on account stated. *Cole v. Reynolds*, 18, 74.

In action for partnership accounting, there can be no accounting unless partnership is proved. *Salter v. Ham*, 31, 321.

Action maintainable against representative of deceased partner on showing insolvency of survivor. *Riper v. Poppenhausen*, 43, 68.

Action by one partner against another — when maintainable — evidence. *Crater v. Bininger*, 45, 545.

Action lies against representatives of deceased partner after execution unsatisfied against survivor, although he had property sheriff did not discover. *Pope v. Cole*, 55, 124; 14 Am. Rep. 198.

## IX. New firm.

When new firm not liable for debts of old. *Dounce v. Parsons*, 45, 180.

## X. Member of two firms.

One firm not necessarily agent of another, because one individual was member of both. *Wright v. Ames*, 4 Abb. 644.

## XI. Limited partnership.

Limited partner becomes liable as a general partner by changes pending publication of notice of dissolution. *Beers v. Reynolds*, 11, 97.

Before amendment of 1857, chapter 414, section 3, in insolvency special partner could share for loans until other creditors satisfied. *White v. Hackett*, 20, 178.

Execution creditor has lien superior to subsequent receiver in. *Van Alstyne v. Cook*, 25, 489.

Execution binds firm property, although action is against general partners alone. *Id.*

On judgment against, special partner's property cannot be sold, even if he is present. *Harris v. Murray*, 28, 574.

Insolvency — special partner may claim as creditor, by virtue of being general partner in another firm of creditors. *Hayes v. Heyer*, 35, 326.

Removal of place of business renders special partners liable as general. *Riper v. Poppenhausen*, 43, 68.

Payment of capital cannot be made by contribution of credits. *Van Ingen v. Whitman*, 62, 513.

In Cuba, governed by laws of Spain. *King v. Sarria*, 69, 24; 25 Am. Rep. 128.

Payment of special partner's contribution by giving post-dated check, though paid day after partnership formed, invalid under 1 R. S. 763, § 1. *Durant v. Abendroth*, 69, 148; 25 Am. Rep. 158, note.

## XII. Surviving partner.

Rights of firm and individual creditors as against. *Meech v. Allen*, 17, 300.

Evidence — declarations of. *Daby v. Ericsson*, 45, 786.

Can give notice to claim extension of lease. *Betts v. June*, 51, 274.

May assign the assets to a firm creditor in payment of own debt, although it gives him a preference over firm creditors. *Loeschigk v. Hatfield*, 51, 660.

When landlord can recover rent for term, although one partner has died — when compound interest allowed as between partners — interest between partners' authorities collated. *Johnson v. Hartshorne*, 52, 173.

When liable on note made in firm name by deceased partner for accommodation — renewal after death — no payment of old note — mistake. *First Nat. Bk. of Chittenango v. Morgan*, 73, 593.

Paying firm debts entitled to interest on accounting. *Collender v. Phelan*, 79, 366.

On accounting, judgment directed to pay over to receiver and docketed in favor of plaintiff, properly vacated. *Geery v. Geery*, 79, 565.

Mortgage to secure indorsements — death of one partner — power of survivor to in-

dorse. *National Bank of Newburgh v. Bigler*, 83, 51.

Legal title to judgment in, may maintain action to redeem — Code, section 1468 — no assignment of judgment to him necessary. *Nehrboss v. Bliss*, 88, 600.

Suit at law between survivor and deceased partners representatives before accounting, not maintainable. *Arnold v. Arnold*, 90, 580.

## XIII. Retiring partner.

A partner withdrawing before the limited period is liable to his copartner at law, even before the termination of that period. *Bagley v. Smith*, 10, 489.

Special case of liability of. *Burch v. Newbury*, 10, 374.

Responsible to owner for proceeds of goods received by other partner after dissolution but contracted for before. *Briggs v. Briggs*, 15, 471.

Notice of change of name, to exonerate, must show his withdrawal. *American Linen Thread Co. v. Wortendyke*, 24, 550.

Concealing his withdrawal and permitting use of old firm name is still liable to new creditors — faith of continuance of partnership. *Buffalo City Bank v. Howard*, 35, 500.

Outgoing partners only liable as sureties to creditors for remaining partners. *Savage v. Putnam*, 32, 501.

Creditor knowing of retirement of a partner at time of giving credit cannot hold him. *Davis v. Keyes*, 38, 94.

When not surety for rent. *Palmer v. Purdy*, 83, 144.

Has cause of action as surety — when — agreement for royalties. *Sizer v. Ray*, 87, 220.

## XIV. Silent partner.

When not liable for a fraudulent representation by general partner. *Chamberlain v. Prior*, 1 Abb. 338.

Is liable for debts contracted after his retirement with persons who knew of his connection and had no notice of his retirement. *Davis v. Allen*, 3, 168.



Need not be joined in action — burden of proof. *North v. Bloss*, 30, 374.

#### XV. Dissolution of partnership.

Promise by one partner after, will not revive debt barred by the statute of limitation. *Van Keuren v. Parmelee*, 2, 523.

Actual notice of, requisite as to previous dealers. *Clapp v. Rogers*, 12, 283.

Notice by one after dissolution binding unless notice thereof is published. *City Bank of Brooklyn v. McChesney*, 20, 240.

Prima facie, each partner after, may collect debts and dispose of property. *Robbins v. Fuller*, 24, 570.

Actual notice of, due to dealers — publication in newspaper insufficient — burden of proof. *Bank of Commonwealth v. Mudgett*, 44, 514; *Howell v. Adams*, 68, 314.

Mailing notice to actual dealer is only presumptive evidence of notification. *Austin v. Holland*, 69, 571; 25 Am. Rep. 246, note.

By the American civil war. *Bank of New Orleans v. Matthews*, 49, 12.

One carrying on business as a firm is estopped to deny its existence — the civil war did not terminate partnerships between loyalists and rebels until August 16, 1861. *McStea v. Matthews*, 50, 166.

May be proved by parol — evidence of. *Emerson v. Parsons*, 46, 560.

Check of, signed before but delivered after, invalid. *Gale v. Miller*, 54, 536.

Firm creditor cannot enforce bond given by one partner to another on, for payment of firm debts. *Merrill v. Green*, 55, 270.

The obligor may set off a note given by the obligee for a debt to the firm. *Id.*

Creditor taking notes of the partners assuming the debts in payment on, releases the others. *Millerd v. Thorn*, 56, 402.

Construction of bond against after. *Holmes v. Hubbard*, 60, 183.

Liquidating partner cannot bind firm by covenant in assignment of judgment after. *Bennett v. Buchan*, 61, 222.

Individual bankers — notice — alteration of certificate of deposit. *Howell v. Adams*, 68, 314.

No time named for continuance, dissolvable at will and receiver may be appointed. *McElvey v. Lewis*, 76, 373.

Note by partner after, for part of partnership debt, is good consideration for creditor's agreement to discharge him. *Luddington v. Bell*, 77, 138; 33 Am. Rep. 601.

One may act as special agent in winding up — third persons with notice dealing another, subject to equitable rights of other partners. *Hilton v. Vanderbilt*, 82, 591.

#### XVI. Practice.

Judgment against one partner, and vacatur saving the rights of the other, does not revive the cause of action against the latter. *Olmstead v. Webster*, 8, 413.

One who holds out others as partners with him is estopped to deny it in bankruptcy. *Kelly v. Scott*, 49, 595.

Evidence of motive, when competent to contradict inference of partnership from acts. *Tracy v. McManus*, 58, 257.

When creditor may sue, on agreement to assume debts — evidence of fraud. *Arnold v. Nichols*, 64, 117.

What sufficient consideration to continue — individual agreement of one to pay portion of profits — admissible in action for accounting — action on agreement no bar to accounting. *Emery v. Wilson*, 79, 78.

See AGENCY; EXECUTION; JUDGMENT; NEGOTIABLE INSTRUMENT; SALE.

#### PARTY-WALL.

When old wall is — trespass for tearing down — damages. *Schile v. Brokhahus*, 80, 614.

One party may complete when the other refuses to build according to parol contract, and recover one-half the cost — equitable action. *Rindge v. Baker*, 57, 209; 15 Am. Rep. 475.

Either party may increase the height if it can be done safely. *Brooks v. Curtis*, 50, 639; 10 Am. Rep. 545.

Covenant for compensation for use of, does not run with land. *Cole v. Hughes*, 54, 444; 13 Am. Rep. 611.

When action for share of expense premature. *Brown v. McKee*, 57, 684.

Covenant to contribute to party-wall when covenantor shall use it, does not run with the land—no personal liability. *Scott v. McMillan*, 76, 141.

Rights of grantees of common grantor—when one may take down whole wall for repair. *Partridge v. Gilbert*, 15, 601.

Simultaneous deeds of lots with party-walls—wall constitutes servitude. *Rogers v. Sinsheimer*, 50, 646.

Right to payment of share of expense of, does not pass with the land—covenant to rebuild and repair does. *Hart v. Lyon*, 90, 663.

Agreement for the building of a party-wall, how construed. Each party or his assigns to pay half the expense, when to be recovered. *Brown v. Pentz*, 1 Abb. 227.

Not legal incumbrance avoiding sale. *Hendricks v. Stark*, 37, 106.

Not on line—easement. *Rogers v. Sinsheimer*, 50, 646.

See COVENANT; EASEMENT.

## PATENT.

State courts have no jurisdiction to restrain infringement. *Dudley v. Mayhew*, 3, 9.

State courts have jurisdiction of action on contract although it involves validity of patent. *Middlebrook v. Broadbent*, 47, 443.

Contract subject to decision in interference proceedings. *Peck v. Collins*, 70, 376.

Liability under agreement for royalty. *Marsh v. Dodge*, 66, 533.

Contract to manufacture under—notice of rescission—recovery. *Union Manfg. Co. v. Lounsbury*, 41, 363.

One owner in common not liable to account to co-owners for use. *De Witt v. Elmira Nobles Manfg. Co.*, 66, 459; 23 Am. Rep. 73.

Invalidity no defense during time licensee has enjoyed unmolested use. *Marston v. Swett*, 66, 206; 23 Am. Rep. 43.

Right in, may be reached by creditor's action—want of utility or novelty no defense. *Gillett v. Bate*, 86, 87.

Reassignment—acceptance, waiver of condition of trial. *Young v. Hunter*, 6, 203.

Sale by assignee of his right to manufacture subject to royalties—recovery over—estoppel. *Sizer v. Ray*, 87, 220.

## PATENT OF LAND.

Royal—action for repeal—limitations. *People v. Clarke*, 9, 349.

When improperly granted to holder of easement. *People v. Colgate*, 67, 512.

Under water under act of 1813, chapter 74—prohibition of filling in. *People v. New York, etc., Ferry Co.*, 68, 71.

Issue of second by mistake—first cannot be impeached collaterally. *Parmelee v. Oswego*, 6, 74.

Otherwise if absolutely void. *People v. Van Rensselaer*, 9, 291.

When land under water passes—fishery. *Trustees of Brookhaven v. Strong*, 60, 56.

To town of Huntington—when authorizes lease of land under water. *Robins v. Ackerly*, 91, 98.

See LANDLORD AND TENANT, 9, 291.

## PAYMENT.

- I. Generally.
- II. What constitutes.
- III. What does not constitute.
- IV. Presumption of.
- V. Under protest.
- VI. By agent.
- VII. By order.
- VIII. How applied.

### I. Generally.

Of mortgage, when question of fact. *Peck v. Minot*, 4 Trans. App. 27.

Of note not surrendered — suit by third party — what necessary to protect maker. *Barmon v. Lithauer*, 1 Abb. 99.

As between parties liable on note — surety — compromise. *Freeland v. Van Campen*, 2 Abb. 184.

## II. What constitutes.

Creditor's acceptance of surety's note as against principal. *Howe v. Buffalo, etc., R. Co.*, 37, 297.

Commercial paper, when, although becoming valueless by neglect of receiver. *Darnall v. Morehouse*, 45, 64.

Of assessment for local improvement, regular on its face, is involuntary. *Peyser v. Mayor, etc.*, 70, 497; 26 Am. Rep. 624.

Consent by A. that his money in hands of B. may be appropriated to debt of C. to B., when effectual as payment. *Hodge v. Hoppock*, 75, 491.

Giving check presented, payment of outstanding note. *National Bank v. Wells*, 79, 498.

If check given in absolute, be paid to finder or fraudulent holder, debtor discharged, otherwise not. *Thomson v. Bank of North America*, 82, 1.

Voluntary cancellation and surrender of note releases liability. *Larkin v. Hardbrook*, 90, 333; 43 Am. Rep. 176.

Oral agreement constituting payment on mortgage held valid against subsequent assignee without notice. *Green v. Fry*, 93, 353.

## III. What does not constitute.

Debtor not released by unfulfilled agreement of creditor to look to another. *Rice v. Isham*, 4 Abb. 37.

Debtor's note. *Hill v. Beebe*, 13, 556.

What is not voluntary. *Lake v. Artists' Bank*, 3 Keyes, 276.

When check is not. *Turner v. Bank of Fox Lake*, 3 Keyes, 425. Affirmed, 23 How. (U. S.) 399.

Delivery of check is not — burden of proving — laches. *Bradford v. Fox*, 38, 289.

When transfer of collateral not. *Wright v. Storrs*, 32, 691.

New note, when not payment of old. *Bates v. Rosekrans*, 37, 409.

Note of insolvent third person not payment where insolvency was not known. *Roberts v. Fisher*, 43, 159; 3 Am. Rep. 680.

When note is not, on mortgage — application. *Feldman v. Beier*, 78, 293.

When creditor not bound by debtor's direction as to application made subsequent to payment. *Nat. Bk. of Newburgh v. Bigler*, 83, 51.

## IV. Presumption of.

Note of third person received on contracting of debt presumed payment — otherwise as to precedent debt — onus. *Noel v. Murray*, 13, 167.

Note or bill of a third person received on sale is presumed payment. *Gibson v. Tobey*, 46, 637; 7 Am. Rep. 397.

Presumption of, raised by lapse of time and poverty of plaintiff. *Bean v. Tonnele*, 94, 381; 46 Am. Rep. 153.

## V. Under protest.

Of excessive freight to carrier, in order to get property, may be recovered back. *Harmony v. Bingham*, 12, 99.

Without duress, concludes — that under protest, immaterial. *Flower v. Lance*, 59, 603.

## VI. By agent.

Payment to the son of a mortgagee's agent, who had been accustomed to act as his father's clerk, is not payment on mortgage. *Lewis v. Ingersoll*, 3 Abb. 55.

To agent actually though not apparently authorized, valid. *Johnson v. Donnell*, 90, 1.

## VII. By order.

Order on bank to deliver securities or "give him the cash" is paid by crediting

payee in account and paying his checks. *Weedsport Bank v. Park Bank*, 4 Abb. 545.

Acceptance of contractor's orders by owner operating as payment. *Gibson v. Lenane*, 94, 183.

#### VIII. *How applied.*

Where no application is made by parties on running accounts, equity will apply to first items, although those are secured and subsequent are not. *Truscott v. King*, 6, 147.

Agreement to apply indebtedness of payee to partnership upon note by one partner operates as payment when other partner assents. *Davis v. Spencer*, 24, 386.

Application of, made on general account. *Sheppard v. Steele*, 43, 52; 3 Am. Rep. 660.

Application to unsecured debt, when proper—when not affected by equities between debtor and third person. *Harding v. Tift*, 75, 461.

When application will be made by court. *Jones v. Benedict*, 83, 79.

Acquiescence of parties. *Pennsylvania Coal Co. v. Blake*, 85, 226.

To one not owner of mortgage but surety on, held not applicable against surety. *Carter v. Holahan*, 92, 498.

Application to mortgage in preference to open account on equitable grounds. *Griswold v. Onondaga Co. Sav. Bk.*, 93, 301.

Creditor may apply on any debt at any time in the absence of direction from debtor. *Bank of California v. Webb*, 94, 467.

By court, should be on equitable principles—elder security. *Campbell v. Vedder*, 1 Abb. 295; 3 Keyes, 174.

See ACCORD AND SATISFACTION; BANKS; DEBTOR AND CREDITOR; EXECUTION; JUDGMENT; MORTGAGE; NEGOTIABLE INSTRUMENT; RECEIPT; TAXATION; TENDER.

#### PENALTY.

Civil action for—when knowledge must be shown. *Verona Cent. Cheese Co. v. Murtaugh*, 50, 314.

Only one recoverable for removing goods from demised premises—all parties may be sued together. *Conley v. Palmer*, 2, 182.

Against railroad company for exacting illegal fare, when maintainable. *Nellis v. New York Cent. R. Co.*, 30, 505.

By act of 1839, chapter 13, concerning unlicensed theaters, there can be but one penalty against the several offenders. *People v. Koll*, 3 Keyes, 236.

Cannot be implied. *Health Dept. v. Knoll*, 70, 530.

When successive, may be recovered of toll-gate keeper. *Suydam v. Smith*, 52, 383.

Construction of 2 R. S. 602, § 66—does not relieve from consequences of violation of private rights. *Chenango Bridge Co. v. Paige*, 83, 178; 38 Am. Rep. 407.

See CONSTITUTIONAL LAW; CRIMINAL LAW; PILOTS; PLANKROAD COMPANY; STATUTES.

#### PERJURY.

No action lies to set aside judgment obtained by. *Ross v. Wood*, 70, 8.

See CRIMINAL LAW.

#### Personal Property.

See CLAIM AND DELIVERY; FIXTURES; MORTGAGE—*Chattel*; PROPERTY; SALE.

#### PHYSICIANS.

Cannot be excluded from medical societies for failure before admission to conform to ethical rules. *People v. Medical Society*, 32, 187.

See CONTRACT; CRIMINAL LAW; EVIDENCE; INSURANCE; LIBEL AND SLANDER; MALPRACTICE.

#### PILOTS.

Master of foreign vessel not bound to take first pilot offering—acts of 1853,

chapter 467, 1857, chapter 243. *Gillespie v. Zittlosen*, 60, 449.

Acts of 1853, chapter 467, 1857, chapter 243, not abrogated by act of congress of 1866. *Henderson v. Spofford*, 59, 131.

Under acts of 1853, chapter 469, section 29, 1857, chapter 243, pilot, to recover for services, must be licensed by the board of commissioners. *Brown v. Elwell*, 60, 249.

Action for penalty for employing unlicensed—one only maintainable. *Sturgis v. Spofford*, 45, 446.

Licensed by State for port of New York may also demand employment and pay for off-shore pilotage. *Cisco v. Roberts*, 36, 292.

Notice to be given by commissioners to persons encroaching on New York harbor—how to be given. *Commissioners of Pilots v. Vanderbilt*, 31, 265.

Effect of act of congress on State statute as to. *Sturgis v. Spofford*, 45, 446.

Penalty for violation of State act of 1853 may be recovered since amendment of 1867 of act of congress of 1866. *Commissioners of Pilots v. Pacific Mail Steamship Co.*, 52, 609.

Owner not excused from liability for accident while vessel in charge of pilot is anchored in river Mersey to finish loading and coaling. *Guterman v. Liverpool, etc., Steamship Co.*, 83, 358.

See SHIP AND SHIPPING.

### PLACE OF TRIAL.

Action against National bank may be brought in county where plaintiff resides. *Talmage v. Third Nat. Bk.*, 91, 531.

Action between county officers of different counties in justices' courts may be brought where plaintiffs live. *Lapham v. Rice*, 55, 472.

In case of criminal contempt. *People v. Mead*, 92, 415.

Action for dividend declared on certificate of interest in hotel and earnings not local under Code of Civil Procedure, section 982. *Roche v. Marvin*, 92, 398.

Action against officer of manufacturing company for signing false report is local

—demand and change. *Veeder v. Baker*, 83, 156.

Action of foreclosure cannot be tried at adjourned term in another county than that where premises are situated. *Gould v. Bennett*, 59, 124.

Action for injuries to, must be brought in forum "rei sitæ"—not changed by Code, section 982. *Cragin v. Lovell*, 88, 258.

Not to be changed for convenience of justice—waiver of objection—power to adjourn. *Birmingham Iron Foundry v. Hatfield*, 43, 224.

Waiver of right to change—omitting to make claim on trial. *West Point Iron Co. v. Reymert*, 45, 703.

—by acquiescence in illegal order. *Abrahams v. Benson*, 76, 629.

See PRACTICE.

### PLANKROAD COMPANY.

Requisites of incorporation—release from subscription. *Schenectady & Saratoga Plankroad Co. v. Thatcher*, 11, 192.

Acts forming plankroad companies give no interest or easement in adjoining lands. *Auburn & Cato Plankroad Co. v. Douglass*, 9, 444.

Grant of highway to—extent of power to make. *Palmer v. Fort Plain, etc., Plankroad Co.*, 11, 376.

Construction of general law—length of road—increase of stock—payment of subscription before filing articles—evidence—special promise to subscribe—transfer of instrument. *Eastern Plankroad Co. v. Vaughan*, 14, 546.

Effect of taking highway—commissioners of highways may still remove encroachments. *Walker v. Caywood*, 31, 51.

Having acquired right to use highway, the public may still travel thereon during the construction. *Ireland v. Oswego, etc., Plankroad Co.*, 13, 526.

Is liable for injury to traveler by defect in road during such construction. *Id.*

Proceedings to reorganize validated by act of 1881, chapter 551. *People v. Newburgh, etc., Plankroad Co.*, 86, 1.

Only subscribers of articles of association entitled to or liable for stock. *Poughkeepsie & Salt Point Plankroad Co. v. Griffin*, 24, 150.

Violation of condition of grant of highway will not sustain an action. *Palmer v. Fort Plain & Cooperstown Plankroad Co.*, 11, 376.

Limitation of action to enforce personal liability of stockholder. *Conklin v. Furman*, 48, 527.

May sue for tolls. *Jordan, etc., Plankroad Co. v. Morley*, 23, 552.

Penalty for running toll-gate. *Monterey Plankroad Co. v. Chamberlain*, 33, 46.

Forfeiture—evidence of organization, act April 18, 1855. *Belfast & Angelica Plankroad Co. v. Chamberlain*, 32, 651.

Reversion of land on surrender of road. *Heath v. Barmore*, 50, 302.

See CORPORATION, 9, 444.

## PLEADING.

### I. General principles.

### II. Complaint.

1. *In general.*
2. *Joinder.*
3. *Parties.*
4. *Particular subjects and issues.*
  - (a.) *Assumpsit.*
  - (b.) *Contract.*
  - (c.) *Fraud.*
  - (d.) *Married woman.*
  - (e.) *Promissory note.*
  - (f.) *Sealed instruments, etc.*
  - (g.) *Libel and slander.*
  - (h.) *Miscellaneous.*
5. *Relief warranted by.*

### III. Answer.

1. *Counter-claim.*
2. *Defenses which must be pleaded.*
3. *Issues raised by.*
4. *Joinder of defenses.*
5. *Admissions.*
6. *Practice in respect to.*
  - (a.) *Sham and frivolous defense.*
  - (b.) *Indefinite, etc., answers.*
7. *Miscellaneous.*

### IV. Reply.

#### V. Demurrer.

1. *To complaint.*
2. *To answer.*
3. *Generally.*

### VI. Proof authorized under.

1. *Variance.*
2. *General issue.*
3. *Admissions.*
4. *Miscellaneous.*

### VII. Amendment.

### VIII. General matters.

#### I. General principles.

Wrong name given to action is harmless. *Cornes v. Harris*, 1, 223.

In action in Supreme Court after plea of title in justice's court the proceedings in the justice's court need not be alleged. *Pugsley v. Kisselburgh*, 10, 420.

Where time is stated under a *vide licet* repugnantly to previous allegation, it is rejected. *Lester v. Jewett*, 11, 453.

Party not estopped by mistaken averment of law. *Union Bank v. Bush*, 36, 631.

Liberally and rationally construed. *Olcott v. Carroll*, 39, 436.

Effect of "duly." *Rockwell v. Mervin*, 45, 166.

Relief demanded does not necessarily characterize the action. *Hale v. Omaha Nat. Bk.*, 49, 626.

When verification may be omitted. *Fredericks v. Taylor*, 52, 596.

Dilatory plea, must be strict. *Wright v. Wright*, 54, 437.

Action by wife against husband—form immaterial. *Id.*

May not be struck out as penalty for disobedience of an order granted *ex parte*. *Rice v. Ebele*, 55, 518.

When sufficient to plead legal effect and not circumstances. *Brown v. Champney*, 66, 214.

Matter irrelevant to the particular action or defense and party only will be stricken out. *Hagerty v. Andrews*, 94, 195.

II. *Complaint.*1. *In general.*

When bill not liable to charge of multifariousness. *Brady v. McCosker*, 1, 214.

When complaint construed as if for accounting. *Emery v. Pease*, 20, 62.

Complaint, when for relief. *McDougall v. Cooper*, 31, 498.

Objection that complaint does not state cause of action may be taken at any stage — motion to dismiss before referee. *Coffin v. Reynolds*, 37, 640.

Plaintiff not bound to anticipate defense. *Cohen v. Continental Life Ins. Co.*, 69, 300.

Supplemental complaint — not allowed ex parte. *Fleischman v. Bennett*, 79, 579.

2. *Joinder.*

Legal and equitable causes of action may be joined. *Phillips v. Gorham*, 17, 270; *Davis v. Morris*, 36, 569.

Claims to recover land and damages for withholding may be joined. *Vandervoort v. Gould*, 36, 639.

Breach of covenant of quiet enjoyment in lease, and tort for unlawful entry and injury cannot be joined. *Keep v. Kaufman*, 56, 332.

Causes of action for money paid on contract on ground of defendant's repudiation and on ground of fraud may be joined. *Freer v. Denton*, 61, 492.

Complaint may not charge defendant as stockholder of manufacturing company for failure to record certificate, and as trustee for failure to file report. *Wiles v. Suydam*, 64, 173.

Action to collect a debt and action to enforce a lien may not be joined — mechanics' lien. *Burroughs v. Tostevan*, 75, 567.

Complaint for malicious prosecution and false imprisonment in same transaction, when valid. *Neil v. Thorn*, 88, 270.

3. *Parties.*

Complaint by supervisor — official description in title and statement that he

complains "as supervisor as aforesaid" is sufficient. *Smith v. Levinus*, 8, 472.

Addition of "survivor," etc., to name of a defendant sued on a joint and several obligation is mere surplusage. *Bogert v. Vermilya*, 10, 447.

Descriptio personæ in title does not outweigh allegations in body of complaint. *Stilwell v. Carpenter*, 62, 639.

After death of a joint debtor his personal representatives cannot be substituted without averment of inability to collect of survivor. *Hauck v. Craighead*, 67, 432.

Proper statement of capacity in which plaintiff sues — requisites of complaint on bond of indemnity. *Beers v. Shannon*, 73, 292.

In action against public officers, should describe defendants by title. *Boots v. Washburn*, 79, 207.

When supplemental complaint allowed to bring in new parties. *Prouty v. Lake Shore, etc., R. Co.*, 85, 272.

Official titles of city officers in complaint for negligence held simply descriptio personæ. *Bennett v. Whitney*, 94, 302.

In ejectment several cannot be named as plaintiffs jointly in one count and separately in another. *St. John v. Pierce*, 4 Abb. 140.

4. *Particular subjects and issues.*(a.) *Assumpsit.*

Declaration in assumpsit — when bad for not alleging balance or refusal to settle. *Pattison v. Blanchard*, 5, 186.

In a County Court must allege that defendant is a resident of that county. *Frees v. Ford*, 6, 176.

Complaint alleging indebtedness for goods sold and that so much is "due" is good. *Allen v. Patterson*, 7, 476.

Indebitatus assumpsit allowable under Code — waiver of defect of party defendant by omission to demur or raise objection in answer. *Hosley v. Clack*, 28, 438.

Complaint for balance admits payment. *White v. Smith*, 46, 418.

Under complaint for quantum meruit for services, recovery may be had on

specific contract fixing price. *Fells v. Vestvali*, 2 Keyes, 152.

(b.) *Contract.*

Complaint simply stating that by means of a contract set forth the defendant was bound to do certain things is not sufficient. *City of Buffalo v. Holloway*, 7, 493.

In action on a contract forbidden in this State, complaint must aver where it was made and that it was there lawful. *Thacher v. Morris*, 11, 437.

Sufficiency of complaint on contract set forth. *Prindle v. Caruthers*, 15, 425.

In action on special contract one may count on implied assumpsit without declaring specially. *Farron v. Sherwood*, 17, 227.

Where contract is fully performed complaint for quantum meruit is sufficient. *Hurst v. Litchfield*, 39, 377.

Complaint stating cause of action on contract may authorize recovery although in form for conversion. *Conaughty v. Nichols*, 42, 83.

When on contract and not ex delicto. *Austin v. Rawdon*, 44, 63; *Greentree v. Rosenstock*, 61, 583; *Nefel v. Lightstone*, 77, 96.

When action ex delicto and not on contract. *Miller v. Barber*, 66, 558.

On complaint for fixed sum for services recovery may be had quantum meruit. *Sussdorff v. Schmidt*, 55, 319.

Complaint need not allege that contract is in writing — statute of frauds. *Marston v. Swett*, 66, 206; 23 Am. Rep. 43.

Setting forth copy instrument for payment of money where liability is conditional. *Tooker v. Arnoux*, 76, 397.

Complaint on contract and not for fraud. *Nefel v. Lightstone*, 77, 96.

Complaint for breach of contract must allege tender of performance or excuse by plaintiff. *Smith v. Wright*, 4 Abb. 274.

(c.) *Fraud.*

Fraud must be alleged in equity. *Bailey v. Ryder*, 10, 363.

Averment of fraudulent representations, when does not make action one in tort. *Byzbie v. Wood*, 24, 607.

Allegations of fraud do not necessarily stamp complaint as in tort. *Sparman v. Keim*, 83, 245.

"Falsely and fraudulently represented" is sufficient statement of scienter. *Thomas v. Beebe*, 25, 244.

On complaint for fraud no recovery can be had for breach of contract. *Ross v. Mather*, 51, 108; 10 Am. Rep. 562.

Where gravamen is fraud, court cannot change form and allow recovery in contract. *Barnes v. Quigley*, 59, 265.

Where gravamen is breach of contract, allegations of fraud do not change action or remedy — arrest — summons no part of pleadings. *Graves v. Waite*, 59, 156.

Construction of complaint in fraud — single cause of action. *People v. Tweed*, 63, 194.

Where complaint is for fraud, action cannot be maintained for mutual mistake. *McMichael v. Kilmer*, 76, 36.

(d.) *Married woman.*

In action against married woman complaint should be as if she were single. *Hier v. Staples*, 51, 136.

Complaint against married woman may be as if she were single. *Frecking v. Rolland*, 53, 422; *Smith v. Dunning*, 61, 249.

Complaint merely setting out bond by husband and wife, valid as to husband, invalid as to wife. *Broome v. Taylor*, 76, 564.

(e.) *Promissory note.*

Note received in satisfaction but not fully paid — set-off. *Fletcher v. Button*, 4, 396.

What sufficient complaint on promissory note. *Keteltas v. Myers*, 19, 231.

What is sufficient allegation of assignment of note. *Brown v. Richardson*, 20, 472.

Ownership of note, when sufficiently averred. *Farmers and Mechanics' Bank of Genesee v. Wadsworth*, 24, 547.



Averment that note was duly protested not sufficient allegation of notice to indorser. *Cook v. Warren*, 88, 37.

Complaint against indorser must allege presentment, non-payment and notice. *Conkling v. Gandall*, 1 Keyes, 228 ; 1 Abb. 423.

(f.) *Sealed instruments, etc.*

Declaration in debt on recognizance need not state special facts giving jurisdiction to officer taking bail. *Champlain v. People*, 2, 82.

If recognizance extorted in violation of right to examination, that defense must be pleaded. *Id.*

Declaration on sealed instrument in justice's court. *Smith v. Kerr*, 3, 144.

Requisites of declaration on replevin bond. *Shaw v. Tobias*, 3, 188.

Complaint in action on undertaking on appeal must state service of notice of entry of judgment on adverse party. *Porter v. Kingsbury*, 71, 588.

In action upon bond of cashier held sufficient. *Bostwick v. Van Voorhis*, 91, 353.

(g.) *Libel and slander.*

Allegations of publication, falsehood and malice, in libel — what sufficient. *Hunt v. Bennett*, 19, 173.

When counts sufficient in libel. *Fry v. Bennett*, 28, 324.

Innuendo does not make non-actionable words actionable. *Fleischmann v. Bennett*, 87, 231.

(h.) *Miscellaneous.*

In trover for goods, etc., usuriously received, the declaration must conform to the statute. *Schroeppe v. Corning*, 2, 132.

Complaint by maker of note stating facts showing his right to its possession, and conversion by defendant, good after verdict. *Decker v. Mathews*, 12, 313.

Sufficient averment of partnership — issue. *Anable v. Conklin*, 25, 470.

Complaint of assignee of fire insurance held bad for want of averment of intent. *Fowler v. New York Indemnity Ins. Co.*, 26, 422.

In complaint for penalty, not necessary to set forth statute. *People v. McCann*, 67, 506.

Requisites of complaint for penalties against railroad company for exacting illegal fare. *Nellis v. New York Cent. R. Co.*, 30, 505.

Describing property as belonging to a city is not good averment of title. *People v. Booth*, 32, 397.

Action for services for corporation — what requisite to complaint. *Coffin v. Reynolds*, 37, 640.

Complaint need not aver incorporation of plaintiff. *Phoenix Bank v. Donnell*, 40, 410.

In claim and delivery of personal property — requisites of complaint. *Scofield v. Whitelegge*, 49, 259.

Requisites of complaint in action to compel determination of claims to real property. *Austin v. Goodrich*, 49, 266.

When bill of peace lies. *Bailey v. Briggs*, 56, 407.

When allegations of fiduciary character are not issuable. *Prouty v. Swift*, 51, 594.

When case of usury set forth. *Tyng v. Commercial Warehouse Co.*, 58, 308.

Charge of adultery with unknown persons, when sufficient in divorce. *Mitchell v. Mitchell*, 61, 398.

Complaint against trustees — reference to copy paper annexed — demurrer — joinder of causes of action. *Bonnell v. Griswold*, 68, 294.

Complaint for rents and profits — when insufficient — statement of legal conclusion — right of intervention. *Sheridan v. Jackson*, 72, 170.

When complaint insufficient to hold grantee for deficiency on foreclosure. *Calvo v. Davies*, 73, 211 ; 29 Am. Rep. 130.

Requisites of complaint to set aside conclusive judgment against corporation. *Whittlesey v. Delaney*, 73, 571.

Complaint in ejectment must allege possession of defendants. *Bockes v. Lansing*, 74, 437.

Form of complaint in action for claim and delivery, and in action by principal to compel surrender of securities by agent. *Western R. Co. v. Bayne*, 75, 1.

Complaint to compel delivery of stock by corporation, when insufficient. *Burrall v. Bushwick R. Co.*, 75, 211.

Where complaint by receiver appointed in supplementary proceedings does not show title to real estate to warrant partition. *Dubois v. Cassidy*, 75, 298.

When complaint does not state a cause of action for conspiracy. *Cohn v. Goldman*, 76, 284.

Insurance—when defendant has affirmative. *Murray v. New York Life Ins. Co.*, 85, 236.

Breach of covenant of seizin—when affirmative of issue is on plaintiff. *Woolley v. Newcombe*, 87, 605.

Creditor's complaint must allege return of execution unsatisfied. *Adsit v. Butler*, 87, 585.

Complaint in foreclosure against personal representatives—devisee taking subject to mortgage. *Glaciux v. Fogel*, 88, 434.

### 5. Relief warranted by.

Complaint will support judgment, if it states sufficient facts, although the grounds of the judgment may differ from those in the pleader's mind. *Wright v. Hooker*, 10, 51.

Single damages may be recovered on complaint under statute of willful trespass—so of acts of trespass prior to time laid. *Dubois v. Beaver*, 25, 123.

Plaintiff may recover for negligent waste although complaint charges intentional waste. *Robinson v. Wheeler*, 25, 252.

When accounting may be compelled under prayer for general relief. *Wood v. Brown*, 34, 337.

Complaint stating all facts may support recovery for warranty, although not specifically stated. *White v. Madison*, 26, 117.

Complaint for accounting concerning bonds—judgment for amount of bonds erroneous. *Wintermute v. Cooke*, 73, 107.

Where complaint warrants only legal relief, equitable relief cannot be awarded on the evidence. *Stevens v. Mayor, etc.*, 84, 296.

In action for specific performance of oral agreement to convey land, when lien for purchase-money may be adjudged. *Benedict v. Benedict*, 85, 625.

Prayer for damages controls—may be amended as to amount on appeal. *Schultz v. Third Ave. R. Co.*, 89, 242.

Recovery cannot be had on grounds not alleged in complaint. *Rome Exchange Bank v. Eames*, 4 Abb. 83.

## III. Answer.

### 1. Counter-claim.

Claim of answer for damages for non-fulfillment of contract sued on is not counter-claim. *Vassear v. Livingston*, 13, 248.

Defendant cannot have judgment for cause of action not set up in defense or counter-claim. *Wright v. Delafield*, 25, 266.

When breach of collateral independent parol agreement need not be counter-claimed. *Van Brunt v. Day*, 81, 251.

In foreclosure—defense of usury and demand that mortgage be canceled—when not a counter-claim. *Equitable Life Ass. Soc. v. Cuyler*, 75, 511.

Failure of defendant to plead non-performance of contract does not preclude him from counter-claim for damages. *Taylor v. Mayor, etc.*, 83, 625.

New matter not a counter-claim is deemed controverted. *Arthur v. Homestead Fire Ins. Co.*, 78, 462; 34 Am. Rep. 550.

Counter-claim cannot be struck out as irrelevant—demurrer. *Fettretch v. McKay*, 47, 426.

Counter-claim—what is not, in action against general assignee for accounting. *Duffy v. Duncan*, 35, 187.

What is not counter-claim. *Bates v. Rosekrans*, 37, 409.

Recoupment may not be pleaded in bar. *Nichols v. Dusenbury*, 2, 283.

Counter-claim. *Thompson v. Kessel*, 80, 383.

When counter-claim sufficiently set forth. *Ashley v. Marshall*, 29, 494.

Balance due on unsettled partnership accounting is counter-claim. *Waddell v. Darling*, 51, 327.

In action for price of real property, answer claiming damages for fraudulent representations as to extent constitutes counter-claim. *Isham v. Davidson*, 52, 237.

In foreclosure of mortgage, obligor may set up counter-claim on contract against plaintiff as against claim for deficiency on bond. *Hunt v. Chapman*, 51, 555.

Must be complete cause of action; if court has no jurisdiction, not available. *Cragin v. Lovell*, 88, 258.

Need not contain in itself all necessary allegations — reference to other parts of answer or complaint. *Id.*

See COUNTER-CLAIM; SET-OFF.

## 2. Defenses which must be pleaded.

An award, to operate as a bar. *Brazill v. Isham*, 12, 9.

Defense that bank paid loan in depreciated bank bills. *Codd v. Rathbone*, 19, 37.

Objection that suit is commenced prematurely. *Smith v. Holmes*, 19, 271.

Usury. *Manning v. Tyler*, 21, 567.

Discharge in bankruptcy. *Cornell v. Dakin*, 38, 253.

Defense of alien enemy. *Burnside v. Matthews*, 54, 78.

Limitation of time to sue, in carrier's receipt. *Westcott v. Fargo*, 61, 542; 19 Am. Rep. 300.

In action by officer for salary, defense of irregularity of his appointment. *Brennan v. Mayor, etc.*, 62, 365.

Plaintiff's non-ownership of cause of action. *Smith v. Hall*, 67, 48.

Mitigation in slander. *Willover v. Hill*, 72, 36.

In slander defendant may mitigate without pleading a justification. *Bush v. Prosser*, 11, 347.

Defense that insurance is a wager. *Goodwin v. Massachusetts Mut. Life Ins. Co.*, 73, 480.

Where defense not pleaded, unavailable though interposed by receiver of defendant. *Honegger v. Wettstein*, 94, 252.

Misnomer. *Traver v. Eighth Ave R. Co.*, 4 Abb. 422.

Plea of non-joinder of parties must name parties. *Wigand v. Sichel*, 3 Keyes, 120.

When former judgment need not be pleaded. *Krekeler v. Ritter*, 62, 372.

When seller of goods replevies for non-payment, the replevin action may not be pleaded in abatement. *Morris v. Rexford*, 18, 552.

## 3. Issues raised by.

Non est factum merely puts in issue the execution of the instrument and admits the other allegations. *Haggart v. Morgan*, 5, 422.

General denial not equivalent to nul tiel corporation. *Bank of Genesee v. Patchin Bank*, 13, 309.

Answer repeating condition of bond as set forth in complaint, and averring that it is not contained in the mortgage, is not denial of mortgage. *Dimon v. Dunn*, 15, 498.

What raises issue as to plaintiff's care in action of negligence. *Wall v. Buffalo Water-Works Company*, 18, 119.

Ownership of note — when put in issue. *Allis v. Leonard*, 46, 688.

Issue raised cannot be disregarded, though pleader may have intended a different issue. *Youngs v. Kent*, 46, 672.

When ownership of premises not in issue. *Fiske v. Bailey*, 51, 150.

When answer does not raise issue of fraud. *Lester v. Field*, 52, 621.

When answer puts in issue only the value of services, and materials. *Van Dyke v. Maguire*, 57, 429.

When answer does not distinctly raise issue. *Pennsylvania Coal Co. v. Blake*, 85, 226.

Answer to supplemental complaint that defendant is ignorant of fact admitted in original answer raises no issue. *Forbes v. Waller*, 25, 430.

Plea of payment — what evidence of payment of note may be given under. *Farmers & Citizens' Bk. v. Sherman*, 33, 69.

## 4. Joinder of defenses.

In slander defendant may justify and mitigate. *Bisbey v. Shaw*, 12, 67.

Non-joinder and defense on the merits may be united. *Sweet v. Tuttle*, 14, 465.

Matter in abatement may be joined with defense in bar — arrest on *capias* at suit of assignor not good plea of former action pending. *Gardner v. Clark*, 21, 399.

Answer may aver want of consideration and recoup for damages and need not state election. *Springer v. Dwyer*, 50, 19.

Action for partnership accounting and dissolution, answer of general denial — judgment of no partnership but recovery of advances is improper. *Arnold v. Angell*, 62, 508.

In action for breach of contract of sale defendant may plead rescission for fraud or mistake and also breach of warranty. *Bruce v. Burr*, 37, 237.

## 5. Admissions.

Implication from failure of answer to deny existence of part of claims. *Williams v. Hayes*, 20, 58.

Defendant only bound to deny such allegations as he wishes to controvert. *Newell v. Doty*, 33, 83.

Effect of admissions in answer. *Paige v. Willett*, 38, 28.

Failure in answer to deny statements in complaint is admission of them. *Fleischmann v. Stern*, 90, 110.

## 6. Practice in respect to.

## (a.) Sham and frivolous defense.

What is sham answer. *People v. McCumber*, 18, 315.

Sham or irrelevant defense cannot be struck out on trial. *Smith v. Countryman*, 30, 655.

When answer does not put in issue amount due on mortgage — answer showing subsequent lien raises no issue — when defense properly struck out as false. *Kay v. Whittaker*, 44, 565.

General denial cannot be struck out as sham. *Wayland v. Tylen*, 45, 281.

General denial — construction of — cannot be struck out as sham — answer not frivolous if partly good. *Thompson v. Erie Ry. Co.*, 45, 468.

Answer in libel denying that article was published by defendant's knowledge or assent is not frivolous. *Samuels v. Evening Mail Association*, 52, 625.

Answer presenting material issue cannot be held frivolous — cannot be adjudged frivolous if complaint is insufficient. *Munger v. Shannon*, 61, 251.

Motion for judgment for frivolousness of answer must be denied when complaint is insufficient. *Van Alstyne v. Friday*, 41, 174.

One only of several defenses in one answer cannot be adjudged frivolous. *Strong v. Sproul*, 53, 497.

## (b.) Indefinite, etc., answers.

Indefiniteness of answer must be taken advantage of by motion to make more certain. *Seeley v. Engell*, 13, 542.

Uncertainty of answer must be corrected on motion. *Kerr v. Hays*, 35, 331; *Greenfield v. Massachusetts Mut. Life Ins. Co.*, 47, 430.

Sufficiency of defense not determinable on motion to strike out. *Walter v. Fowler*, 85, 621.

## 7. Miscellaneous.

Success on one avowry on plea in bar entitled to judgment although others may be bad. *Nichols v. Dusenbury*, 2, 283.

Requisites of plea of discharge in bankruptcy. *McCormick v. Pickering*, 4, 276.

Effect of answer in equity as evidence. *Jacks v. Nichols*, 5, 178.

In covenant for transportation of property, plea that if plaintiff was damaged it was by his own wrong, etc., is bad. *Harmony v. Bingham*, 12, 99.

Construction of answer as to denial. *Simmons v. Sisson*, 26, 264.

Answer averring removal of cause. *Ayres v. Western R. Corp.*, 45, 260.

When complaint shows cause of action for money received in fiduciary capacity,

authorizing arrest—denials in answer requiring account do not change character of action or excuse non-payment. *Roberts v. Prosser*, 53, 260.

When leave to file supplemental answer not granted. *Holyoke v. Adams*, 59, 233.

When answer alleges defect of parties, it need not specify capacity in which party should be joined. *Miller v. Hall*, 70, 250.

When plea of discharge in bankruptcy should allege assignment. *Dewey v. Moyer*, 72, 70.

What is valid plea of usury—set-off under National bank act. *National Bank of Auburn v. Lewis*, 75, 516 ; 31 Am. Rep. 434.

When letter may not be annexed to answer in libel—when introductory statement struck out. *Kelly v. Waterbury*, 87, 179.

Pleading in action for false imprisonment, answer of facts in mitigation of damages permissible. *Bradner v. Faulkner*, 93, 515.

Answer cannot be withdrawn by defendant without consent of court against objection of other parties. *Cushman v. Le-land*, 93, 652.

Error in answer alleging defect of parties vitiates it. *Weigand v. Sichel*, 4 Abb. 592.

#### IV. Reply.

A plea to an avowry must answer all it professes to. *Nichols v. Dusenbury*, 2, 283.

When reply not required. *Argotsinger v. Vines*, 82, 308.

Replication to an answer in Chancery does not put in issue immaterial allegations. *Candee v. Lord*, 2, 269.

When reply does not depart from complaint—no ground of demurrer. *White v. Joy*, 13, 83.

Where there are two replications, and either is sustained, judgment passes on that issue. *Cole v. Jessup*, 10, 96.

No reply necessary to averment of payment. *VanGiesen v. VanGiesen*, 10, 316.

Plaintiff may show fraud without reply, unless court so directs. *Argall v. Jacobs*, 87, 110 ; 41 Am. Rep. 357.

Want of reply waived by not raising point on trial—party not estopped by not taking issue on matter of law. *Jordan v. Nat. Shoe and Leather Bank*, 74, 467 ; 30 Am. Rep. 319.

When relator takes issue on return instead of demurring, he admits its legal sufficiency. *People v. Board of Metropolitan Police*, 26, 316.

#### V. Demurrer.

##### 1. To complaint.

For misjoinder of causes of action remedy is by demurrer. *Blossom v. Barrett*, 37, 434.

Demurrant electing to submit to judgment rather than answer, is bound. *Whiting v. Mayor, etc.*, 37, 600.

On demurrer for want of facts, lack of capacity to sue cannot be raised. *Fulton Fire Ins. Co. v. Baldwin*, 37, 648 ; *People v. Crooks*, 53, 648.

Not separately stating distinct causes of action is no ground of demurrer. *Bass v. Comstock*, 38, 21.

How defect of parties plaintiff taken advantage of. *Patchin v. Peck*, 38, 39.

Demurrer does not lie for improper joinder of parties. *Allen v. City of Buffalo*, 38, 280 ; *People v. Crooks*, 53, 648.

Demurrer not answer under section 275, Code of Procedure. *Kelly v. Downing*, 42, 71.

General demurrer to complaint with two counts fails if either is good—remedy to make complaint more definite and certain is by motion. *Hale v. Omaha Nat. Bk.*, 49, 626.

To complaint does not lie for inartificial pleading or mistake as to relief demanded. *Wetmore v. Porter*, 92, 76.

Will lie where two causes of action not affecting all defendants are joined. *Nichols v. Drew*, 94, 22.

##### 2. To answer.

In libel, specifying only objections to one defense has no effect on other defense. *Matthews v. Beach*, 8, 173.

On demurrer to answer defendant may attack complaint. *People v. Booth*, 32, 397.

### 3. Generally.

Demurrer in words of statute, when sufficient. *Haire v. Baker*, 5, 357.

Operates as admission of the facts alleged in the pleading demurred to, on the trial. *Cutler v. Wright*, 22, 472.

Allegation that a judgment of another State void, not admitted by demurrer. *Kinnier v. Kinnier*, 45, 535; 6 Am. Rep. 132.

Where one valid ground of recovery is alleged demurrer does not lie because of insufficiency of another—action to set aside assessment. *Boyle v. City of Brooklyn*, 71, 1.

Demurrer does not admit conclusion of law. *Lange v. Benedict*, 73, 12; 29 Am. Rep. 80, note.

Demurrer not frivolous if argument needed—must indicate interposed in bad faith—word in, having two meanings, how construed. *Cook v. Warren*, 88, 37.

## VI. Proof authorized under

### 1. Variance.

A plea of eviction will not let in proof of the landlord's breach of agreement to repair. *Nichols v. Dusenbury*, 2, 283.

Under non est factum in covenant, neither mutual abandonment nor non-performance by plaintiff of conditions precedent can be proved. *Laraway v. Perkins*, 10, 371.

Damages naturally resulting need not be alleged in action of covenant. *Id.*

Averment of tender warrants evidence of waiver. *Holmes v. Holmes*, 9, 525.

What is not material variance in ejectment. *Fosgate v. Herkimer Manuf. and Hyd. Co.*, 12, 580.

Where issue is taken on a defense defectively pleaded, evidence must not be excluded on account of such defect. *White v. Spencer*, 14, 247.

In action of fire policy, proof that there was no force pump in building, admissible

under allegation of warranty that there was a force pump and its removal. *McComber v. Granite Ins. Co.*, 15, 495.

Allegation of tort and proof of contract does not justify recovery. *DeGraw v. Elmore*, 50, 1.

Former judgment, though not pleaded in bar, is competent to prove material issue. *Marston v. Swett*, 66, 206.

When complaint sets forth one instrument, alleging contract, defendant under general denial may prove another executed at same time as part of contract. *Marsh v. Dodge*, 66, 533.

When fraudulent transfer may be proved under general allegation of ownership in another. *Raymond v. Richmond*, 78, 351.

### 2. General issue.

Under plea of not guilty, defendant cannot prove a judgment and execution in his favor, in bar or in mitigation. *Coats v. Darby*, 2, 517.

Under general issue in slander, former recovery in whole or part may be shown. *Campbell v. Butts*, 3, 173.

Bankrupt discharge provable under general issue with notice. *Campbell v. Perkins*, 8, 430.

Evidence of payment inadmissible under general denial. *McKyring v. Bull*, 16, 297.

On suit for balance, and general denial, payment may be proved. *Quin v. Lloyd*, 41, 349.

Revocation of agent's authority—when provable under general denial. *Hier v. Grant*, 47, 278.

What may be proved under general denial. *Weaver v. Barden*, 49, 286.

Under general denial in action on promissory note, evidence of alteration may be given—objection to verification cannot be raised on trial. *Schwarz v. Oppold*, 74, 307.

Under general denial in an action for breach of promise of marriage evidence that plaintiff drank intoxicating liquors may be shown in mitigation of damages. *Button v. McCawley*, 1 Abb. 282.

### 3. Admissions.

Admission of execution of deed admits signing, sealing and delivery. *Thorp v. Keokuk Coal Co.*, 48, 253.

When locus in quo admitted. *Potter v. Smith*, 70, 299.

Admission by, that parties to action are sole owners precludes objection that others should have been made parties. *Prentice v. Janssen*, 79, 478.

Tender admits cause of action — court may so treat it — grant judgment on pleadings — under section 1010 of Code should move for new trial. *Eaton v. Wells*, 82, 576.

### 4. Miscellaneous.

One sued as a public officer may insist upon a former adjudication as conclusive, without pleading it. *Doty v. Brown*, 4, 71.

Indorsement for accommodation is conclusive evidence of indebtedness under money counts. *Cayuga Co. Bank v. Warden*, 6, 19.

In action by indorser against acceptor, the bill may be given in evidence under common counts — Laws of 1832, chapter 276. *Purdy v. Vermilya*, 8, 346.

When in action for price of goods defects may be proved. *Moffet v. Sackett*, 18, 522.

Factor may maintain action against principal for over-advances without averring certain balance, express promise and breach. *Blackmar v. Thomas* 28, 67.

Unless existence of corporation denied, not necessary to prove it. *Stone v. Western Transp. Co.*, 38, 240.

When averments sufficient to authorize proof of indorser's privity with negotiation. *Meyer v. Hibsher*, 47, 265.

When answer in replevin insufficient to admit proof of pledge to defendant's wife. *Stowell v. Otis*, 71, 36.

### VII. Amendment.

Amendment without costs. *Cayuga Co. Bank v. Warden*, 6, 19.

When answer amendable — issue raised cannot be disregarded, although pleader

may have intended a different issue. *Youngs v. Kent*, 46, 672.

Amendment of, in proceedings to determine claims to real property — extent of right. *Brown v. Leigh*, 49, 78.

Complaint ex delicto cannot be converted on trial into one ex contractu. *Neudecker v. Kohlberg*, 81, 296.

Defendant in an answer amended as of course, may set up an entire new defense — statute of limitations. *McQueen v. Babcock*, 3 Abb. 130; 3 Keyes, 428.

A bill of particulars annexed to a complaint is a part of it and is amendable. *Melvin v. Wood*, 3 Abb. 272.

When referee may amend. *Woolsey v. Trustees of Rondout*, 2 Keyes, 603.

### VIII. General matters.

Jurisdiction of inferior courts — requisites. *Turner v. Roby*, 3, 193.

Essentials as to stockholder's individual liability under general manufacturing act. *Chambers v. Lewis*, 28, 454.

Construction of, in quo warranto for forfeiture of charter of incorporation. *People v. Northern R. Co.*, 42, 217.

When non-residence established by. *Pratt v. Chase*, 44, 597; 4 Am. Rep. 718.

When executor stopped from insisting that he did not receive moneys as individual. *Scholey v. Halsey*, 72, 578.

Fictitious name cannot be used in summons to designate known defendant. *Town of Hancock v. First Nat. Bk. of Oxford*, 93, 82.

See various specific heads.

### PLEDGE.

Obtained by false representations vests no interest. *Mead v. Bunn*, 32, 275.

Creditor may assign debt with collateral pledge held by him. *Chapman v. Brooks*, 31, 75.

Pledgee of lent property with notice of real ownership cannot confer title although the pledgor has apparent title. *Porter v. Parks*, 49, 564.

Cannot be held except for designated loan—admissions of pledgor. *Duncan v. Brennan*, 83, 487.

Agreement for, may be made valid by subsequent delivery, without fraud, as against intermediate creditors—is not a chattel mortgage. *Parshall v. Eggert*, 54, 18.

By agent to pledgee with knowledge cannot be held for agent's debt. *Talmage v. First Nat. Bank*, 91, 531.

When husband cannot plead pledge to his wife in replevin. *Stowell v. Otis*, 71, 36.

Of collaterals for security for loan—presumption that it does not cover future transactions. *National Ex. Bk. v. Silliman*, 65, 475.

Of property of railroad company to director for precedent debt—foreclosure. *Duncomb v. New York, Housatonic, etc., R. Co.*, 84, 190.

Pledgee of stock as collateral, transferring it to order of pledgor on receiving his pay, does not impliedly warrant genuineness of stock. *Ketchum v. Stevens*, 19, 499.

Of stock—sale by pledgee—return of same quantity on payment of loan. *Ogden v. Lathrop*, 65, 158.

Where owner of stock pledges it with a blank assignment, and the pledgee fills up the assignment and transfers it for his own debt, the pledgor is estopped. *McNeil v. Tenth Nat. Bk.*, 46, 325; 7 Am. Rep. 341.

Of stocks to broker—acquiescence in account—payment for release. *Stenton v. Jerome*, 54, 480.

Securities pledged with banker not subject to general lien. *Wyckoff v. Anthony*, 90, 442.

On pledge of commercial paper for a loan, the pledgee may not sell, but must collect and apply. *Wheeler v. Newbould*, 16, 392.

No pledge can be sold without personal notice to pledgor of time, place and manner of sale, which must be public. *Id.*

Where an accommodation note is pledged for a loan—rights of the parties determined. *Blydenburgh v. Thayer*, 1 Abb. 156.

Of corporate stock—requisites of. *Wilson v. Little*, 2, 443.

Of stock as collateral—when not authorized by power of attorney and transfer in blank. *Merchants' Bk. of Canada v. Livingston*, 74, 223.

When arises out of stock brokerage transactions—evidence. *Markham v. Jaudon*, 41, 235.

When pledgee may use—custom will not justify sale after payment. *Lawrence v. Maxwell*, 53, 19.

Of property contracted to be sold to pledgor and in possession of warehouseman—ratification by owner—estoppel. *Voorhis v. Olmstead*, 66, 113.

Purchaser from pledgor of goods pledged, with notice of pledgee's lien, takes subject thereto, and cannot offset a demand against pledgor—purchaser cannot take advantage of pledgee's substitution of other like goods—evidence. *Carrington v. Ward*, 71, 360.

May not be sold without demand, although it is provided that it may be without notice. *Wilson v. Little*, 2, 443.

Where pledgee has wrongfully sold and cannot restore, pledgor not bound to tender debt before suit for damages. *Id.*

Pledgee of securities, selling them by order of pledgor, not responsible to purchaser for their genuineness—usury. *Baker v. Arnot*, 67, 448.

Liable to seizure and sale of pledgor's interest on execution, but after sale pledgee entitled to possession until redemption. *Stief v. Hart*, 1, 20.

Pledgee may purchase pledge at public sale. *Bryan v. Baldwin*, 52, 232.

Purchaser of pledge may enforce lien. *Lewis v. Mott*, 36, 395.

See AGENCY; BANKS; BROKER; CONTRACT, 24, 34; DAMAGES, 2, 443; FACTOR; SALE.

### Police.

See CONSTITUTIONAL LAW; CRIMINAL LAW; METROPOLITAN POLICE; NEW YORK CITY.



**POOR.**

Majority of superintendents may act. *Johnson v. Dodd*, 56, 76.

Vacancy in office of superintendent, how filled. *People v. Comstock*, 78, 356.

When person liable for removing pauper to another county. *Foster v. Cronkhite*, 35, 139.

Persons equally bound to support indigent person, may be made to contribute according to ability. *Stone v. Burgess*, 47, 521.

Pauper may recover for services rendered to keeper of county poor-house on his contract to pay for them. *Bergin v. Wemple*, 30, 319.

**POSTMASTER.**

Charging letter postage on newspaper does not act judicially, and is liable to action for conversion of newspaper. *Teall v. Fulton*, 1, 537.

**POWERS.**

To sell land and reinvest proceeds is not repugnant to a trust to receive rents and profits and apply to use of wife. *Belmont v. O'Brien*, 12, 394.

To sell lands—how defeated. *Hetzel v. Barber*, 69, 1.

Of appointment and execution of—of sale by executor passing to administrator with will annexed. *Mott v. Ackerman*, 92, 539.

When to be executed with consent of third persons, death of one of such persons before consent defeats power. *Barber v. Cary*, 11, 397.

Married woman may execute independently. *Wright v. Tallmadge*, 15, 307.

Trust failing as such, but valid as power, may take effect although it gives trustee power to conduct a manufacturing establishment during life of beneficiary—if part of beneficiaries cannot take, heirs succeed subject to rights of others. *Downing v. Marshall*, 4 Abb. 662.

Appointment to dispose of property by deed or will, when legally executed by married woman. *White v. Hicks*, 33, 383.

Of sale in will for purposes of trust vests in trustees substituted for executors. *Farrar v. McQue*, 89, 139.

See EXECUTOR AND ADMINISTRATOR; MORTGAGE; TRUSTS; USES; WILL.

**PRACTICE.**

- I. *Generally.*
- II. *Pleadings.*
- III. *Evidence.*
- IV. *Reference.*
- V. *Default.*
- VI. *Trial.*
- VII. *Verdict*

**I. Generally.**

Title of action—effect of enactment of Code of Procedure on. *Clickman v. Clickman*, 1, 611.

Security under section 223 of Code of Civil Procedure—order of reference to ascertain damages on injunction—effect on sureties in undertaking. *Methodist Churches v. Barker*, 18, 463.

Request for submission to jury must be made at trial, and point cannot be first raised on appeal. *Winchell v. Hicks*, 18, 558.

When party must sue rather than move to set aside stipulation. *Hill v. Hermans*, 59, 396.

Rule for judgment construed as necessary finding of mutual mistake. *Rider v. Powell*, 28, 310.

Supreme Court has power to stay action on coupons in Superior Court, pending foreclosure suit of mortgage securing. *Cushman v. Leland*, 93, 652.

**II. Pleadings.**

Answer may be struck out as sham although verified—motion may be joined with motion for judgment for frivolousness. *People v. McCumber*, 18, 315.

Relief on complaint framed in double aspect. *New York Ice Co. v. N. W. Ins. Co.*, 23, 357.

When complaint asks specific performance or damages, and conveyance cannot be made, case should be returned for award of damages. *Burlow v. Scott*, 24, 40.

### III. Evidence.

Exception to deposition must be specific. *Valton v. National Fund Life Assurance Co.*, 20, 32.

Return of commissioners to take testimony may be on independent sheet. *Pendell v. Coon*, 20, 134.

Insufficient notice of defendant's intention to testify. *Hinds v. Barton*, 25, 544.

Of parties before trial — one not really a party cannot be examined — officers of defendant bank — fictitious name in summons. *Town of Hancock v. First Nat. Bk. of Oxford*, 93, 82.

### IV. Default.

Court may open default in divorce case where summons was published — Code, section 135. *Brown v. Brown*, 58, 609.

Proof against defaulting defendants may be made on trial of issues as to others. *Lyon v. Yates*, 61, 661.

Proper remedy to get relief from judgment by default, is motion to open. *Maltby v. Greene*, 3 Abb. 144.

### V. Reference.

How referee compelled to insert matter in case. *Lester v. Field*, 47, 407.

Proper place of referee's report in case. *Hurlbert v. Dean*, 2 Abb. 428.

### VI. Trial.

When new trial need not be granted. *Bench v. Cooke*, 28, 508.

Claim that trial concerning land should be had in another county, waived by not being raised at trial. *West Point Iron Co. v. Reymert*, 45, 703.

### VII. Verdict.

Verdict subject to opinion — hearing exceptions at General Term, regular. *City Bank of Brooklyn v. McChesney*, 20, 240.

Specific verdict, not covering whole case, referred to General Term for judgment, mis-trial. *Manning v. Monaghan*, 23, 539.

Where a verdict assesses the value of goods, stating that the amount is to be reduced by certain charges not assessed, the General Term, on exceptions in first instance, may not order reference to assess those charges. *Wood v. Orser*, 25, 348.

See various specific heads, especially APPEAL; COSTS; JUDGMENT; NEW TRIAL; TRIAL.

## PREScription.

None arises against State. *Burbank v. Fay*, 65, 57.

See ADVERSE POSSESSION; BOUNDARY; DEDICATION; EASEMENT; HIGHWAY; NUISANCE; PARTY-WALL; WATER AND WATER-COURSE; WAY.

## Presumptions.

See EVIDENCE.

## Principal and Agent.

See AGENCY.

## Principal and Surety.

See SURETY.

## PRISON.

Construction of statute concerning contract for convict labor — act 1847, chapter

460, section 77—contract may be enlarged—is assignable. *Horner v. Wood*, 28, 350.

See CONVICT; CRIMINAL LAW; IMPRISONMENT.

### Process.

See ARREST AND BAIL; ATTACHMENT; SHERIFF; SUMMONS.

### PROHIBITION.

Lies to prevent exercise of unauthorized power where there is jurisdiction. *Quimbo Appo v. People*, 20, 531.

Inquiry relates to jurisdiction—when not issued for error or mistake in practice. *People v. Nichols*, 79, 582.

Writ not available to prevent appeal to this court. *Thomson v. Tracy*, 60, 31.

### PROPERTY.

When title to, question of fact. *Kelsey v. Northern Light Oil Co.*, 45, 505.

Title does not pass to buyer, where seller retains goods as security under contract to manufacture. *Tuthill v. Bogart*, 79, 215.

A willful trespasser gets no title to corn taken by him and converted by him into whisky. *Silsbury v. McCoon*, 3, 379.

Action for possession of personal property, what must be shown—possession by defendant. *Latimer v. Wheeler*, 3 Abb. 35.

Where one having interest in lands dies intestate after sale, proceeds are personal property and go to his administrator. *Denham v. Cornell*, 67, 556.

When growing grass personal, as between landlord and tenant. *Jencks v. Smith*, 1, 90.

Seat in New York cotton exchange, property liable for debts. *Powell v. Waldron*, 89, 328; 42 Am. Rep. 301, note.

A mortgage on real property in trust to collect principal and interest for a specific

end is a trust in personal property. *Bunn v. Vaughn*, 1 Abb. 253.

Slander of title to personal property is actionable. *Like v. McKinstry*, 3 Abb. 62.

Building erected on another's land without authority or agreement becomes realty. *Richtmyer v. Morss*, 4 Abb. 55.

Gas mains not real estate for taxation. *People v. Board of Assessors*, 39, 81.

When marl deposited on another's land becomes realty—rights of bona fide purchaser from subsequent grantee. *Lacustrine Fertilizer Co. v. Lake Guano, etc., Co.*, 82, 476.

Owner of land on which a tree stands is entitled to fruit on branches overhanging another's land. *Hoffman v. Armstrong*, 48, 201; 8 Am. Rep. 537.

Bona fide purchaser of chose in action obtained by the seller from the owner by undue influence and coercion gets no title. *Barry v. Equitable Life Ass. Soc.*, 59, 587.

Title to check deposited vests in bank. *Metropolitan Nat. Bk. v. Loyd*, 90, 530.

Where owner of goods does not part with indicia of title he may reclaim them. *Hentz v. Miller*, 94, 64.

Statutory proceedings to determine claims to real estate not affected by Code. *Burnham v. Onderdonk*, 41, 425.

Determination of claim to real property—jurisdiction—remedies—estoppel—joinder of parties—costs. *Fisher v. Hepburn*, 48, 41.

—“actual possession” means actual occupation. *Churchill v. Onderdonk*, 59, 134.

—action not authorized against infants. *Bailey v. Briggs*, 56, 407.

—three years' actual possession must immediately precede action. *Boylston v. Wheeler*, 61, 521.

—defendant claiming no interest must appear and disclaim. *Davis v. Read*, 65, 566.

Evidence of possession—when prima facie title—when countervailed by prior possession. *Ford v. Belmont*, 69, 567.

Question of vesting of title in logs under contract for manufacturing lumber. *Hurd v. Cook*, 75, 454.

See EMINENT DOMAIN; FIXTURES; SALE; TAXATION; WILL.

**PUBLICATION.**

Notice to present claims against estate — omitting middle letter of name, immaterial. *Cornes v. Wilkin*, 79, 129.

See SUMMONS; SURROGATE.

**PULTENEY ESTATE.**

Title affirmed. *People v. Snyder*, 41, 397.

Act to perpetuate testimony respecting, valid. *Howard v. Moot*, 64, 262.

**Q.****QUARANTINE.**

When widow not entitled to. *Peck v. Sherwood*, 56, 615.

**QUEENS COUNTY.**

Acts of 1872, chapter 285, 1869, chapter 855, 1875, chapter 482, construed. *People v. Brinkerhoff*, 68, 259.

**QUO WARRANTO.**

To review fraud in election canvass — evidence — regularity of canvass. *People v. Cook*, 8, 67.

Action in nature of, lies to test legality of erection of town. *People v. Carpenter*, 24, 86.

Error to charge that it must appear affirmatively that ballot-boxes were tampered with, to justify rejection. *People v. Livingston*, 79, 279.

Costs recoverable on. *People v. Clute*, 52, 576. See 10 Am. Rep. 508.

Rules of evidence unchanged. *People v. Thacher*, 55, 525; 14 Am. Rep. 312.

Incumbent must be officer de facto or de jure. *People v. Common Council of Brooklyn*, 77, 503; 33 Am. Rep. 659.

The only remedy under act of 1870, chapter 241. *People v. Clark*, 70, 518.

Discretion of attorney-general as to bringing. *People v. Fairchild*, 67, 334.

Construction of statute most favorable to defendant adopted. *People v. Flanagan*, 66, 237.

See OFFICE AND OFFICER.

**R.****RAILROAD.****I. Organization of company and its incidents.**

1. Incorporation and franchises.
2. Stockholders' rights and liabilities.
3. Directors' rights and liabilities.
4. Sale, lease and mortgage of road.
5. Miscellaneous.

**II. Construction of road and its incidents.**

1. Right of way and acquirement.
2. Fences, cattle-guards and crossings.
3. Miscellaneous.

**III. Operation of road and its incidents.**

1. Duties and liabilities as carrier.  
See CARRIER.
2. Duties and liabilities as to employees. See MASTER AND SERVANT.
3. Negligence.
  - (a.) As to animals.
  - (b.) As to travelers on highway.
  - (c.) Setting fire.
  - (d.) Miscellaneous.
4. Penalties.
5. General matters.

## I. Organization of company and its incidents.

### 1. Incorporation and franchises.

Articles of association—estimate of length of road—construction of affidavit as to amount of stock subscribed per mile, and manner of payment. *Buffalo & Pittsburgh R. Co. v. Hatch*, 20, 157.

Forfeits franchise by abandoning or ceasing to operate part of route. *People v. Albany & Vermont R. Co.*, 24, 261.

Remedy is by mandamus, indictment, or proceedings to annul. *Id.*

Failing to begin construction within five years from filing articles becomes thereby extinct. *Matter of Application of Brooklyn, etc., R. Co.*, 75, 335.

### 2. Stockholders' rights and liabilities.

Right of action against stockholders of insolvent, for unpaid subscriptions to capital, is in receiver. *Rankine v. Elliott*, 16, 377.

Incorporation—subscription to stock—calls—filing articles. *Lake Ontario, etc., R. Co. v. Mason*, 16, 451.

Subsequent part payment makes valid a subscription to stock of, made without payment. *Black River & Utica R. Co. v. Clarke*, 25, 208.

Subscription for stock payable in services—when binding. *Beach v. Smith*, 30, 116.

One whose shares have been forfeited for non-payment is not liable to creditors for unpaid amount. *Mills v. Stewart*, 41, 384.

Action by creditor to enforce stockholders' liability—assignment of stock may be shown to be collateral—judgment against company no evidence of debt—authorities on this point collated—whether plaintiff was laborer or creditor in fact—judgment must be for personal services. *McMahon v. Macy*, 51, 155.

Action against stockholder by creditor—record of judgment against company competent evidence. *Stephens v. Fox*, 83, 313.

When subscription to stock invalid after formation—when statute not retroactive. *New York & Oswego Midland R. Co. v. Van Horn*, 57, 473.

Subscription to articles of association with names of directors blank is inoperative. *Dutchess & Columbia R. Co. v. Mabbett*, 58, 397.

Subscriber to stock of road put in operation cannot defend against call on ground of defects in articles of association in stating termini and route. *Cayuga Lake R. Co. v. Kyle*, 64, 185.

Action to compel payment of dividends—evidence—constitutional law. *Boardman v. Lake Shore, etc., R. Co.*, 84, 157.

What is valid subscription to stock—omission to construct whole distance—foreclosure sale. *Buffalo & Jamestown R. Co. v. Gifford*, 87, 294.

Note of subscriber to capital stock, for first ten per cent, if paid, constitutes valid subscription for balance. *Ogdensburg, etc., R. Co. v. Wolley*, 1 Keyes, 118.

### 3. Directors' rights and liabilities.

Effect of consolidation of companies on officers as to creditors and officers. *Prouty v. Lake Shore, etc., R. Co.*, 52, 363.

Under disabilities of trustees as to acquiring title to its property. *Blake v. Buffalo Creek Co.*, 56, 485.

Pledge of property to director for precedent debt. *Duncomb v. New York, Housatonic, etc., R. Co.*, 84, 190.

### 4. Sale, lease and mortgage of road.

What is contract of lease. *Fisher v. New York Cent., etc., R. Co.*, 46, 644.

When mortgage of rolling stock must be filed. *Hoyle v. Plattsburgh, etc., R. Co.*, 54, 314; 13 Am. Rep. 595.

Equities between bondholders and pledgee of interest coupons upon foreclosure. *Union Trust Co. of N. Y. v. Monticello, etc., R. Co.*, 63, 311; 20 Am. Rep. 541.

Lease of portion—when lessee's construction and expenditure cannot be deemed those of lessor, in determining

question of corporate existence. *In Matter of Brooklyn, etc., Ry. Co.*, 81, 69.

Act of 1853, chapter 502, section 2, as to foreclosure, repealed by acts of 1854, chapter 282, and 1874, chapter 430. *Pratt v. Munson*, 84, 582.

When may not lease its road—when injunction will not be granted. *Troy & Boston R. Co. v. Boston, etc., Ry. Co.*, 86, 107.

Sale and transfer of railroad to existing corporation valid—constitutionality of legislation relating to Brooklyn street railways. *People v. Brooklyn, etc., R. Co.*, 89, 75.

Validity of sale of, under mortgage. *Harpending v. Munson*, 91, 650.

Effect of mortgage as to after-acquired property. *Stevens v. Watson*, 4 Abb. 302.

### 5. Miscellaneous.

Proceedings to authorize issue of aid bonds—certiorari—evidence—petition. *People v. Smith*, 45, 772.

Aid bonds—proceedings to authorize, must be strictly in pursuance of statute—signing of petition. *People v. Hulburt*, 46, 110.

Rolling stock is personalty liable to sale for taxes. *Randall v. Elwell*, 52, 521; 11 Am. Rep. 747.

Action to compel exchange of bonds—bonds stolen and forged—condition precedent—waiver—negligence. *Maas v. Missouri, etc., Ry. Co.*, 83, 223.

Powers of receiver to maintain action against stockholder. *Mann v. Pentz*, 3, 415.

## II. Construction of road and its incidents.

### 1. Right of way and acquirement.

When officers have power to submit to arbitration in acquiring lands. *Wood v. Auburn & Rochester R. Co.*, 8, 160.

May be authorized to acquire private property. *Buffalo & N. Y. R. Co. v. Brainard*, 9, 100.

When does not “cut off” a wharf—what wharves are intended in Laws of

1846, chapter 279. *Tillotson v. Hudson R. Co.*, 9, 575.

When notice necessary to give jurisdiction under Laws of 1847, chapter 31. *Cruiger v. Hudson R. Co.*, 12, 190.

May acquire lands by proceedings under its charter, although inconsistent with general railroad act. *Clarkson v. Hudson R. Co.*, 12, 304.

Although authorized to cross a stream in such manner as not to impair its usefulness, is still liable for damages thereby caused to lands not on the stream. *Brown v. Cayuga & Susquehanna R. Co.*, 12, 486.

Diverting stream, bound to restore it as fully as practicable. *Cott v. Lewistown R. Co.*, 36, 214.

Commissioners to locate, appointment and jurisdiction. *Matter of Long Island R. Co.*, 45, 364.

Lands may be acquired by, for depot purposes. *In re New York & Harlem R. Co. v. Kip*, 46, 546; 7 Am. Rep. 385.

Commissioners under section 22 of general act may change route, but they must preserve continuity of line—only one board in each county. *People v. Tubbs*, 49, 356.

Lease of its road and lands includes land acquired by it for a street, and where the land was condemned for another railroad the lessee was entitled to the use of the money awarded as damages during the lease. *Matter of New York Cent. R. Co.*, 49, 414.

No action lies against, by adjoining owners on street, not owning fee of street, for causing inconvenience of access. *Kellinger v. Forty-second Street, etc., R. Co.*, 50, 206.

Cannot acquire land held by city for park. *Matter of Boston & Albany R. Co.*, 53, 574.

Deed to in fee, operative. *Yates v. Van De Bogert*, 56, 536.

Under act of 1854, chapter 282, section 5, Supreme Court may put into possession of lands acquired. *Matter of New York Cent., etc., R. Co.*, 60, 116.

On discontinuance, land acquired by, reverts to owners. *Heard v. City of Brooklyn*, 60, 242.

Conveyance in fee of right of way does not release obligation to maintain crossings. *Smith v. New York & Oswego Midland R. Co.*, 63, 58.

Lands may be acquired for cattle-yards, elevators and abattoirs—when gas company's lands may be condemned. *In Matter of Petition of New York Cent., etc., R. Co. v. Metropolitan Gas-light Co.*, 63, 326.

Acquiring land additional to roadway—burden of proof of necessity. *Matter of Application of New York Cent. R. Co.*, 66, 407.

May proceed to acquire fee of lands of which it has lease—leasing road after commencing proceedings does not abrogate them. *Kip v. New York & Harlem R. Co.*, 67, 227.

Cannot refuse to pay award for land damages after confirmation. *Mutter of Rhinebeck & Conn. R. Co.*, 67, 242.

Proceedings to perfect title to right of way—act of 1873, chapter 531—consolidation—amendment of petition—constitutionality—appeal—costs. *Matter of Petition of Prospect Park, etc., R. Co.*, 67, 371.

Authority to appropriate lands does not include use for street or highway. *Strong v. City of Brooklyn*, 68, 1.

In proceeding to condemn lands petition must contain description. *Matter of Application of New York Cent., etc., R. Co.*, 70, 191.

Proceedings under rapid transit act to acquire right of way. *Matter of Petition of New York Elevated R. Co.*, 70, 327; *Matter of Petition of Gilbert Elevated Ry. Co.*, 70, 361.

Failing to begin construction within statutory time, cannot acquire right of way. *Matter of Application of Brooklyn, etc., Ry. Co.*, 72, 245.

Proceedings to acquire lands in city of New York—streets—land under water—piers. *Matter of New York Cent., etc., R. Co.*, 77, 248.

Proceedings to acquire right to cross another railroad—requisites of petition—burden of proof—when answer raises issue. *Matter of Lockport & Buffalo R. Co.*, 77, 557.

When loses right to lay tracks in city street, by non-compliance with charter *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78, 524.

Act of 1850, chapter 140, authorizes more than one crossing of track of another road. *Matter of Boston & Hoosac, etc., R. Co.*, 79, 64.

Under act of 1850, chapter 140, attempt to agree with company as to points and manner of crossing, condition precedent to appointment of commissioners—must be averred in petition. *Matter of Boston & Hoosac, etc., R. Co.*, 79, 69.

Elevated cable railway, under act of 1866, chapter 697, may cross Ocean Parkway constructed under act of 1874, chapter 583. *Stranahan v. Sea View Ry. Co.*, 84, 308.

Designation of new route—change of route—jurisdiction to fix crossing of another railroad. *Matter of New York, etc., R. Co.*, 88, 279.

Condemnation of land for—what questions can be considered on appeal here—what questions commissioners may determine. *Matter of Lake Shore, etc., R. Co.*, 89, 442.

Condemnation proceedings—petition not amendable after appeal. *Matter of New York, etc., R. Co.*, 89, 453.

Street may be laid out over road-bed though including several tracks without compensation under statute of 1863, chapter 62. *President Del. & H. C. Co. v. Village of Whitehall*, 90, 21.

Abutting owner entitled to compensation where elevated railroad built in street. *Story v. New York El. R. Co.*, 90, 122; 43 Am. Rep. 146.

Adjoining owner entitled to damages for unreasonable use of street by railroad company though fee in city. *Mahady v. Bushwick R. Co.*, 91, 148; 43 Am. Rep. 661.

Land condemned for, cannot be afterward condemned for highway—erection of superfluous structures on land taken not abandonment. *Prospect Park, etc., R. Co. v. Williamson*, 91, 552.

## 2. Fences, cattle-guards and crossings.

Contract with land-owner as to fences, etc.—negligence. *Poler v. New York Cent. R. Co.*, 16, 476.

Must maintain cattle-guards at street crossings in villages. *Brace v. New York Cent. R. Co.*, 27, 269.

Bound to construct cattle-guard at road crossing although near depot. *Bradley v. Buffalo, etc., R. Co.*, 34, 427.

Hudson River railroad not bound to maintain fences where road runs in river —“river” includes channels around islands. *Schermerhorn v. Hudson River R. Co.*, 38, 103.

Liability to maintain fences and cattle-guards—lessee. *Tracy v. Troy & Boston R. Co.*, 38, 433.

Establishment of farm crossings must regard convenience of both parties—court may grant pecuniary compensation instead of compelling construction. *Wade-man v. Albany & Susquehanna R. Co.*, 51, 568.

When mandamus lies to compel restoration of highway. *People v. Dutchess & Columbia R. Co.*, 58, 152.

Foreign company operating road in this State bound to fence. *Purdy v. New York & N. H. R. Co.*, 61, 353.

May be required by legislature to build bridge over turnpike. *People v. Boston & Albany R. Co.*, 70, 569.

When indictable for nuisance in bridging highway. *People v. New York Cent., etc., R. Co.*, 74, 302.

When directors of, liable for contempt in disobeying mandamus to erect fence. *People v. Rochester, etc., R. Co.*, 76, 294.

When mortgage trustees in possession may be compelled to build and maintain fences and farm crossing. *Jones v. Seligman*, 81, 190.

Construction of highway crossing—bridge may be of less width than highway—not per se nuisance. *People v. New York, etc., R. Co.*, 89, 266.

General act requires pre-existing company to make fences and gates although its charter did not require it to make gates. *Staats v. Hudson River R. Co.*, 4 Abb. 287.

Obligation to fence—privilege to land-owners to maintain gates or bars not in conflict with. *Staats v. Hudson R. R. Co.*, 3 Keyes, 196.

Must maintain fences of sufficient height, although statute referred to in general act as furnishing standard of height prescribes none. *Tallman v. Syracuse, etc., R. Co.*, 4 Abb. 351.

Duty to fence although statute does not prescribe height and strength of fence. *Tallman v. Syracuse, etc., R. Co.*, 4 Keyes, 128.

## 3. Miscellaneous.

Liable to laborers for sub-lessees of original contractors. *Kent v. New York Cent. R. Co.*, 12, 628.

When liable under section 12 of general law to laborers employed by contractors. *Atcherson v. Troy & Boston R. Co.*, 1 Abb. 13.

“Laborer” does not include contractor in general act. *Balch v. New York & Oswego Midland R. Co.*, 46, 521.

Definition of “track” in act of 1853, chapter 62, section 1. *Boston & Albany R. Co. v. Village of Greenbush*, 52, 510.

When bound by use of materials bought without authority—evidence—letters—entries. *Scott v. Middletown, etc., R. Co.*, 86, 200.

## III. Operation of road and incidents.

### 1. Duties and liabilities of carrier.

See CARRIER.

### 2. Duties and liabilities as to employees.

See MASTER AND SERVANT.

### 3. Negligence.

#### (a.) As to animals

Neglecting to maintain fences and cattle-guards, is liable for cattle killed on track although not owned by an adjoining proprietor, and it does not appear how or whence they came there. *Corwin v. N. Y. & Erie R. Co.*, 13, 42.



Not liable for negligently running over cattle escaping from owner's inclosure and getting upon track, although he was not negligent. *Munger v. Tonawanda R. Co.*, 4, 349.

Not responsible for killing of cattle getting on track by filling up of guards with snow when owner was negligent in allowing them to escape from yard. *Hance v. Cayuga & Susquehanna R. Co.*, 26, 428.

Running train at full speed over road frequented by cattle is negligence. *Brown v. New York Cent. R. Co.*, 34, 404.

Liable for killing cattle although owner was bound by contract with company to fence the track. *Shepard v. Buffalo, etc., R. Co.*, 35, 641.

Liable for killing of cattle coming on track through gate used in company's business. *Spinner v. New York Cent., etc., R. Co.*, 67, 153.

Liability for injury caused by improper fencing. *Murray v. New York Cent. R. Co.*, 3 Abb. 339.

Not absolutely liable for injury by temporary want of repairs of fence. *Murray v. New York Cent. R. Co.*, 4 Keyes, 274.

As to transportation of animals, see CARRIER.

(b.) *As to travelers on highway.*

Violation of city ordinance regulating speed of railway train is no evidence of negligence in fact. *Brown v. Buffalo & State Line R. Co.*, 22, 191.

Speed of railroad train at street crossing. *Wills v. Hudson River R. Co.*, 29, 315.

Relative duties of company and of traveler on highway at crossing. *Ernst v. Hudson River R. Co.*, 35, 9.

Traveler at highway crossing not bound to stop if company has obstructed his view. *Mackay v. New York Cent. R. Co.*, 35, 75.

Negligence of company and of traveler on highway at crossing. *Renwick v. New York Cent. R. Co.*, 36, 132.

Omission of bell or whistle by railroad — running engine by fireman — duty toward young person. *O'Mara v. Hudson R. R. Co.*, 38, 445.

Withdrawing an accustomed flagman at crossing may render liable for accident produced thereby. *Ernst v. Hudson R. R. Co.*, 39, 61; *Kissenger v. N. Y., etc., R. Co.*, 56, 538; *McGrath v. N. Y. Cent., etc., R. Co.*, 63, 522.

Whether bound to maintain flagman at crossing in city, question for jury. *Beisiegel v. New York Cent. R. Co.*, 40, 9.

Duty to ring bell at crossings — duty of traveler on highway to look for trains. *Grippen v. New York Cent. R. Co.*, 40, 34.

When street railroad company not liable for injury to young child on street. *Bulger v. Albany Railway*, 42, 459.

Duty to give statutory signals at crossings only applies to persons crossing — respective care required. *Harty v. Cent. R. Co. of N. J.*, 42, 468.

Duty at highway crossings. *Richardson v. New York Cent. R. Co.*, 45, 846.

Comparative rights of company and citizens at highway crossings — high speed at, not negligent. *Warner v. New York Cent. R. Co.*, 44, 465.

Of flagman at crossing — evidence of his former intoxication incompetent — plaintiff must be shown free from negligence. *Id.*

Of street railway company — defect in track — constructive notice. *Worster v. Forty-second Street, etc., R. Co.*, 50, 203.

Signals of intended backing of train across city street — ringing or whistling not sufficient — passers not absolved from care by omission. *Eaton v. Erie Ry. Co.*, 51, 544.

To run train backward in city street at night without light or warning is negligent as to persons on the street. *Maginnis v. New York Cent., etc., R. Co.*, 52, 215.

Not absolutely bound to establish flagmen and gates at highway crossings. *Weber v. New York Cent., etc., R. Co.*, 58, 451.

Questions of giving signals at railroad crossing and contributory negligence for jury. *Salter v. Utica, etc., R. Co.*, 59, 637.

Effect of ordinance as to speed of trains. *Calligan v. New York Cent., etc., R. Co.*, 59, 651.

Not bound to keep flagman at crossing — fireman in charge of locomotive, when

immaterial — evidence of not hearing signals. *Culhane v. New York Cent., etc., R. Co.*, 60, 133.

When highway is not "a traveled public road or street" necessitating signals at crossing — omission, when question of fact. *Cordell v. New York Cent., etc., R. Co.*, 64, 535.

Leasing to another company, not liable for injury to traveler on highway from omission of lessee to repair fence. *Ditchett v. Spuyten Duyvil, etc., R. Co.*, 67, 425.

Accident at highway and railway crossing — backing engine — flagman — omission of boy to look — question of fact. *McGovern v. New York Cent., etc., R. Co.*, 67, 417.

Not bound to keep premises at highway crossings clear of obstructions to view of travelers on highway. *Cordell v. New York Cent., etc., R. Co.*, 70, 119; 26 Am. Rep. 550.

Collision of railway trains at crossing of railway — questions of fact. *Wood v. New York Cent., etc., R. Co.*, 70, 195.

Duty to give other than statutory signals at highway crossing. *Dyer v. Erie Ry. Co.*, 71, 228.

Absence or negligence of customary flagman at highway crossing — obstruction of view of track — evidence. *Dolan v. Delaware & Hudson Canal Co.*, 71, 285.

Street railway company, contracting to keep street in repair "in and about tracks," liable to third party for negligence therein injuring him. *McMahon v. Second Ave. R. Co.*, 75, 231.

Liability of railroad company for frightening horse by whistle at highway crossing. *Voak v. Northern Cent. Ry. Co.*, 75, 320.

When street railroad company using track of another not liable for injury by neglect of latter to keep track on grade of street. *Lowery v. Brooklyn City, etc., R. Co.*, 76, 28.

Bound to keep highway crossing safe. *Gale v. New York Cent., etc., R. Co.*, 76, 594.

Of railroad and of person crossing track at station to board train. *Terry v. Jewett*, 78, 338.

Negligence at highway crossing — custom to keep flagman — omission of statutory signals. *Casey v. New York Cent., etc., R. Co.*, 78, 518.

No flagman at crossing — city no power to regulate by ordinance. *Long Island City v. Long Island R. Co.*, 79, 561.

Unplanked rails of railroad at highway crossing — excessive speed — contributory — leaving horse untied. *Wasmer v. Delaware, etc., R. Co.*, 80, 212; 36 Am. Rep. 608, note.

Omission of statutory signals not negligence — when plaintiff sees engine approaching — object of signals to notify travelers. *Pakalinsky v. N. Y. Cent., etc., R. Co.*, 82, 424.

Negligence in maintaining track above level of street — evidence. *Wooley v. Grand Street, etc., R. Co.*, 83, 121.

Question of fact — unsafe condition of railway track at highway crossing. *Payne v. Troy & Boston R. Co.*, 83, 572.

Railroad bound to maintain highway crossing safe, although street railway company also bound at same point. *Masterson v. New York Cent., etc., R. Co.*, 84, 247; 38 Am. Rep. 510.

At highway crossing, when liable for negligence, although fright of horse contributed. *Cosgrove v. New York, etc., R. Co.*, 87, 88; 41 Am. Rep. 355.

Negligence in running trains. *Sheeham v. New York Cent., etc., R. Co.*, 91, 332.

Duty of care at place where public licensed to cross. *Barry v. N. Y. Cent., etc., R. Co.*, 92, 289; 44 Am. Rep. 377.

Failure to give statutory signals at crossing of untraveled alley not negligence. *Byrne v. New York Cent., etc., R. Co.*, 94, 12.

What degree of care a horse car driver must exercise — plaintiff's negligence — defendant must show extraordinary care where plaintiff falls in crossing track. *Mentz v. Second Ave. R. Co.*, 3 Abb. 274.

(c.) *Setting fire.*

Degree of care requisite — contributory negligence. *Pero v. Buffalo & State Line R. Co.*, 22, 209.

Communication of fire. *Field v. New York Cent. R. Co.*, 32, 339; *Webb v. Rome, etc., R. Co.*, 49, 420; 10 Am. Rep. 389.

In action for negligent communication of engine sparks evidence is competent to show distance at which sparks from that engine had kindled. *Hinds v. Barton*, 25, 544.

Use in ordinary form and manner will not excuse negligence. *Id.*

Sparks from locomotive — removal of screen. *Bedell v. Long Island R. Co.*, 44, 367; 4 Am. Rep. 468.

Question of fact — violation of fire ordinance. *Briggs v. New York Cent., etc., R. Co.*, 72, 26.

(d.) *Miscellaneous.*

Presumption of negligence arises when accident arises from defect in railroad bed or apparatus. *Curtis v. Rochester & Syracuse R. Co.*, 18, 534; *Seybolt v. New York, etc., R. Co.*, 95, 562.

One injured by concurrent negligence of two railroads may maintain an action against both jointly. *Colegrove v. N. Y. & N. H. and N. Y. & H. R. Cos.*, 20, 492; or either *Barrett v. Third Ave. R. Co.*, 45, 628.

Railroad owes ordinary care to one while shipping freight. *Stinson v. N. Y. Cent. R. Co.*, 32, 333.

"Running switch" is negligence. *Brown v. N. Y. Cent. R. Co.*, 32, 597.

Negligent in running at full speed over road frequented by cattle. *Brown v. N. Y. Cent. R. Co.*, 34, 404.

Of railroad company in condition of ground near station. *Hulbert v. N. Y. Cent. R. Co.*, 40, 145.

Railroad not liable for unavoidable breaking of rail. *McPadden v. N. Y. Cent. R. Co.*, 44, 478; 4 Am. Rep. 705.

Street railroad — duty as to track — constructive notice of defect in track. *Worster v. Forty-second Street, etc., R. Co.*, 50, 203.

Bound only to use of appliances safe and generally used. *Unger v. Forty-second Street, etc., R. Co.*, 51, 497.

When railroad company not liable for, in regard to running or starting of trains. *Rose v. Boston & Albany R. Co.*, 58, 217.

When railroad not chargeable with, in retaining employee who has been negligent in a single instance only. *Barulec v. N. Y. & Harlem R. Co.*, 59, 356; 17 Am. Rep. 325.

Railroad not liable for, of contractor in construction. *McCafferty v. Spuyten Duyvil, etc., R. Co.*, 61, 178; 19 Am. Rep. 267.

Assignee of railroad in bankruptcy, when not liable to action of. *Cardot v. Barney*, 63, 281; 20 Am. Rep. 533.

Running trains over road of another — liable for negligence. *McGrath v. N. Y. Cent., etc., R. Co.*, 63, 522.

Duty of railroad company toward licensee on its lands. *Sutton v. N. Y. Cent., etc., R. Co.*, 66, 243.

When injury has been caused by a defect in a railway bridge, evidence of subsequent correction of the defect is incompetent. *Dale v. Delaware, etc., R. Co.*, 73, 468.

Bound to keep station platform clear of ice. *Weston v. N. Y. Elevated R. Co.*, 73, 595.

Leasing its road to an individual without legislative authority, is liable for his negligence in operating it. *Abbott v. Johnstown, etc., R. Co.*, 80, 27; 36 Am. Rep. 572.

What degree of negligence in suit for damages will justify nonsuit. *Cook v. N. Y. Cent. R. Co.*, 1 Abb. 432; 3 Trans. App. 8.

#### 4. Penalties.

Under act of 1850, section 39, liable to penalty for not ringing or whistling on crossing highway, although crossing was on a bridge fifteen feet above. *People v. N. Y. Cent. R. Co.*, 13, 78.

Penalty for exacting excessive fare, on train, not incurred when ticket office open at time of starting. *Chase v. N. Y. Cent. R. Co.*, 26, 523.

Action for penalty for demanding illegal fare — when maintainable — complaint. *Nellis v. N. Y. Cent. R. Co.*, 30, 505.

For extorting excessive fare—only one action maintainable for all instances up to time of suit—may be recovered by one riding simply to obtain it. *Fisher v. New York Cent., etc., R. Co.*, 46, 644.

When a railroad corporation existing before the general railroad act was limited in rates of fare, under that act it was authorized to increase them to the new limit. *Johnson v. Hudson R. R. Co.*, 49, 455.

#### 5. General matters.

Street railroad cars are not “public stages.” *Whitaker v. Eighth Ave. R. Co.*, 51, 295.

Street railway company liable for act of driver in throwing off person endeavoring to pass over platform of car not in motion. *Shea v. Sixth Ave. R. Co.*, 62, 180; 20 Am. Rep. 480.

Other vehicles bound promptly to make way for cars—negligence—contributory. *Adolph v. Central Park, etc., R. Co.*, 76, 580.

When liable for forcible ejection of trespasser from train. *Rounds v. Delaware, etc., R. Co.*, 64, 129; 21 Am. Rep. 597.

Contract between railroads as to rates, tolls, fares, etc.—construed. *B. & O. R. Co. v. Tioga R. Co.*, 1 Abb. 149.

Inconvenience of company from delay of shippers in loading—demurrage—lien. *Crommelin v. N. Y. & H. R. Co.*, 1 Abb. 472.

Order to receiver to pay debts due laborers and employees may include counsel fees to attorneys. *Gurney v. Atlantic and Great Western Ry. Co.*, 58, 358.

See CARRIER; EMINENT DOMAIN; MASTER AND SERVANT; NEGLIGENCE.

#### Rape.

See CRIMINAL LAW.

#### Ratification.

See AGENCY; CONTRACT; INFANCY.

#### Real Action.

See CLOUD ON TITLE; EJECTMENT; SUMMARY PROCEEDINGS; TRESPASS; PARTITION.

#### Real Property.

See DEED; INJUNCTION; MECHANICS' LIEN; MORTGAGE; PROPERTY; VENDOR AND PURCHASER.

#### Reargument.

See APPEAL.

#### RECEIPT.

Acknowledging money in full for damages, not receipt but release. *Coon v. Knap*, 8, 402.

Explainable by parol—when not conclusive of payment. *Buswell v. Poiner*, 37, 312; *Ryan v. Ward*, 48, 204; 8 Am. Rep. 539.

In full, without full satisfaction, inoperative without new consideration. *Bliss v. Shwarts*, 65, 444.

In full, by mistake, not conclusive. *Boardman v. Gaillard*, 60, 614.

Payment of one claim, not consideration for receipt in full without payment of the other. *Miller v. Coates*, 66, 609.

By auctioneer of land, providing for return of money deposited by purchaser to seller on return of receipt indorsed by purchaser—seller entitled to money. *Cockcroft v. Muller*, 71, 367.

See ACCORD AND SATISFACTION; BILL OF LADING; CONTRACT; EVIDENCE; EXECUTION; PAYMENT; WAREHOUSEMAN.

#### RECEIVER.

- I. *Appointment.*
- II. *Compensation.*
- III. *Liabilities.*
- IV. *Rights, powers and duties.*
- V. *Title.*

I. *Appointment.*

Stranger may not ask for his appointment — jurisdiction over — interference with — contempt — accounting. *O'Mahoney v. Belmont*, 62, 133.

Consent to appointment waives irregularities. *Powell v. Waldron*, 89, 328; 42 Am. Rep. 301, note.

Receiver of rents will not be appointed in foreclosure where debt not due — receivership as to parcel. *Hollenbeck v. Donnell*, 94, 342.

II. *Compensation.*

Court may fix. *Gardiner v. Tyler*, 2 Abb. 247; 3 Keyes, 505; 3 Trans. App. 161.

Of insolvent life insurance companies — compensation not to be fixed by superintendent — authority as to investing funds. *Attorney-Gen. v. North Am. L. Ins. Co.*, 89, 94.

Of insurance company appointed before Laws of 1883, chapter 378, entitled to have compensation paid by superintendent of department. *People v. McCall*, 94, 587.

Commissions of receiver of insurance company before act of 1883, chapter 378, were to be fixed by court. *Matter of Attorney-General v. Guardian L. Ins. Co.*, 93, 631.

Where he allows business of corporation to be carried on. *In Matter of Woven Tape Skirt Co.*, 85, 506.

Of insolvent savings bank — what are proper allowances on settlement of accounts. *Matter of Guardian Sav. Inst.*, 78, 408.

Of insolvent corporation, may include in assessment a reasonable sum for making and collecting. *Sands v. Boutwell*, 26, 233.

III. *Liability.*

Appointed in another State, when liable to employee here for injury by defective machinery. *Kain v. Smith*, 80, 458.

Liability to — proceedings for contempt in discharging order of court — discretion

of court below — when fine proper. *Clark v. Bining*, 75, 344.

Not liable to attorney for services to company after appointment. *Barnes v. Newcomb*, 89, 108.

When not liable as for special deposit. *Butler v. Sprague*, 66, 392.

IV. *Rights, powers and duties.*

Of railroad — right to maintain action against stockholders. *Mann v. Pentz*, 3, 415.

May select court in which to sue. *Rockwell v. Merwin*, 45, 166.

Cannot interfere in action until made party. *Tracy v. First Nat. Bk. of Selma*, 37, 523.

Right of, to defend action against principal. *Honegger v. Wettstein*, 94, 252.

When may satisfy mortgage. *Heermans v. Clarkson*, 64, 171.

Of insolvent corporation, bound by lawful acts of corporation. *Hyde v. Lynde*, 4, 387.

In supplementary proceedings, may bring action to admeasure dower assigned by widow. *Payne v. Becker*, 87, 153.

In supplementary proceedings in favor of bank — effect of insolvency and dissolution of bank. *Wright v. Nostrand*, 94, 31.

In divorce, for sequestration of husband's property, cannot sue to set aside fraudulent transfer. *Foster v. Townshend*, 68, 203.

In supplementary proceedings cannot set aside assignment by judgment debtor in fraud of creditors. *Bostwick v. Menck*, 40, 333.

Of an insolvent corporation suing to recover back payment made by corporation in fraud of creditors, represents the creditors and not corporation — set-off. *Osgood v. Ogden*, 3 Abb. 425.

Of insolvent mutual insurance company is bound to make assessment — limit of recovery. *Savage v. Medbury*, 19, 32.

Of insolvent insurance company — appointment — powers — assessments. *Bangs v. Duckinfield*, 18, 592.

Purchaser at sale by, not compelled to take imperfect title though afterward

perfected. *People v. Open Board, etc., Co.*, 92, 98.

On sale of assets of insolvent corporation by receiver, purchaser gets no right to compel accounting by former trustee. *Mann v. Fairchild*, 2 Keyes, 106.

Court has discretion to deny motion by purchaser to compel receiver to complete sale. *Matter of Attorney-General v. Continental L. Ins. Co.*, 94, 199.

Of insolvent bank may not purchase its property for himself on foreclosure. *Jewett v. Miller*, 10, 402.

Order fraudulently obtained by, for sale of debt of corporation, may be vacated by action for that purpose. *Hackley v. Draper*, 60, 88.

Court cannot, without notice to debtor, direct receiver to pay attorney's fee. *Godard v. Stiles*, 90, 199.

To receiver to pay debts due laborers and employees may include counsel fees to attorneys. *Gurney v. Atlantic & Gt. West. Ry. Co.*, 58, 358.

Appointment and powers of receiver under 2 R. S. 463, as to sequestration. *Mann v. Pentz*, 3, 415.

As an officer of the court may always apply for instructions as to fund where there is danger of unfair distribution through error. *People v. Security Life*, 79, 267.

Distribution of assets by receiver — priority of tax warrant. *Matter of Columbian Insurance Co.*, 3 Abb. 239.

Of insolvent bank — when not bound to pay amount of check to owner remitting for collection — trust. *People v. Merchants and Mechanics' Bank*, 78, 269; 84 Am. Rep. 532.

When lien of junior mortgagee upon rents and profits obtained by receiver in foreclosure is superior to equities of prior mortgagee. *Ranney v. Peyser*, 83, 1.

### V. Title.

Title to property where receiver dies, vests in court which may appoint new one. *Nicoll v. Boyd*, 90, 516.

Rule that receiver's title dates only from filing of order of appointment does not

apply to chose in action. *Clark v. Brockway*, 1 Abb. 351.

See INSURANCE; MORTGAGE — Foreclosure; NEGLIGENCE; RAILROAD; SUPPLEMENTARY PROCEEDINGS.

### Receiving Stolen Goods.

See CRIMINAL LAW.

### RECITAL.

In conveyance binds only parties and privies. *Hardenburgh v. Lakin*, 47, 109.

See DEED; MORTGAGE.

### RECOGNIZANCE.

By husband for support of wife — when no breach shown — evidence — character of support — violence. *People v. Pettit*, 74, 320.

For appearance before justice from time to time as directed — needs order for appearance to make effectual. *People v. Scott*, 67, 585.

See CRIMINAL LAW.

### RECORDING ACT.

Sheriff's deed is within. *Hetzel v. Barber*, 69, 1.

To assail prior unrecorded mortgage must show bona fide purchase for value, and that his own conveyance first recorded. *Westbrook v. Gleason*, 79, 23.

Vendee in possession taking deed is bona fide purchaser for value under act, and has title prior to unrecorded mortgage. *Westbrook v. Gleason*, 89, 641.

Donee of bond and mortgage is not. *Baker v. Lever*, 67, 304; 23 Am. Rep. 117.

Mortgage for precedent debt does not constitute holder a purchaser for value — authorities on "valuable consideration" collated. *Cary v. White*, 52, 138.

Assignee of mortgage as security, without surrendering any right or security, is

not a bona fide purchaser. *DeLancey v. Stearns*, 66, 157.

Deed, absolute in terms, but intended as mortgage, must be recorded as such, although grantee contemporaneously covenants to account to grantor for resales. *Macaulay v. Porter*, 71, 173.

Recorded deed, with notice of prior deed subsequently recorded but without payment of purchase-money, is postponed to such prior deed. *Ring v. Steele*, 3 Keyes, 450; 4 Abb. 68.

What agreement as to payment of mortgage not within. *Judson v. Dada*, 79, 373.

Assignment of mortgage, not recorded—subsequent mortgagee is "purchaser." *Van Keuren v. Corkins*, 66, 77.

Record of assignment, constructive notice to subsequent purchasers. *Smyth v. Knickerbocker Life Ins. Co.*, 84, 589.

Recorded assignment of recorded mortgage, preferred to prior unrecorded mortgage. *Decker v. Boice*, 83, 215.

Assignee of mortgage not bound to record assignment as against subsequent purchasers or mortgagees. *Campbell v. Vedder*, 3 Keyes, 174; 1 Abb. 295.

Record of assignment of mortgage, when constructive notice of subsequent acts of mortgagee—fraudulent discharge. *Viele v. Judson*, 82, 32.

Junior mortgagee, with notice, assigns to bona fide purchaser for value without notice—last transfer is "conveyance," within meaning of recording act, and entitled to preference if first recorded. *Westbrook v. Gleason*, 79, 23.

Satisfaction-piece and assignment of mortgage are "conveyances." *Bacon v. Van Schoonhoven*, 87, 446.

Notice putting junior mortgagee on inquiry, will defeat priority of lien by record—leading authorities on "constructive notice" collated. *Ellis v. Horrman*, 90 466.

When record of mortgage by partner, not notice to copartners or corporation subsequently formed from partnership. *Tarbell v. West*, 86, 280.

Omission to index mortgage does not deprive mortgagee of right by priority of record. *Mutual Life Ins. Co. v. Duke*, 87, 257.

Recorded mortgage to secure future advances or indorsements has preference over subsequent judgment. *Ackerman v. Hunsicker*, 85, 43; 39 Am. Rep. 621.

Priority—constructive notice—possession—bankruptcy proceedings. *Page v. Waring*, 76, 463.

Constructive notice of possession, not applicable to uninhabited dwelling-house. *Brown v. Volkening*, 64, 76.

Parties may rely on record—error in, cannot affect bona fide purchasers ignorant of. *Curnen v. Mayor*, 79, 511.

See ACKNOWLEDGMENT; DEED; EVIDENCE; MORTGAGE; NOTICE.

### Recoupment.

See COUNTER-CLAIM; DAMAGES; LANDLORD AND TENANT; PLEADING; SET-OFF.

### Redemption.

See EXECUTION; MORTGAGE—Foreclosure; TAXATION.

### REFERENCE.

- I. *When granted.*
- II. *Practice.*
- III. *When vacated.*
- IV. *Powers of referees.*
- V. *Reports of referees.*
- VI. *Compensation of referees.*

#### I. *When granted.*

Of controversies between receivers and members of mutual insurance companies, valid—may be made by Special Term. *Sands v. Harvey*, 4 Abb. 147.

When ordered in default of answer after demurrer is overruled, complaint to be taken as true, but other evidence given will be considered. *Darling v. Brewster*, 55, 667.

Action for money deposits—when on contract and not in tort. *Vilmar v. Schall*, 61, 564.

Is proper if long account is involved, although one item is stated in separate account. *Place v. Chesebrough*, 63, 315.

Where cause is not referable without consent, consent to refer to a particular person is binding only as to that person. *Preston v. Morrow*, 66, 452.

When will not be ordered for accounting after defeat on main issue. *Van Gelder v. Van Gelder*, 77, 446.

When new reference should be had, after bringing in new parties. *Wood v. Swift*, 81, 31.

Action may be referable although answer sets up fraud and claims damages. *Welsh v. Darragh*, 52, 590.

Court may order compulsory, between receiver of insolvent corporation and a debtor, though fraud is alleged, and though receiver has brought action to recover the debt — costs in such action on discontinuance, discretionary. *Crosby v. Day*, 81, 242.

Of issues cannot be ordered where long account is only collaterally involved. *Camp v. Ingersoll*, 86, 433.

## II. Practice.

Exception to general finding, unavailing. *Brooks v. Van Every*, 3 Keyes, 27.

Proceeding before referee waives right to jury trial — appeal. *Baird v. Mayor*, etc., 74, 382.

Oral agreement as to fees, entered in stenographer's minutes, is not "agreement in writing." *First Nat. Bk. v. Tamajo*, 77, 476.

Objection to referee's residence must be raised at trial. *Blake v. Lyon & Fellows Manuf. Co.*, 77, 626.

## III. When vacated.

Cannot be terminated under section 273, Code of Procedure, when there was an oral agreement on trial for indefinite time. *Ballou v. Parsons*, 55, 673.

Not vacated by reversal of judgment per se. *Catlin v. Adirondack Co.*, 81, 379.

When may be vacated for inability of referee to hear promptly. *Parkhurst v. Berdell*, 87, 145.

## IV. Powers of referees.

Bound to find only on issues, not on evidence. *Wiltzie v. Eaddie*, 4 Trans. App. 481.

When referee may allow amendment. *Secor v. Lane*, 4 Abb. 188; *Melvin v. Wood*, 3 Keyes, 533.

Bound to grant legal or equitable relief under Code, section 275. *Armitage v. Pulver*, 37, 494.

May give judgment on insufficient answer. *Schuyler v. Smith*, 51, 309; 10 Am. Rep. 609.

May dismiss complaint for failure to proceed and close case. *Morange v. Meigs*, 54, 207.

Cannot amend so as to change cause of action from equitable to legal. *Bockes v. Lansing*, 74, 437.

Power of to amend complaint — might impose permission to demur as condition — plaintiff submitting, cannot question authority. *Smith v. Rathbun*, 75, 122.

Power to grant amendment — reserving decision. *Chapin v. Dobson*, 78, 74; 34 Am. Rep. 511.

Power to allow amendment of complaint. *Grattan v. Metropolitan Life Ins. Co.*, 80, 281.

When referee may grant leave to apply to court to bring in new party. *Peyser v. Wendt*, 87, 322.

Under interlocutory judgment for accounting by executors — referee controlled by judgment as to questions passed upon therein. *Earle v. Earle*, 93, 104.

## V. Reports of referees.

In equitable action between partners a referee's findings of fact are conclusive, if any evidence to sustain. *Barker v. White*, 1 Abb. 95.

Facts must show conclusion of law erroneous to reverse. *Collender v. Phelan*, 79, 366.

Referee cannot compel party to take report and pay fees. *Geib v. Topping*, 83, 46.

Findings in case prevail over those in report — construction of conflicting — sev-



eral requests construed together. *Schwinger v. Raymond*, 83, 192; 38 Am. Rep. 415.

Judgment of referee reversed on facts by General Term will be sustained if not manifestly contrary to evidence. *Sherwood v. Hauser*, 94, 626.

#### VI. Compensation of referees.

When referees entitled to fees and how much. *Dissoway v. Winant*, 2 Trans. App. 192.

Referee taking agreement for lien on judgment for fees, disqualified from settling case on appeal. *Leonard v. Mulry*, 93, 392.

See APPEAL; COSTS.

#### REFORMATION.

Can only be had in case of mistake or accident or fraud. *Leavitt v. Palmer*, 3, 19.

Of writing for accident or mistake. *Prior v. Williams*, 3 Keyes, 231.

Executed contract reformable for mistake. *Paine v. Upton*, 87, 327; 41 Am. Rep. 371.

Mistake must be clear and mutual. *Nevius v. Dunlap*, 33, 676.

There must be mutual mistake or fraud. *Moran v. McLarty*, 75, 25.

Allowed for mistake on one side and fraud on another — damages. *Welles v. Yates*, 44, 525; *Albany City Sav. Inst. v. Burdick*, 87, 40; *Paine v. Jones*, 75, 593.

Of contract — cannot be had where parties did not intend a contract. *Jackson v. Andrews*, 59, 244.

When insurance policy reformable for mistake in statement as to occupancy. *Maher v. Hibernia Ins. Co.*, 67, 283.

When insurance policy not reformable for mistake. *Mead v. Westchester Fire Ins. Co.*, 64, 453.

Fraudulent insertion of covenant in deed. *Kilmer v. Smith*, 77, 226; 33 Am. Rep. 613.

Mortgage executed as an accommodation security may be corrected. *Prior v. Williams*, 2 Keyes, 530; 3 Abb. 624.

Action to correct instrument fraudulently procured. *DePuyster v. Hasbrouck*, 11, 582.

Written contract may be reformed for fraud or mistake although required by statute of frauds to be in writing — parol evidence. *Rider v. Powell*, 4 Abb. 63.

On ground of fraud or mutual mistake — when rights of assignor inure to assignee — when assignable. *Bentley v. Smith*, 1 Abb. 126.

When negligence defeats action for. *Moran v. McLarty*, 75, 25.

When municipal bond not reformable. *Potter v. Town of Greenwich*, 92, 662.

Damages may be awarded in action for reformation of contract. *Bidwell v. Astor Mutual Ins. Co.*, 16, 263.

#### Registry.

See RECORDING ACT.

#### Rehearing.

See APPEAL.

#### RELEASE.

Receipt in full of damages is. *Coon v. Knap*, 8, 402.

When a question of fact. *Knapp v. Simon*, 86, 311.

Of claims against estate — when does not cover claim of gift by decedent. *Trow v. Shannon*, 78, 446.

By executors, of their legal estate, not presumed when a breach of duty. *Brewster v. Striker*, 2, 19.

Of trustee of manufacturing company from personal liability by assignor of judgment against company, invalid — burden of proof of release of one joint debtor. *Bolen v. Crosby*, 49, 183.

Revenue stamp as seal may be valid — no secret condition can be imposed. *Van Bokkelen v. Taylor*, 62, 105.

See ATTORNEY AND CLIENT; FRAUD; PAYMENT.

## RELIGIOUS SOCIETIES.

Nature of — power of court over trustees — legality of trust for. *Robertson v. Bullions*, 11, 243.

Formed under the statute can have no denominational character imposed on them. *Petty v. Tooker*, 21, 267.

Trustees take for members of congregation as well as of church — majority of corporators may control revenues without respect to tenets. *Gram v. Prussia, etc., Society*, 36, 161.

Royal charter of 1634 to Dutch church in city of New York — confined to that church. *Att'y-Gen'l v. Ref. Dutch Church*, 36, 452.

Who entitled to vote in. *People v. Tut-hill*, 31, 550.

May eject one disturbing meeting. *Wall v. Lee*, 34, 141.

Must sue in corporate name. *Van Deuzen v. Trustees of Presb. Cong.*, 4 Abb. 465.

May assign property to pay debts — prohibition against "selling" does not prevent. *De Ruyter v. St. Peter's Church*, 3, 238.

Right to hold accumulations of personality. *Williams v. Williams*, 8, 525.

Deed of lands without consideration to the corporation, void. *Madison Ave. Baptist Church v. Church in Oliver St.*, 46, 131.

Election — certificate — burden of proof — opinions. *People v. Lacoste*, 37, 192.

On incorporation may enforce subscription made before. *Reformed Prot. Dutch Church v. Brown*, 4 Abb. 31.

When may recover moneys collected for Sunday school. *Rector, etc. v. Crawford*, 43, 476.

What sufficient record evidence of formation. *Meth. Epis. Union Church v. Pickett*, 19, 482.

Certificate of organization not void for loss of seals — proceedings by minority of unincorporated society to organize new society — where effectual to invest with title to property. *Trustees, etc. v. Bly*, 73, 323.

How one can separate and divide their property — adverse possession — statute of

limitations — reservation of easement. *Reformed Church of Gallupville v. Schoolcraft*, 65, 134.

Separation into two societies — respective rights to real and personal property. *Rector, etc. v. Rector, etc.*, 68, 570.

May maintain ejectment for land conveyed in trust to the trustees. *Van Deuzen v. Trustees of Pres. Cong.*, 3 Keyes, 550.

Have no power under act of 1813, chapter 60, to try corporator for moral delinquency. *People v. German, etc., Church*, 53, 103.

Trustees may not distribute property — sale of real estate not allowed for purpose of distribution — jurisdiction of County Court. *Wheaton v. Gates*, 18, 395.

Lease by, of part of their lands — when renewal cannot be compelled. *Alexander Presbyterian Church v. Presbyterian Church*, 64, 274.

Unauthorized deed cannot be held valid because executed — jurisdiction to order conveyance — rights of mortgagee in possession — turning ejectment into action to redeem. *Madison Ave. Baptist Church v. Oliver Street Baptist Church*, 73, 82.

Methodist Episcopal Church of Fort Edward is legally organized. *Van Deuzen v. Trustees, etc.*, 3 Trans. App. 39.

Reformed Dutch Church — contract with pastor, how terminable — authority of courts to inquire into proceedings of classis — refusal of officer or trustee to perform duties justifies removal — no vacancy. *Connitt v. Reformed Protestant Dutch Church of New Prospect*, 54, 551.

Possession of trustees is possession of society. *People v. Fulton*, 11, 94.

Decision of classis of Dutch Church conclusive unless appealed from. *Watkins v. Wilcox*, 66, 654.

Waiver of forfeiture as to occupancy of property. *Cook v. Wardens of St. Paul's Church*, 67, 594.

On sale of church for debt grantee takes in spite of doctrine of reverter. *Woodworth v. Payne*, 74, 196; 30 Am. Rep. 298.

Distinction between corporation and trustees. *Davis v. First Cong. Society*, 65, 278.

**Remainder.**

See WILL.

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**RENTS.**

When heir at law entitled to. *Lent v. Howard*, 89, 169.

See APPORTIONMENT, 21, 280; LANDLORD AND TENANT.

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**REMOVAL OF CAUSE.**

Petition — statement of citizenship. *Pechner v. Phoenix Ins. Co.*, 65, 195.

Obligatory on appellate court — “is a citizen” is insufficient allegation. *Holden v. Putnam Fire Ins. Co.*, 46, 1; 7 Am. Rep. 287.

For alienage — petition must state its existence at time of commencement of action. *Trugman v. National Steamship Co.*, 76, 207; reversed, 106 U. S. 118.

State court loses jurisdiction on presentation of bond, apparently good, in absence of objection. *Taylor v. Shew*, 54, 75.

State court may not stay proceeding for. *Bell v. Dix*, 49, 232.

Removed cause not subject to restriction of jurisdiction as to suits in favor of assignee under section 12 of the United States judiciary act. *Ayres v. Western R. Corp.*, 45, 260.

Corporation of another State may remove — bond — affidavit — presumption that objection waived. *Mix v. Andes Ins. Co.*, 74, 53; 30 Am. Rep. 260.

Foreign corporation, closing business here, may remove cause to Federal court. *Stevens v. Phoenix Ins. Co.*, 41, 149.

When all defendants must petition for — corporation cannot remove — authorities on citizenship of corporations, collated. *Cooke v. State Nat. Bk. of Boston*, 52, 96; 11 Am. Rep. 667.

May be pleaded — petition of managing agent of foreign corporation sufficient — sufficiency of affidavit. *Shaft v. Phoenix Mut. Life Ins. Co.*, 67, 544; 23 Am. Rep. 138, note.

By one of several defendants — dismissal of complaint as to all and affirmance as to all but one — joint liability in equity. *Vose v. Yulee*, 64, 449; reversed, 99 U. S. 539.

County judge making order appointing commissioners under act 1869, chapter 888, not disqualified under Code of Procedure, section 30, subdivision 13, because of interest, from certifying cause to Supreme Court — authorities as to disqualification because of interest, collated. *Matter of Ryers*, 72, 1; 28 Am. Rep. 88, note.

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**Replevin.**

See CLAIM AND DELIVERY.

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**REPORTS.**

Effect and validity of contract for publishing reports of decisions of this court. *Little v. Banks*, 85, 258.

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**Residence.**

See DOMICILE; MARRIAGE.

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**RESTITUTION.**

On reversal of judgment of removal from office. *People v. Livingston*, 80, 66.

On motion for, Supreme Court may order withholding and investing of moneys pending suit. *Marvin v. Brewster Iron Mining Co.*, 56, 671.

On reversal of judgment of dispossession, party entitled to restitution. *People v. Johnson*, 38, 63; *Chamberlain v. Choles*, 35, 477.

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**Restraint of Trade.**

See CONTRACT.

**REVENUE.**

Summary sale by collector of internal — title under — decree of forfeiture. *Tracey v. Corse*, 58, 143.

**Reversal.**

See **APPEAL**; **JUDGMENT**; **RESTITUTION**.

**REWARD.**

Construction of offer. *Jones v. Phoenix Bank*, 8, 228.

To entitle to, services must have been rendered with knowledge and on faith of offer. *Fitch v. Snedaker*, 38, 248.

Cannot be recovered without reliance on it and giving information leading to recovery. *Howland v. Lounds*, 51, 604; 10 Am. Rep. 654.

See **CONTRACT**.

**Riots.**

See **MOBS AND RIOTS**.

**Robbery.**

See **CRIMINAL LAW**.

**RULES.**

Court may dispense with. *Cole v. Gourlay*, 79, 527.

Judges may not annul provision of Code by rule — as to findings by referee. *Formerly v. McGlynn*, 84, 284.

Court may not, by rule, abridge right of appeal from final adjudication — not legalized by act of 1870, chapter 408. *Rice v. Ebele*, 55, 518.

Rule in conflict with statute inoperative. *Formerly v. McGlynn*, 84, 284; *Glenney v. Stedwell*, 64, 120; *French v. Powers*, 80, 146.

Court may relieve from violation of. *Martine v. Lowenstein*, 68, 456; *People v. Nichols*, 79, 582.

**S.****SALE.****I. Contract of sale, how construed.**

A general bill of sale will transfer an item unknown to either party. *Cram v. Union Bank*, 1 Abb. 461.

Contract for sale of 30,000 staves at specified rate per thousand — delivery of 7,000 passes title to so many, although not seen by buyer nor counted. *Hyde v. Lathrop*, 2 Abb. 436.

Contract of sale of "carding machine and fulling mill and fixtures," how construed. *Martin v. Cope*, 3 Abb. 182.

Agreement by a miller to take wheat and give flour therefor is a sale and not a bailment. *Norton v. Woodruff*, 2, 153.

**I. Contract of sale, how construed.****II. Breach of contract.****III. Sale by sample.****IV. Conditional sale.****V. Delivery.****VI. Acceptance.****VII. Stoppage in transitu.****VIII. Payment.****IX. When title passes.****X. Warranty.****XI. Fraud.****XII. Evidence.****XIII. Rights and liabilities of seller..****XIV. Rights and liabilities of purchaser.**

Requisites of sale of part of brick in kiln. *Crowfoot v. Bennett*, 2, 258.

On contract for sale of article to be paid for on delivery within a certain period, seller cannot recover without showing offer to deliver. *Dunham v. Mann*, 8, 508.

Of crops to be sown is valid. *Andrew v. Newcomb*, 32, 417.

Of legacy, when will not be set aside. *Parmelee v. Cameron*, 41, 392.

When buyer takes possession after receipt of written statement of terms, that becomes the contract—evidence of facts but not of language of parties admissible to explain obscurities. *Dent v. North American Steamship Co.*, 49, 390.

Where no price is fixed the current market rate controls—where a mixture is ordered without specifying proportions the ordinary mixture is implied. *Konitzky v. Meyer*, 49, 571.

Of merchandise, free from taxes, and not contract of loan or pledge. *Hale v. Hays*, 54, 389.

Contract may be in writing on one side and oral on the other—remedy—damages. *Mason v. Decker*, 72, 595; 28 Am. Rep. 190.

Of stock, with contingent interest in sale by purchaser—when sale can be compelled after purchaser's death—account of dividends—exchange for bonds. *Jones v. Kent*, 80, 585.

Construction of contract for sale and shipment of sugars. *Welsh v. Gossler*, 89, 540.

## II. Breach of contract.

Ratification by suit against buyer, and by acceptance of order on third person. *Wilmot v. Richardson*, 2 Keyes, 519.

Replevy of goods sold, for non-payment, is disaffirmance—need not be pleaded in abatement of action for price. *Morris v. Rexford*, 18, 552.

Breach of contract to deliver entire quantity of goods, when bar to action for price of those delivered—use by purchaser of those delivered. *Catlin v. Tobias*, 26, 217.

Original defect in goods, subsequently repaired, no defense to action for price if finally accepted. *Cassidy v. LeFevre*, 45, 562.

If seller sues for contract price he must deliver property on demand and payment. *Hayden v. Demets*, 53, 426.

Subsequent to a contract of, defendant agrees to pay \$300 to plaintiff to release his rights therein—plaintiff sued for goods sold and delivered; nonsuit proper—release of equitable interest will not sustain action. *Harris v. Kasson*, 79, 381.

Buyer under sale void as against public policy, cannot maintain trover unless he has had actual possession. *Clements v. Fturria*, 81, 285.

When purchaser waives condition precedent of entire delivery, seller may recover for part delivered—authorities collated. *Avery v. Willson*, 81, 341; 37 Am. Rep. 503.

Sales at different times upon same credit constitute separate causes of action—putting into one account does not change rule. *Zimmerman v. Erhard*, 83, 74; 38 Am. Rep. 396.

## III. Sale by sample.

Warranty when not implied. *Hargous v. Stone*, 5, 73; *Beirne v. Dord*, 5, 95.

Evidence of custom in respect to, when not competent. *Beirne v. Dord*, 5, 95.

Without acceptance does not pass title. *Burt v. Dutcher*, 34, 493.

Of mixtures, warrants only a fair correspondence. *Leonard v. Fowler*, 44, 289.

Of part of larger quantity—must be clearly defined and give right to take it. *Foot v. Marsh*, 51, 288.

Where goods are sold by sample, payable by note, and purchaser refuses note, claiming that goods are inferior to sample, he cannot retain goods to answer for performance of contract. *Osborn v. Ganz*, 60, 540.

By sample—when title does not pass. *Kein v. Tupper*, 52, 550.

IV. *Conditional sale.*

Of such timber as the buyer removes within a specified time is a sale only of so much as is actually removed within that period, after which he becomes a trespasser — if insolvent may be enjoined. *Boisaubin v. Reed*, 1 Abb. 161.

On condition as to payment — intent of purchaser immaterial where no fraud. *Jessop v. Miller*, 2 Abb. 449.

Waiver of condition — presumption — burden of proof — title of purchaser from purchaser. *Smith v. Lynes*, 5, 41.

On conditional sale and delivery, the seller cannot reclaim as against a bona fide purchaser from his purchaser. *Wait v. Green*, 36, 556; *Comer v. Cunningham*, 77, 391; 33 Am. Rep. 626. Contra: *Balard v. Burgett*, 40, 314.

Conditional on payment of price — waiver of condition. *Hutchings v. Munger*, 41, 155.

Of newspaper — good-will passes. *Boon v. Moss*, 70, 465.

V. *Delivery.*

Examination of goods — delivery — when title passes. *Delafield v. De Graw*, 1 Abb. 500.

By carrier authorized to receive, to another carrier, valid. *Thompson v. Menck*, 4 Abb. 400.

Sale on credit, with delivery for sale in name and as property of the owner, the purchase-price to be first paid, and the purchaser to have the balance, vests no title or right of lien in the purchaser. *Covell v. Hill*, 6, 374.

What is not shipment in name of purchaser or intrusting of bill of lading, within Laws of 1830, chapter 179. *Covell v. Hill*, 6, 375.

Readiness to pay for goods to be delivered at particular place is equivalent to tender. *Bronson v. Wiman*, 8, 182.

Failure to deliver within agreed time — buyer having paid in advance, may sue for damages — waiver. *Rouse v. Lewis*, 2 Keyes, 352.

Entire delivery of parcels of goods is condition precedent to payment. *Baker v. Higgins*, 21, 397.

On contract to deliver goods in parcels on payment for each parcel, seller may treat contract as broken by single failure to make payment, although he has repeatedly delivered without payment. *Gardner v. Clark*, 21, 399.

On contract to deliver rye, corn and oats on security for payment, accepting payment for the rye without security does not release seller as to the corn and oats on offer of security. *Cornwell v. Haight*, 21, 462.

Rescission by insolvent vendee after delivery — title of vendor superior to attaching creditor. *Sturtevant v. Orser*, 24, 538.

Otherwise complete, not rendered executory by seller's agreement to transport to place of delivery. *Terry v. Wheeler*, 25, 520.

Delivery to carrier by buyer's order vests title in him so that seller cannot maintain action for loss. *Krulder v. Ellison*, 47, 36; 7 Am. Rep. 402.

When delivery to carrier with notice of shipment is valid without notice of arrival by seller. *Pacific Iron Works v. Long Island R. Co.*, 62, 272.

Delivery to carrier by direction of buyer is delivery to buyer. *Wilcox Silver Plating Co. v. Green*, 72, 17.

Where purchaser is to designate place of delivery seller need not tender. *Hunter v. Wetsell*, 84, 549; 38 Am. Rep. 544.

Delivery of shipping receipts, when properly held delivery of goods, waiving pre-payment. *Barker v. Baxter*, 86, 586.

VI. *Acceptance.*

Buyer not bound to accept after agreed day of delivery. *Rouse v. Lewis*, 4 Abb. 121.

Goods being received and sold by the purchaser, a promise is implied to pay, although they were not of the quality called for by the contract. *Shields v. Pettie*, 4, 122.

The measure of damages is market value at time of demand. *Id.*

Induced by artifice or fraud of seller, not binding. *Dutchess Company v. Harding*, 49, 321.

In absence of fraud or latent defects acceptance after opportunity to examine waives defects. *Gaylord Manufg. Co. v. Allen*, 53, 515.

Of part of goods inferior to those contracted for, does not relieve from obligation to take residue. *Cahen v. Platt*, 69, 348; 25 Am. Rep. 203.

Refusal to accept on untenable ground — damages — remedy. *Smith v. Bettee*, 70, 13.

### VII. Stoppage in transitu.

Sale defeated by carrier's delivery of negotiable bill of lading. *Western Transp. Co. v. Marshall*, 4 Abb. 575.

When title may repass. *Stiles v. Howland*, 32, 309.

Sale on credit — seller must hold goods till expiration of credit — authorities on stoppage in transitu collated. *Babcock v. Bonnell*, 80, 244.

Defeated by seller's delivery of bill of lading to bona fide indorsee — when transit completed — estoppel. *Becker v. Hallgarten*, 86, 167.

Right of, exists as against insolvent vendee's assignee for benefit of creditors. *Harris v. Pratt*, 17, 249.

### VIII. Payment.

Condition precedent of payment when not waived by symbolical delivery — protection of bona fide purchaser. *Dows v. Kidder*, 84, 121.

Taking back for non-payment, rescission presumed. *Sloane v. Van Wyck*, 4 Abb. 250.

Payable in notes — insolvency of maker — tender. *Benedict v. Field*, 16, 595.

When is condition precedent. *Hammett v. Linneman*, 48, 399.

Sale of ore payable in pig-iron is within act of congress, June 30, 1864, section 97. *Hudson Iron Co. v. Alger*, 54, 173.

### IX. When title passes.

Delivery on ship — purchaser stealing shipping receipts from seller, and fraudulently procuring and negotiating bill of lading — seller does not lose title. *Brower v. Peabody*, 13, 121.

Title vests on delivery to carrier in pursuance of contract, although counting took place afterward. *Hyde v. Lathrop*, 3 Keyes, 597.

On sale of ale, the barrels to be returned, or if not returned, to be paid for at a fixed price, the property in the barrels remains in seller. *Westcott v. Thompson*, 18, 363.

Title to goods sold in bond at New York for export to Canada passes on delivery to purchaser's carrier. *Waldron v. Romaine*, 22, 368.

Seller of chattel, title not to pass till payment, may maintain action for unpaid value against one who took it from the buyer without right, although he has paid a judgment recovered therefor by the buyer. *Hasbrouck v. Lounsbury*, 26, 598.

Of personalty, title not to pass till payment — purchaser from buyer gets no title. *Herring v. Hoppock*, 15, 409; *Ballard v. Burgett*, 40, 314; overruling *Wait v. Green*, 36, 556.

When goods are sold to be paid for on delivery, but are delivered without requiring payment, a bona fide purchaser from the vendee gets title discharged of the lien — conflict of laws. *Comer v. Cunningham*, 77, 391; 33 Am. Rep. 626.

To part of cargo of grain without separation. *Russell v. Carrington*, 42, 118; 1 Am. Rep. 498.

Bailee for hire, with unperformed conditional agreement for purchase, cannot give title to a purchaser in good faith. *Austin v. Dye*, 46, 500.

Title may pass although number of articles is to be ascertained — custom. *Groat v. Gile*, 51, 431.

On sale of part of mass of grain, separation not necessary when intent to pass title is manifest. *Kimberly v. Patchin*, 19, 330.

Title does not pass through acts of pre-tended agent. *McGoldrick v. Willits*, 52, 612.

Of lumber, to be dressed and cut—title does not pass—authorities collated. *Cooke v. Millard*, 65, 352; 27 Am. Rep. 619.

Of lumber, to be culled, piled, counted or estimated—when title passes. *Burrows v. Whitaker*, 71, 291.

When goods in custodia legis change of possession not necessary. *Mumper v. Rushmore*, 79, 19.

### X. Warranty.

Of goods to arrive by ship "sailed on or about" a specified day—not a warranty as to time of sailing. *Hawes v. Lawrence*, 4, 345.

On breach of warranty action lies without offer to return, or purchaser may recoup in action for price, although purchaser has sold the goods. *Muller v. Eno*, 14, 597.

On transfer of note without indorsement there is an implied warranty against usury. *Delaware Bank v. Jarvis*, 20, 226.

On sale of chattel by manufacturer the seller is liable as for implied warranty against latent defect of materials only where he knew or is presumed to have known of the defect. *Hoe v. Sanborn*, 21, 552.

What is not express warranty. *Reed v. Randall*, 29, 358.

When action lies as warranty—purchaser not bound to return goods. *Parks v. Morris Ar and Tool Co.*, 54, 586.

Warranty of fitness not implied from seller's knowledge of purpose. *Bartlett v. Hoppeck*, 34, 118.

No implied warranty of title on agreement to sell chattel not in possession. *Scranton v. Clark*, 39, 220.

On breach of warranty property need not be returned—evidence. *Rust v. Eckler*, 41, 488.

What constitutes executed sale with warranty. *Foot v. Bentley*, 44, 166; 4 Am. Rep. 652.

Sale of article at auction as "blue vitriol" constitutes a warranty—authorities upon the subject of warranty collated. *Hawkins v. Pemberton*, 51, 198; 10 Am. Rep. 595.

Buyer with warranty of goods to be delivered in future not bound to return on discovery of breach, but cannot rely on warranty as to open and visible defects. *Day v. Pool*, 52, 416; 11 Am. Rep. 719.

Of non-negotiable instrument—implied warranty of title. *Ledwich v. McKim*, 53, 307.

With warranty of fitness for manufacture—buyer not bound to test before using. *Dounce v. Dow*, 57, 16.

Of "XX pipe iron"—no implied warranty of quality—waiver of warranty. *Dounce v. Dow*, 64, 411.

When not affected by independent inquiries by the person to whom it is given. *Bruce v. Burr*, 67, 237.

Implied warranty on sale of seed by particular name. *Van Wyck v. Allen*, 69, 61; 25 Am. Rep. 536; *White v. Miller*, 71, 118; 27 Am. Rep. 13.

Does not extend to defects known to agent negotiating sale. *Bennett v. Buchan*, 76, 386.

Damages on breach of warranty of title. *O'Brien v. Jones*, 91, 193.

### XI. Fraud.

Sale fraudulent as to creditors binds parties. *Waterbury v. Westervelt*, 9, 598.

When seller has been defrauded but proceeds to judgment against vendee for the price he cannot follow the goods or the proceeds into hands of third. *Bank of Beloit v. Beale*, 34, 473.

One in possession of goods under a sale voidable for fraud may give title to a bona fide purchaser. *Paddon v. Taylor*, 44, 371.

Rescission for fraud—subsequent action on contract by seller does not bar his action of conversion against a third who had received the goods from the vendee. *Kinney v. Kiernan*, 49, 164.

Fraud in vendee—vendor retook portion of goods—disaffirmance—right to pursue vendee for value of remainder not



lost — retaking no defense to third person — bankruptcy proceedings no defense to vendor's right to recover — splitting cause of action. *Powers v. Benedict*, 88, 605.

False representations as to value of personal property sold in absence of artifice or vendee's ignorance not fraud. *Chrysler v. Canaday*, 90, 272 p 43 Am. Rep. 166.

See FRAUD.

## XII. Evidence.

Offer to deliver lead — measure of damages — evidence — resale — usage. *Pollen v. LeRoy*, 30, 549.

Note or bill of a third person is presumed payment. *Gibson v. Tobey*, 46, 637 ; 7 Am. Rep. 392.

Damages for breach on sale of chattels — what must be established. *O'Brien v. Jones*, 91, 193.

See PAYMENT.

## XIII. Rights of vendor.

When seller may recover for goods delivered without filling the balance of the contract. *Partridge v. Gildermeister*, 3 Abb. 461.

Seller with lien knowing that buyer has consigned for advances ratifies sale by suing buyer, and has no remedy against the consignee. *Wilmot v. Richardson*, 4 Abb. 614.

Of stock — purchaser from unauthorized seller with notice of owner's equity takes subject thereto. *Crocker v. Crocker*, 31, 507.

Of stock on seller's option — notice — tender — new stock. *Currie v. White*, 45, 822.

## XIV. Rights and liabilities of vendee.

Of certificates of stock — when purchaser not deemed bona fide. *Anderson v. Nicholas*, 28, 600.

Purchaser cannot rescind and keep the property. *Reed v. Randall*, 29, 358.

Examination or opportunity of examination waives defects of quality of goods

of various grades and various prices. *McCormick v. Sarson*, 45, 265 ; 6 Am. Rep. 80.

On failure of title buyer can resort only to his immediate seller. *Bordwell v. Collie*, 45, 494.

When purchaser may set up failure of title as against seller. *McGiffin v. Baird*, 62, 329.

Purchaser at receiver's sale need not accept imperfect title. *People v. Open Board, etc., Co.*, 92, 98.

See CONTRACT ; SHIP AND SHIPPING ; STATUTE OF FRAUDS ; VENDOR AND PURCHASER.

## SALT SPRINGS.

Conditions of setting apart public lands for manufacture of salt — when interest of occupant ceases. *Parmelee v. Oswego & Syracuse R. Co.*, 6, 75.

Grantee of public lands contiguous to salt springs gets no inheritable estate. *Newcomb v. Newcomb*, 12, 603.

## Salvage.

See SHIP AND SHIPPING.

## Satisfaction.

See ACCORD AND SATISFACTION ; EXECUTION ; JUDGMENT ; MORTGAGE.

## Savings Banks.

See BANKS.

## SCHOOLS.

The establishment of separate schools for colored children is not forbidden by statute or the Federal Constitution. *People v. Gallagher*, 93, 438 ; 45 Am. Rep. 232.

Trustees may hire teacher for period extending beyond their term. *Wait v. Ray*, 67, 36.

Duty of trustees in levying assessments. *Jewell v. Van Steenburgh*, 58, 85.

Union free school treasurer—bond without seal—second term—breach of first bond—"school purposes"—what does not amount to payment of bond. *Board of Education v. Fonda*, 77, 350.

Board of education of union free school district not individually liable for negligence. *Bassett v. Fish*, 75, 303.

Superintendent of public instruction cannot alone remove principal of Normal School or approve conditionally his employment. *People v. Hyde*, 89, 11.

Proceedings to compel county treasurer to pay uncollected school taxes assessed on lands of non-residents—when mandamus lies. *People v. Robinson*, 76, 422.

Tax warrant signed by only two trustees, without notice to the third, void. *Lamoreaux v. O'Rourke*, 2 Keyes, 499.

See CONTRACT; CONSTITUTIONAL LAW.

## SEAL.

When internal revenue stamp may operate as. *Van Bokkelen v. Taylor*, 62, 105.

Several may adopt the same. *Atlantic Dock Co. v. Leavitt*, 54, 35; 13 Am. Rep. 556.

On release, conclusive evidence of consideration. *Gray v. Barton*, 55, 68; 14 Am. Rep. 181. Compare *Torry v. Black*, 58, 185.

## Seaman.

See SHIP AND SHIPPING.

## Searches.

See COUNTY CLERK; NEGLIGENCE.

## SEDUCTION.

Parent may maintain action for debauching daughter and infecting her with venereal disease, rendering her unable to labor. *White v. Nellis*, 31, 405.

Action lies where daughter after majority resides with and works for father, although temporarily absent—damages. *Lipe v. Eisenlerd*, 32, 229.

Action may be maintained when daughter was out at service, the father remaining entitled to her services. *Mulverhall v. Millward*, 11, 343.

Where defendant procured the plaintiff's daughter to be indentured to him as a means of seducing her, the father may still maintain the action. *Dain v. Wyckoff*, 18, 45.

Widow can maintain, when daughter is temporarily at home in service. *Gray v. Durland*, 51, 424.

Mother may maintain action for, of minor daughter, whose father is dead, and who is out at service with mother's assent, and is confined at mother's house and at her expense. *Furman v. Van Sise*, 56, 435; 15 Am. Rep. 441, note.

Step-father cannot maintain action for, of step-daughter out at service. *Bartley v. Richtmyer*, 4, 38.

Action for, by the father of indentured servant, cannot be maintained, against master. *Dain v. Wyckoff*, 7, 191.

Loss of service must be direct and immediate. *Knight v. Wilcox*, 14, 413.

Evidence of plaintiff's bad moral character inadmissible. *Dain v. Wyckoff*, 18, 45.

See CRIMINAL LAW.

## Servitude.

See EASEMENT.

## SET-OFF.

- I. *Between what parties allowed.*
- II. *What debts may be set off.*
- III. *What debts cannot be set off.*
- IV. *In equity.*
- V. *Practice.*

### I. *Between what parties allowed.*

Maker of note may not enforce, against assignor. *Williams v. Brown*, 2 Keyes, 486.

In action by assignee on liquidated claim, unliquidated claim of damages for breach of contract against assignor is not proper set-off. *Frick v. White*, 57, 103.

Bank cannot set off claim against decedent, not maturing till after his death, in action by his personal representative for deposit. *Jordan v. Nat. Shoe and Leather Bank*, 74, 467; 30 Am. Rep. 319.

County sued to recover debt, defendant may set off, though it could not maintain action — over-payments. *Taylor v. City of New York*, 82, 10.

Bank cannot set off claim against customer individually in action for deposit as agent in name of another. *Falkland v. St. Nicholas Nat. Bk.*, 84, 145.

## II. What debts may be set off.

Demand must be due. *Bradley v. Angel*, 3, 475.

When suspended right revives. *Robinson v. Howes*, 20, 84.

One agreeing to pay debts of firm may set off debt due to himself from plaintiff as assignee of one of partnership debts. *Barlow v. Myers*, 64, 41; 21 Am. Rep. 382.

Debts to be due at same time and before change in ownership — not necessary that action could be maintained — claim against municipal corporation — presentation to officer as prescribed by charter — in action by corporation may be set off. *Taylor v. City of New York*, 82, 10.

## III. What debts cannot be set off.

Claim in favor of maker against assignor of note cannot be set off against assignee for value before maturity with notice. *Williams v. Brown*, 4 Abb. 607.

Of judgment against receiver — when not allowed. *Clark v. Brockway*, 3 Keyes, 13.

Until demand matures, its set-off may be defeated by assignment of claim of opposite party, although he is insolvent, and his claim was assigned before maturity. *Myers v. Davis*, 22, 489.

For damages for breach of contract not allowed in action on note given in payment of contract. *Walker v. Millard*, 29, 375.

In action by assignee, a note made by assignor falling due after the assignment cannot be set off. *Martin v. Kunzmüller*, 37, 396.

Of judgments for tort and on contract not compellable. *Roberts v. Carter*, 38, 107.

Of prior judgment against assignment of prospective costs to attorney cannot prevail. *Perry v. Chester*, 53, 240.

When judgment may not be set off against assigned verdict — equities. *Zogbaum v. Parker*, 55, 120.

Debt due from testator cannot be set off by mortgagor where mortgage was executed in testator's life-time, payable to his executor — but mortgagor paying testator's funeral expenses may offset them. *Patterson v. Patterson*, 59, 574; 17 Am. Rep. 384.

In action for contribution by a surety, defendant cannot set off a debt of the plaintiff to the principal. *Davis v. Toulmin*, 77, 280.

Certificate of deposit as against claim on discounted note not allowed. *Munger v. Albany City Nat. Bank*, 85, 580.

## IV. In equity.

When allowed — insolvency. *Smith v. Felton*, 43, 419.

Several liability against joint — want of mutuality — equitable set-off. *Coffin v. McLean*, 80, 560.

When allowed. *Davidson v. Alfaro*, 80, 660.

## V. Practice.

May be waived by agreement for consideration — estoppel. *Gutchees v. Daniels*, 49, 605.

Of judgment, when not allowable on motion. *Swift v. Prouty*, 64, 545.

See ATTORNEY AND CLIENT; COUNTER-CLAIM; JUDGMENT.

## SETTLEMENT.

Construction of a testamentary — conflict of laws. *Monroe v. Douglass*, 5, 447.

See MARRIAGE.

**Sewers.**

See MUNICIPAL CORPORATION; NEGLIGENCE.

**SHAKERS.**

Their usages no ground for depriving them of custody of child. *People v. Gates*, 43, 40.

Corporate liability—right of trustees to warrant sales. *White v. Miller*, 71, 118; 27 Am. Rep. 13.

**SHAWANGUNK.**

Construction of Laws 1882, chapter 90, in relation to—mandamus to enforce compliance with act. *People v. Hardenburgh*, 90, 411.

**SHERIFF.**

- I. *Authority*
- II. *Liability.*
- III. *Rights and duties.*
- IV. *Actions against.*
- V. *Bonds and undertakings.*
- VI. *Fees.*

**I. Authority.**

A sheriff in an attachment upon real property need not take actual possession even as against a bona fide purchaser. *Burkhardt v. McClellan*, 1 Abb. 263.

May dismiss deputy by writing not under seal. *Edmunds v. Barton*, 31, 495.

May not forcibly retake property levied on and removed by debtor out of county. *Hill v. Haynes*, 54, 153.

Agreement in violation of section 210, Code of Procedure, to surrender property to defendant, void. *Hofheimer v. Campbell*, 59, 269.

Power to sell on foreclosure after expiration of office—"mandate," "seizure." *Union Dime Sav. Inst. v. Anderson*, 83, 174.

Provision of Code of Civil Procedure, section 1440, for payment by plaintiff

where deed declared void, does not apply where act of grantee fraudulent. *McIntyre v. Sanford*, 89, 634.

**II. Liability.**

Prima facie liable for not returning execution. *Brookfield v. Remsen*, 4 Trans. App. 278.

Being compelled to pay a fine for neglect of duty, in respect to an execution, cannot, to indemnify himself, enforce the execution. *Carpenter v. Stilwell*, 11, 61.

When liable for escape of prisoner illegally imprisoned on execution—damages. *Smith v. Knapp*, 30, 581.

Having taken receipt for levy, and got judgment for the value, is estopped from showing that goods did not belong to judgment debtor. *People v. Reeder*, 25, 302.

When not liable as trespasser. *Wood v. Orser*, 25, 348.

Degree of care required of, in custody of chattels seized in replevin. *Moore v. Westervelt*, 27, 234.

Not liable for failure of sureties in replevin to justify when judgment is for damages only. *Gallarati v. Orser*, 27, 324.

Not liable for escape where process void. *Carpenter v. Willett*, 31, 90.

Not estopped from contesting liability for escape by recovery upon limit bond. *Lawrence v. Campbell*, 32, 454.

Not liable to judgment for relinquishing levy found against, by jury. *People v. Ames*, 35, 482.

When liable for escape of prisoner on order of arrest. *Bensel v. Lynch*, 44, 162.

Liable for money collected on irregular execution not void. *James v. Gurley*, 48, 163.

Liable without demand to action for moneys collected on execution. *Nelson v. Kerr*, 59, 224.

When under-sheriff liable in place of deceased sheriff. *Newman v. Beckwith*, 61, 205.

Bound to return execution although he has received attachment against plaintiff. *Wehle v. Conner*, 63, 258.

Liability for false return of execution against person, when released by surren-

der to plaintiff and his release. *Walter v. Middleton*, 68, 605.

When liable for false return of execution against person — surrender by bail — act of 1869, chapter 813, as to Kings county. *Cozine v. Walter*, 55, 304.

For attaching goods shipped, without indemnifying master or owner for lien. *Campbell v. Conner*, 70, 424.

Chargeable with interest for using moneys pending action to determine claims thereto. *Thompson v. Sweet*, 73, 622.

Liability for false return — seizure under subsequent bankruptcy proceedings — instructions of attorney — proving claim in bankruptcy without disclosing levy, releases. *Ansonia Brass and Copper Co. v. Babbitt*, 74, 395.

Liable for escape voluntarily or negligently suffered — insolvency of debtor no defense — liable although process voidable. *Dunford v. Weaver*, 84, 445.

Liability as bail — answer as evidence — direction to return execution, when waiver of liability. *Douglas v. Haberstro*, 88, 611.

Not liable for failure to sell under execution where stayed by bankruptcy court in which creditor appears. *Dorrance v. Henderson*, 92, 406.

### III. Rights and duties.

When does not become insurer of cargo seized in replevin. *Moore v. Westervelt*, 21, 103.

Has insurable interest — deputy may insure. *White v. Madison*, 26, 117.

Mandamus lies to supervisors to audit charges of sheriff as jailer for care of city prisoners — acts of 1845, chapter 180, section 26, 1847, chapter 455, section 18. *People v. Board of Supervisors of Columbia Co.*, 67, 330.

### IV. Actions against.

No defense that execution was returned a few days after the expiration of the sixty days. *Brookfield v. Remsen*, 1 Abb. 210.

No action lies against deputy, to recover money rightfully received by him, and

belonging to the plaintiff. *Colvin v. Holbrook*, 2, 126.

Seizing goods of wrong person, is guilty of official misconduct, and his sureties are liable on his official bond. *People v. Schuyler*, 4, 173.

In action for false return, the issue of the execution within a shorter time after judgment than that prescribed by the statute is no defense. *Bacon v. Cropsey*, 7, 195.

In action for money collected on execution, his return, though made by his deputy, is conclusive of the amount. *Sheldon v. Payne*, 7, 453.

The sheriff is not discharged by the execution of plaintiff's direction to the deputy to sell on credit, unless that direction was followed. *Id.*

In action against, for neglect to return execution, may show that there was no property, but not that execution is still collectible. *Ledyard v. Jones*, 7, 550.

Having levied on goods liable to distress, is protected by payment into court under order. *Acker v. Ledyard*, 8, 62.

Where execution plaintiff authorizes deputy to take particularly indorsed notes on sale, sheriff is liable if deputy sells on credit without security. *Sheldon v. Paine*, 10, 398.

Not estopped by a return of nulla bona canceled by order of court. *Barker v. Binninger*, 14, 270.

When justified by process. *Kerr v. Mount*, 28, 659.

In action for wrongful taking by, he may show that claimant's title was fraudulent. *Rinchey v. Stryker*, 31, 140.

Action for escape — judgment conclusive that plaintiff was proper party — evidence. *Richtmeyer v. Remsen*, 38, 206.

Right of action under section 203 of Code of Procedure. *Clapp v. Schutt*, 44, 104.

When process protects in claim and delivery of personal property. *Bullis v. Montgomery*, 50, 352.

In action for false return of execution, burden of proof is on plaintiff to show property. *Watson v. Brennan*, 66, 621.

Action for false return of execution in claim and delivery — bound to take or at-

tempt to take property if he can find it in his county, whoever holds it — evidence — mortgage — value — exception. *Hoffman v. Conner*, 76, 121.

Action for failure to return execution — attachment — damages — evidence — conspiracy — attorney's lien. *Wehle v. Conner*, 83, 231.

Summons against sheriff — how served. *Dunford v. Weaver*, 84, 445.

#### V. Bonds and undertakings.

Liability of his sureties for his neglect to justify bail. *People v. Dikeman*, 4 Keyes, 93.

May require indemnity bond — measure of recovery. *Chamberlain v. Beller*, 18, 115.

When he recovers judgment in replevin of property levied upon, he is bound to prosecute the plaintiff's sureties, without indemnity. *Sweezey v. Lott*, 21, 481.

Action on bond of indemnity — evidence in mitigation of damages — burden of proof — sureties — presumption. *O'Brien v. McCann*, 58, 373.

Attachment creditors refusing to indemnify and delivering to assignee — execution returned nulla bona — action for false return — defendant must show property not subject to attachment, where does not call jury to pass on title. *Mumper v. Rushmore*, 79, 19.

When undertaking of bail valid as agreement between parties though not in pursuance of statute. *Toles v. Adee*, 84, 222.

Substitution of obligors on bond for sheriff in action for chattels levied on — statute allowing, valid. *Hessberg v. Reiley*, 91, 377.

#### VI. Fees.

No part of judgment. *Craft v. Merrill*, 14, 456.

Not entitled to poundage on attachment in case of settlement without sale. *German-Am. Bk. v. Morris Run Coal Co.*, 68, 585.

Not entitled to poundage where judgment debtor dies in custody. *Flack v. State of New York*, 95, 461.

On attachments issued before Code of Civil Procedure. *Woodruff v. Imperial Fire Ins. Co.*, 90, 521.

See ATTACHMENT ; EXECUTION.

### SHIP AND SHIPPING.

- I. General matters.
- II. Sale and mortgage of vessel.
- III. Lien against vessel.
- IV. Charter-party.
- V. Master and his liability.
- VI. Negligence.
- VII. Owners and their liability.

#### I. General matters.

Seamen's wages — when attach for whole voyage — abandonment — salvage. *Daniels v. Atlantic Mut. Ins. Co.*, 24, 447.

In absence of express contract, consignee may excuse delay in berthing vessel by natural causes. *Cross v. Beard*, 26, 85.

Bank bills carried by express company in crate on deck of vessel liable to contribute by general average for loss by jettison of other goods. *Harris v. Moody*, 30, 266.

Law conferring jurisdiction on State court in proceedings in rem, unconstitutional. *In re Steamboat Josephine*, 39, 19.

Bail for discharge from libel and surety on appeal — payment by, of decree, whether as surety or defendant. *Gager v. Babcock*, 48, 154; 8 Am. Rep. 533.

State courts have jurisdiction of action for injury to vessel on river St. Lawrence. *Baird v. Daly*, 57, 236; 15 Am. Rep. 488.

Attachment against goods shipped — sheriff must indemnify master or owner for lien for freight, etc. — demurrage. *Campbell v. Conner*, 70, 424.

When loss of vessel insured is deemed fixed and certain — when claim for damage accrues. *Duncan v. Great West. Ins. Co.*, 1 Abb. 562.

Contract to build ship passes no title as against party having no notice. *Seymour v. Montgomery*, 1 Keyes, 463.

II. *Sale and mortgage of vessel.*

Sale to alien of vessel, enrolled under act of congress of 1831, but not licensed, does not work forfeiture. *Wilkes v. People's Fire Ins. Co.*, 19, 184.

Mortgage of vessel recorded in Illinois, not in accordance with its law, void as against creditor here. *Aetna Ins. Co. v. Aldrich*, 26, 92.

Bottomry — what is not. *Braynard v. Hoppock*, 32, 571.

Bottomry — when contract of, by insurer, valid. *North-western Ins. Co. v. Ferward*, 36, 139.

When mortgage on coasting vessel must be filed as chattel mortgage. *Best v. Staple*, 61, 71.

Sale by part owner as agent — jury trial — evidence. *Whiton v. Spring*, 74, 169.

Sale of interest and guaranty of dividends — construction — right to recover for deficiency ceases on transfer of interest. *Bishop v. Olcott*, 86, 503.

Executory sale of interest in vessel to be built passes no title as against purchaser after completion without notice. *Seymour v. Montgomery*, 4 Abb. 207.

III. *Lien against vessel.*

When attaches to vessel navigating Hudson river. *Vellman v. Thompson*, 3, 438.

For salvage may attach to a canal boat sunk in the Hudson at Coxsackie. *Baker v. Hoag*, 7, 555.

Action on bond to release from warrant under act of April 24, 1862 — evidence. *Onderdonk v. Voorhis*, 36, 358.

Lien law of 1862, valid — specification within twelve days. *Sheppard v. Steele*, 43, 52; 3 Am. Rep. 660.

State statute giving lien for wharfage of sea-going vessel is void, and so is a bond thereunder. *Brookman v. Hamill*, 43, 54; 3 Am. Rep. 731.

Proceedings to collect demands against — bond — extending time of payment — evidence. *Happy v. Mosher*, 48, 313.

Lien may attach under statute for work done on, on personal credit of owner. *Mott v. Lansting*, 57, 112.

Act of 1862, chapter 482, giving lien for supplies to vessel in foreign commerce is unconstitutional. *Poole v. Kermit*, 59, 554.

Under lien act of 1862, chapter 482, section 2, specifications may not be filed until after departure of vessel. *Squires v. Abbott*, 61, 530.

Lien for repairs on canal boat in possession of mortgagor after default. *Scott v. Delahunt*, 65, 128.

Lien on steam canal boat under acts of 1862, chapter 482, and 1863, chapter 422. *King v. Greensday*, 71, 413.

When contract as to vessel not maritime — lien under act 1862, chapter 482, valid. *Wilson v. Lawrence*, 82, 409.

IV. *Charter-party.*

Exception from charter-party — “necessary” — evidence of negotiations to explain meaning of term. *Almgren v. Duttlh*, 5, 28.

Description of tonnage in charter-party is not a warranty. *Ashburner v. Balchen*, 7, 262.

Construction. *Ward v. Whitney*, 8, 442.

Construction — tonnage and draught. *Roberts v. Opdyke*, 40, 259.

Agreement by charterer to furnish full cargo — not performed by furnishing cargo at wharf where vessel was unable to come by insufficiency of water. *Nelson v. Odiorne*, 45, 489.

When money received by master for deviation belongs to owner rather than to charterer. *Moss v. Husted*, 66, 539.

Construction — demurrage — freight — recoupment — damages. *Elwell v. Skiddy*, 77, 282.

Construction — custom — arbitration — duress. *McPherson v. Cox*, 86, 472.

Acceptance of cargo by consignee binds him to charter-party — demurrage. *Morse v. Pesant*, 2 Keyes, 16.

V. *Master and his liability.*

Charterer, who is also captain, may contract debt binding vessel. *Pendleton v. Franklin*, 7, 508.

Master may bind owners of vessel for repairs in home port, unless forbidden or restricted to the knowledge of the creditor. *Provost v. Patchin*, 9, 235.

What justifies sale of cargo by master at intermediate port. *Butler v. Murray*, 30, 88.

Master of vessel authorized to sell cargo and buy return cargo is general agent therefor. *Bidenlac v. Smith*, 31, 259.

Master cannot allow claim invalid against owners. *Merritt v. Walsh*, 32, 685.

Master owning stock liable to removal by majority in interest of owners. *Ward v. Buckman*, 36, 26.

Insurance by husband and agents and part owners in their own names, payable to them. *Gillilan v. Sun Mut. Ins. Co.*, 41, 376.

Husband or master—may be appointed by minority of owners, and has power to bind all owners of supplies—authorities as to liability of owners for supplies, collated. *McCreedy v. Thorn*, 51, 454.

Master engaged for round voyage at a monthly compensation, abandoning to insurers for unseaworthiness, cannot recover for subsequent wages. *Jenkins v. Wheeler*, 2 Abb. 442.

### VI. Negligence.

Tow-boat-owners are liable for gross, although contract is "at risk of master and owners." *Wells v. Steam Navigation Co.*, 8, 375.

Degree of care requisite to avoid collision with vessel aground—evidence. *Kelsey v. Barney*, 12, 425.

Contributory—failure of towing company to put boat in particular place agreed, does not relieve owner from care. *Milton v. Hudson River Steamboat Co.*, 37, 210.

Collision between vessels—accident—proximate cause—contributory—vessel aground—signals. *Austin v. New Jersey Steamboat Co.*, 43, 75; 3 Am. Rep. 663.

Sailing vessel not required to anchor to avoid steamer. *Parrott v. Knickerbocker & New York Ice Cos.*, 46, 361.

Contributory, not, for captain of canal boat trying to pass lock knowing it to be unsafe. *Johnson v. Belden*, 47, 130.

Duty of steam vessels toward tows. *Hoffman v. Union Ferry Company of Brooklyn*, 47, 176; 7 Am. Rep. 435.

In collision between schooner and tow. *Silliman v. Lewis*, 49, 379.

Collision of vessels—when contributory negligence question of fact. *Whitehall Trans. Co. v. New Jersey Steamboat Co.*, 51, 369.

Construction of act of congress limiting liability of owners—destruction by fire. *Knoulton v. Providence, etc., Steamship Co.*, 53, 76.

Supreme Court has jurisdiction of action for negligence occurring on vessel on Lake Champlain. *Dongan v. Champlain Trans. Co.*, 56, 1.

Liability of owner for injury by defective steam boiler—inspector's certificate—United States statute. *Carroll v. Staten Island R. Co.*, 58, 126; 17 Am. Rep. 221.

Duty of vessels endeavoring to pass each other. *Blanchard v. New Jersey Steamboat Co.*, 59, 292.

Charterer of tow-boat not liable for injury to tow by negligence of owner's crew navigating the tow-boat. *Bissell v. Torrey*, 60, 635.

Relative duties of sailing and steam vessels. *Mailler v. Express Propeller Line*, 61, 312.

In navigation—usage—question of fact. *Hoffman v. Union Ferry Co.*, 68, 385.

Owner of cargo on canal boat in tow, sunk by another tug of same towing line, cannot recover when omission to display proper lights contributed. *Arctic Fire Ins. Co. v. Austin*, 69, 470; 25 Am. Rep. 221.

Anchoring sail-boat in New York harbor—question of fact. *Lambert v. Staten Island R. Co.*, 70, 104.

Small sail-boat, having no rigging twenty feet high, need not display light at anchor in night. *Id.*

Collision of vessels—charge of judge—evidence of insurance—opinions. *Carpenter v. Eastern Transp. Co.*, 71, 574.

As to third persons, vessels are bound to exercise due care to avoid collision, even if that demands departure from gen-



eral rules. *Cooper v. Eastern Transp. Co.*, 75, 116.

Collision between vessel and boat—blindness of manager of boat—lights. *Harris v. Uebelhoefer*, 75, 169.

Action maintainable for negligently causing death of citizen of this State on the high seas on vessel hailing from and registered in this State. *McDonald v. Mallory*, 77, 546; 33 Am. Rep. 664.

When owner liable to charterer for negligence of engineer. *Hagar v. Clark*, 78, 45.

Steamer violating regulations collided with and sunk propeller—engineer drowned—failure of propeller to answer signals—failure to keep lookout not contributory negligence—evidence before inspection as to collision excluded. *Erwin v. Neversink Steamboat Co.*, 88, 184.

#### VII. Owners and their liability.

Contractor to furnish materials and build is "owner" within statute for collection of demands. *Low v. Austin*, 20, 181.

Part owner and manager may not bind estate of deceased part owner for supplies. *Stedman v. Fiedler*, 20, 437.

Question of liability for supplies to registered vessel—evidence—defendant mere trustee. *Macy v. Wheeler*, 30, 231.

When action by one owner against others for conversion lies. *Dyckman v. Valiente*, 42, 549.

Assignee of joint owner in particular voyage takes subject to partnership accounting as to all other voyages. *Williams v. Lawrence*, 47, 462.

One owner insuring in his own name for all, at joint expense, and receiving dividend scrip, must share it with others. *Boardman v. Gaillard*, 60, 614.

Liability of owner of chartered vessel for delivery of goods of shipper received by master from charterer. *Robinson v. Chittenden*, 69, 525.

Nominal owner mortgaging for loan to real owner, for vessel, not personally liable in absence of covenant. *Jenkins v. Wheeler*, 2 Abb. 445; 3 Keyes, 659.

Owner liable for supplies purchased by captain running on shares—burden of proof. *Kenzel v. Kirk*, 2 Abb. 500.

Contract with nominal owner to take charge of ship for voyage—damage and abandonment—nominal owner liable for wages, but only up to abandonment. *Jenkins v. Wheeler*, 3 Keyes, 645.

See CARRIER.

#### Slander.

See LIBEL AND SLANDER.

#### Special Proceedings.

See APPEAL.

### SPECIFIC PERFORMANCE.

- I. Generally.
- II. When action to compel, will lie.
- III. What contracts will be enforced.
- IV. What contracts will not be enforced.
- V. Laches.
- VI. Oral agreements.

#### I. Generally.

When condition precedent waived. *Viele v. Troy & Boston R. Co.*, 20, 184.

No appeal to this court from orders directing mode of conveyance. *Roome v. Philips*, 27, 357.

Court may direct accounting of rents and profits. *Taylor v. Taylor*, 43, 578.

Defect in description in deed to vendor corrected by intrinsic evidence will not release purchaser from performance. *Brookman v. Kurzman*, 94, 272.

When deed deposited to stay proceedings on appeal from decree is lost, defendant must execute new one on affirmation. *Worrall v. Munn*, 17, 475.

#### II. When action to compel, will lie.

Where one has paid money on a contract within the statute of frauds, and a

recovery of the money will not make him whole, he is entitled to specific performance in equity. *Malins v. Brown*, 4, 403.

One may have specific performance of an agreement to release his land from mortgage, although he has conveyed the land, the conveyance being with warranty. *Id.*

Action will not lie where adequate redress at law. *Pennsylvania Coal Co. v. Delaware & Hudson Canal Co.*, 31, 91.

Will not be enforced if contract ambiguous and doubtful. *Buckmaster v. Thompson*, 36, 558.

Rules as to, of contract void by statute of frauds, but partly performed — damages. *Harsha v. Reid*, 45, 415.

When not maintainable for want of certainty of beneficiaries. *Stanton v. Miller*, 58, 192.

Ability of vendor to perform relates to time of decree. *Jenkins v. Fahey*, 73, 355.

Will not be decreed, where no contract consummated. *Dietz v. Farish*, 79, 520.

Equity will enforce a contract for sale of personal property, such as corporate stock, where a judgment for damages will be inadequate relief. *Johnson v. Brooks*, 93, 337.

### III. *What contracts will be enforced.*

Of contract of sale of land, where neither party has performed or offered, the failure to tender going only to costs. *Stevenson v. Maxwell*, 2, 408.

Court may compel, by resident of this State, of contract to convey land out of State. *Newton v. Bronson*, 13, 587.

Contract for exchange of lands — when time not of essence — subsequent mortgagee. *McOlellan v. Jones*, 20, 162.

Not refused of contract of conveyance by devisee of land subject to support and maintenance of third person. *Downer v. Church*, 44, 647.

Of contract of sale — waiver of statute of frauds — of performance at time — tender — subsequent purchaser subject to equities. *Duffy v. O'Donovan*, 46, 223.

Of guardian's contract — when granted. *Sherman v. Wright*, 49, 227.

Of agreement intended as a gift of lands. *Ferry v. Stephens*, 66, 321.

When lies to enforce conveyance of land. *Traphagen v. Burt*, 67, 30.

Of mutual covenants by adjoining land-owners restricting use. *Trustees of Columbia College v. Lynch*, 70, 440; 26 Am. Rep. 615.

Agreement to transfer leases and lands — leases being invalid, performance not decreed — subsequent conveyance from owner does not cure. *Bensel v. Gray*, 80, 517.

Of contract of corporation to pay dividends. *Boardman v. Lake Shore, etc., R. Co.*, 84, 157.

On vendor's breach of contract to sell land and pay taxes vendee may have performance. *Stone v. Lord*, 80, 60.

Covenant to pay debt of another out of means furnished. *Woodruff v. Erie R. Co.*, 93, 609.

### IV. *What contracts will not be enforced.*

Where mortgage incumbrances are not released although mortgagees orally agree to take new mortgages. *Hinckley v. Smith*, 51, 21.

Where contract was entire for exchange and one party failed — but damages for breach may be awarded. *Sternberger v. McGovern*, 56, 12.

Agreement by lessor to repair damages by fire not enforceable — when amendment should be allowed for attainment of legal remedy. English cases on, collated. *Beck v. Allison*, 56, 366; 15 Am. Rep. 430.

When parol agreement as to lands not enforceable on ground of parol performance or parol trust. *Wheeler v. Reynolds*, 66, 227.

### V. *Laches.*

When tender necessary — laches in making. *Leaird v. Smith*, 44, 618.

Laches precluding judgment for — no recovery for money paid on contract. *Finch v. Parker*, 49, 1.

When plaintiff not barred by laches. *Hubbell v. Von Schoening*, 49, 326.

May be denied for laches within statutory period of limitation. *Peters v. Delaplaine*, 49, 362.

Laches defeating action for. *Delavan v. Duncan*, 49, 485.

When delay not fatal to action. *Merchants' Bank v. Thomson*, 55, 7.

When action will not lie — forfeiture — laches. *Davison v. Associates of Jersey Co.*, 71, 333.

## VI. Oral agreements.

To deed land if other party will enter and improve, executed by latter, will be enforced. *Loddell v. Loddell*, 36, 327.

To give land, followed by delivery and improvements will be enforced. *Freeman v. Freeman*, 43, 34; 3 Am. Rep. 657.

See CONTRACT; STATUTE OF FRAUDS; VENDOR AND PURCHASER.

## Stamps.

See CONSTITUTIONAL LAW; SEAL.

## STATE.

May discontinue work contracted for. *Lord v. Thomas*, 64, 107.

When State owns land in another State, it is subject to ordinary rules of ownership — no prescription against — authorities on prescriptive rights collated. *Burbank v. Fay*, 65, 57.

Liability for breach of contract — may not constitutionally impair its contracts. *People v. Stephens*, 71, 527; *Danolds v. State*, 89, 36; 42 Am. Rep. 277.

Construction of contract for public work — estoppel and evidence — auditors may only receive common-law evidence. *Swift v. State*, 89, 52.

Action by, against auditors of city of New York, to recover moneys fraudulently obtained by false audits, cannot be maintained. *People v. Ingersoll*, 58, 1; 17 Am. Rep. 178.

Not liable to counter-claim. *People v. Dennison*, 84, 272.

See CONSTITUTIONAL LAW.

## State Paper.

See OFFICE AND OFFICER, 19, 422.

## STATE TREASURER.

Delegation of powers to deputy. *People v. Bank of North America*, 75, 547.

## STATE PRISON.

Construction of contract for work by convicts — act of 1847, chapter 460. *Horner v. Wood*, 23, 350.

## STATUTES.

- I. *Enactment.*
- II. *Amendment.*
- III. *Repeal.*
- IV. *Construction.*
- V. *Generally.*

### I. Enactment.

Act of 1854, chapter 232, effect of certificate of principal place of business. *Western Transp. Co. v. Scheu*, 19, 408.

"Felony" — 2 R. S. 702, § 30. *Fassett v. Smith*, 28, 252.

Acts of February 16, 1771, and March, 1773 — do not authorize appointment of agent or attorney by married women. *Harndenburgh v. Lakin*, 47, 109.

Husband not entitled to share of recovery for death of wife under acts of 1847, chapter 450, and 1849, chapter 256, previous to act of 1870, chapter 78. *Drake v. Gilmore*, 52, 389.

### II. Amendment.

Effect of amendment incorporating portions of former statute. *Ely v. Holton*, 15, 595.

Authority to designate State paper continuing. *Weed v. Tucker*, 19, 422.

Authority of either house of legislature to recall bill. *People v. Devlin*, 33, 269.

Act of 1864, chapter 8, section 22, as to authority to supervisors to offer military bounties, not retroactive. *People v. Supervisors Columbia County* 43, 130.

Act of 1853, chapter 80, amends Laws of 1829, chapter 352. *People v. Clute*, 50, 451 : 10 Am. Rep. 508.

When amendment is not repeal and re-enactment. *Moore v. Mausert*, 49, 332.

### III. Repeal.

Vested right of landlord not taken away by statute abolishing distress for rent. *Contley v. Palmer* 2, 182.

Where a statute gives a penalty to an aggrieved party, it is in the nature of satisfaction for the wrong. *Id.*

Part 1, chapter 20, title 9, sections 15, 19, not repealed by excise act of 1845, section 5. *Manchester v. Herrington*, 10, 164.

State may repeal exemption from taxation, etc., for militia service. *People v. Roper*, 35, 629.

Repeal by implication. In *Matter of The Evergreens*, 47, 216 ; *Powers v. Shepard*, 48, 540 ; *Matter of Commrs. of Central Park*, 50, 493 ; *People v. City of Brooklyn*, 69, 605 ; *Heckmann v. Pinkney*, 81, 211.

— acts of 1869, chapter 631, section 1, 1872, chapter 181, section 1. as to abortion — general repeal of 1828. *Mungeon v. People*, 55, 613.

Not repealed by subsequent, when not inconsistent. *Kerr v. Dougherty*, 79, 327.

Local statute repealed by subsequent repugnant local statute. *Matter of Goddard*, 94, 544.

Whether repeal of amendatory act restores original. *People v. Supervisors of Montgomery County*, 67, 109 ; 23 Am. Rep. 94 ; *Matter of Livingstone Street*, 82, 621.

### IV. Construction.

When a statute commands an act, it impliedly authorizes all acts necessary to its execution. *Stief v. Hart*, 1, 20.

Authorizing taking of property without consent must be strictly followed, or proceeding void. *Doughty v. Hope*, 1, 79

Concerning land damages for enlargement of Erie canal. *Danforth v. Suydam*, 4, 66.

Of section 47 of amended Code of 1849 — action under Code is not an “equity case,” although subject is equitable. *Giles v. Lyon*, 4, 600.

Authorizing writ of error in behalf of people to review judgment in favor of defendant on indictment, except where he “shall have been acquitted,” does not apply to a judgment rendered before the statute. *People v. Carnal*, 6, 463.

Authorizing a writ of error on “any judgment” includes a judgment rendered after the act takes effect, though in an action pending before the passage. *People v. Clark*, 7, 385.

Act of 1852, chapter 82, authorizes writs of error on judgments in favor of prisoners. *Id.*

When act authorizing tax sufficiently specifies subject in title. *Sun Mutual Ins. Co. v. Mayor, etc.*, 8, 241.

When a wharf is not “cut off” by railroad — what wharves intended in Laws of 1846, chapter 279. *Tillotson v. Hudson R. R. Co.*, 9, 575.

Of 2 R. S. 301, § 46, as to presumption of payment of judgment. *Waddell's Adm'r v. Elmendorf's Adm'r*, 10, 170.

When notice necessary under act of 1847, chapter 31, and not waived. *Cruger v. Hudson R. R. Co.*, 12, 190.

Of act of 1845, chapter 280, as to designation of newspapers to publish laws. *People v. Board of Supervisors of Kings County*, 3 Keyes, 630.

Charter of Syracuse, as to limitation of expenditure. *Weston v. City of Syracuse*, 17, 110.

Port warden act for New York city. *Tinkham v. Tapscott*, 17, 141.

When tax-money not deemed “lost,” so as to authorize new levy. *People v. Supervisors*, 17, 486.

“Until” — is exclusive in meaning. *People v. Walker*, 17, 502.

Strong beer is “strong and spirituous liquor.” *Board of Comm'rs v. Taylor*, 21, 173.

Of chapter 56 of Laws of 1830 as to highways on Long Island. *People v. Smith*, 21, 595.

Mock auction act. *Ranney v. People*, 22, 413.

"May" in Laws of 1860, chapter 508, section 33, is not mandatory. *Williams v. People*, 24, 405.

To avoid a contract under stock-jobbing act (1 R. S. 710, § 6), burden of proof is on party alleging violation. *Dykers v. Townsend*, 24, 57.

Of act relating to sale of bottles, etc. *Mullins v. People*, 24, 399.

Railroad contractor not "laborer" or "servant." *Aikin v. Wasson*, 24, 482.

In bridge charter, provision that it shall not be lawful for any other person to establish a bridge or ferry within two miles is not a renunciation of legislative power to authorize another. *Chenango Bridge Co. v. Binghamton Bridge Co.*, 27, 87.

"Cash" in certificate of deposit by bidder for canal contract. *People v. Contracting Board*, 27, 378.

Of Battery extension act of March 27, 1821. *People v. Vanderbilt*, 26, 287.

Towns touching at corners are "adjoining." *Holmes v. Carley*, 31, 289.

In act of 1868, chapter 844, "adjoining property" means that contiguous to the avenue. *Matter of Petition of Ward*, 52, 395.

What is local act. *People v. Hills*, 35, 449.

Judicial sale is not "business of a court." *King v. Platt*, 37, 155.

Secretary of corporation not "laborer or servant." *Coffin v. Reynolds*, 37, 640.

When construed as awarding compensation, not gratuity. *Bank of Auburn v. Roberts*, 44, 192.

Under excise law of 1857, section 15, the words "knowing or having reason to believe him such" apply to minors. *Perry v. Edwards*, 44, 223.

Act of congress limiting liability of ship-owners for loss of goods includes ordinary baggage. *Chamberlain v. Western Transp. Co.*, 44, 305; 4 Am. Rep. 681.

Statutes as to exemption from taxation strictly construed. *Buffalo City Cemetery v. City of Buffalo*, 46, 506.

Under Laws of 1862, chapter 306, section 4, there must be an intent to defraud some person or corporation. *Low v. Hall*, 47, 104.

Under Laws of 1836, chapter 242, and 1843, chapter 169, judgment creditors need not be made parties. *Watson v. New York Cent. R. Co.*, 47, 157.

1 R. S. 591, § 8, not applicable to banking association under Laws of 1838, chapter 260. *Belden v. Meeker*, 47, 307.

As to Oyer and Terminer in New York city. *Smith v. People*, 47, 330.

Exempting New York Hospital from taxation, valid. *People v. Comm'rs of Taxes*, 47, 501.

Laws of 1864, chapter 578, not retroactive. *Stone v. Flower*, 47, 566.

Laws of 1868, chapter 689, do not authorize appointment of clerk of justice of peace. In *Matter of Claim of Cassidy v. City of Brooklyn*, 47, 659.

1 R. S. 591, § 8, does not apply to sale by bank of securities pledged for loan. *Commercial Bank of Albany v. Ten Eyck*, 48, 305.

Husband and wife competent witnesses in actions pending when act of 1867, chapter 887, took effect. *Southwick v. Southwick*, 49, 510.

Of penal—cheese factory act—actual knowledge of adulteration requisite to recovery of penalty. *Verona Cent. Cheese Co. v. Murtaugh*, 50, 314.

Act of 1867, chapter 814, section 2, does not apply to case of trespass by cattle going through division fence to land of adjoining owner. *Jones v. Sheldon*, 50, 477.

A verified answer is not an affidavit within Laws of 1833, chapter 271, section 8, as to force of notary's certificate of protest. *Gawtry v. Doane*, 51, 84.

U. S. statute as to adding duties—embraces increase imposed after making of contract but before delivery of goods. *Babbett v. Young*, 51, 238.

Street railway cars are not "public stages." *Whitaker v. Eighth Ave. R. Co.*, 51, 295.

"May" means "must" in chapter 388, act of 1837, as to maintenance of public

bridge in Livingston county. *Phelps v. Hawley*, 52, 23.

Act concerning auditing of claims against New York city. *People v. Board of Apportionment*, 52, 224.

Of drainage act for Orange county, act of 1826, chapter 216. *Houston v. Wheeler*, 52, 641.

Of act of 1857, chapter 521, section 8, as to sewerage in Brooklyn. *Matter of Fowler*, 53, 60.

Factors' act, 1858, chapter 326 — weigher's return not receipt. *Western Trans. Co. v. Barber*, 56, 544.

Of act of 1865, chapter 300, as to authorizing contract for lighting streets. *Richmond Co. Gas-light Co. v. Middle-town*, 59, 228.

In statute authorizing taking of private property for public use the intent to take a fee will not be implied when easement sufficient. *Washington Cemetery v. Prospect Park, etc., R. Co.*, 68, 591.

Act of 1873, chapter 119, as to refunding tax laid in two towns, is retroactive. *People v. Board of Supervisors of Essex Co.*, 70, 228.

Of Brooklyn bridge act, 1877, chapter 165. *Matter of Petition of Trustees of New York and Brooklyn Bridge*, 72, 527.

Actions on "contract, obligation or liability, express or implied," do not include actions for tort. *McGaffin v. City of Cohoes*, 74, 387; 30 Am. Rep. 307.

A provision that any demand or claim against a city must be presented to council for audit or allowance does not embrace a demand for tort. *Howell v. City of Buffalo*, 15, 512.

When in pari materia to be construed together. *Beebe v. Estabrook*, 79, 246.

When only penalty declared in prohibitory, will be enforced. *Pratt v. Short*, 79, 437; 35 Am. Rep. 531.

In derogation of common law to be strictly construed. *Taylor v. City of New York*, 82, 10.

By public officers, not controlling on the courts. *Matter of Manhattan Sav. Bank*, 2, 142.

When language as to construction cannot be affected by title. *Matter of Middleton*, 82, 196.

"Claim" and "cause of action." *Minick v. City of Troy*, 83, 514.

#### V. Generally.

Building association — trustees need not sign articles. *Second Man. Buildg. Ass. v. Hayes*, 4 Abb. 183.

Party may waive benefit of. *Buel v. Trustees of Lockport*, 3, 197.

Declarations of driver of car carelessly driven over one not competent against employer in action of negligence. *Luby v. Hudson R. R. Co.*, 17, 131.

Direction to county treasurer to issue warrant against delinquent town tax collector in twenty days is directory. *Looney v. Hughes*, 26, 514.

Father may recover as administrator for death of his son produced by negligence. *McMahon v. Mayor, etc.*, 33, 642.

Under-valuation of land by highway commissioners — verdict, how certified. *People v. Supervisors*, 34, 268.

Absence of proof of special pecuniary damage from death of child will not justify nonsuit or nominal damages. *Ihl v. Forty-second Street, etc., R. Co.*, 47, 317; 7 Am. Rep. 450.

Seizure of estrays—jurisdiction. *Leavitt v. Thompson*, 52, 62.

See CONSTITUTIONAL LAW; EMINENT DOMAIN; MUNICIPAL CORPORATION; NEW YORK CITY.

#### STATUTE OF FRAUDS.

##### I. General matters.

##### II. Memorandum

1. Sufficiency.
2. Consideration.
3. Signed by agent.

##### III. Sales of goods.

1. The contract.
2. Payment.
3. Delivery.

##### IV. Sale of lands.

1. Miscellaneous.
2. Effect of part performance.

V. *Promise to answer for another.*

1. *Valid contracts.*
2. *Void contracts.*
3. *Miscellaneous.*

VI. *Agreement not to be performed within year.*

VII. *Trusts.*

I. *General matters.*

Letter of credit not within. *Union Bank v. Coster's Ex'rs*, 3, 203.

One who has performed that part of a contract which is void by, cannot be compelled to perform the residue which is only void by reason of its connection. *Baldwin v. Palmer*, 10, 232.

Does not apply to executed oral agreement to extend mortgage. *Dodge v. Crandall*, 30, 294.

Does not apply to statutory undertakings. *Doolittle v. Dinwiny*, 31, 350.

If part of entire contract is void, whole void. *DeBerski v. Paige*, 36, 537.

Oral contract for trading venture not within. *Coleman v. Eyre*, 45, 38.

Where contract void but partly performed, damages may not be awarded. *Harsha v. Reid*, 45, 415.

Agreement as to volunteer bounties — when within. *Richardson v. Crandall*, 48, 348.

No claim can be founded on a contract void by, as against third persons. *Dung v. Parker*, 52, 494.

Note in consideration of marriage valid. *Wright v. Wright*, 54, 437.

Oral modifications of valid contract void. *Schultz v. Bradley*, 57, 646.

Promise to redeem bonds pledged by A. in consideration of conveyance to B. when not within statute. *Booth v. Elghmie*, 60, 238; 19 Am. Rep. 171.

Damages may be recovered for fraudulent prevention of void contract if it would have been performed. *Rice v. Manley*, 66, 82; 23 Am. Rep. 30.

Deed as security—when payment of money and execution of receipt do not change from mortgage or take case out of statute. *Odell v. Montross*, 68, 499.

When not pleaded, and question not raised at trial, question cannot be raised

on appeal. *Bommer v. Am. Spiral Spring, etc., Co.*, 81, 468.

Pre-existing debt valuable consideration under statute of frauds. *Murphy v. Briggs*, 89, 446.

Cannot be set up against executed contract. *Tomlinson v. Miller*, 3 Trans. App. 250.

Defense of, cannot be first raised on request for findings. *Porter v. Wormser*, 94, 431.

II. *Memorandum.*

1. *Sufficiency.*

Memorandum must be subscribed underneath or at end. *James v. Patten*, 6, 9.

Mutuality—signing by vendor sufficient. *Justice v. Lang*, 42, 493; 1 Am. Rep. 576.

Where memorandum of sale is signed only by seller, the question of agreement to accept and pay is one of fact for the jury. *Justice v. Lang*, 52, 323.

When "bought note" sufficient memorandum—delivery. *Hankins v. Baker*, 46, 666.

When receipt and check make valid contract for sale of lands. *Rarubitschek v. Blank*, 80, 478.

What memorandum of sale must show — names of parties—buyer and seller. *Calkins v. Falk*, 1 Abb. 291.

Letter referring to purchase and directing delivery makes valid contract, being accepted. *Thompson v. Menck*, 4 Abb. 400.

Letter admitting purchase, but not stating consideration or terms, not sufficient memorandum. *Newberry v. Wall*, 65, 484.

Writing merely acknowledging purchase not sufficient memorandum. *Stone v. Browning*, 68, 598.

2. *Consideration.*

A guaranty of a note by the payee on transfer for his own debt is valid, although expressing no consideration. *Brown v. Curtiss*, 2, 225.

A guaranty indorsed on a promissory note, given for the maker's debt, is valid

although expressing no consideration. *Durham v. Manrow*, 2, 533; *Hall v. Farmer*, 2, 553.

An undertaking on appeal need not express consideration nor be sealed. *Thompson v. Blanchard*, 3, 335.

A guaranty, written below a promissory note, and expressing no consideration, is void, and the consideration cannot be shown by parol. *Brewster v. Silence*, 8, 207.

Guaranty—when sufficiently expresses consideration. *Church v. Brown*, 21, 315.

Guaranty must express consideration. *Draper v. Snow*, 20, 331.

“For value received” sufficient in guaranty. *Miller v. Cook*, 23, 495; *Mosher v. Hotchkiss*, 3 Abb. 326.

### 3. Signed by agent.

Auctioneer's memorandum of contract for sale of land sufficient. *Talman v. Franklin*, 14, 584.

What is sufficient memorandum—letter pinned in sales book—parol evidence to ascertain property. *Id.*

Subscription by agent sufficient. *Dykens v. Townsend*, 24, 57.

Resolution of common council in minutes signed by clerk is a sufficient memorandum. *Argus Co. v. Mayor, etc.*, 55, 495; 14 Am. Rep. 296.

Broker's memorandum of sale of goods, when sufficient contract. *Newberry v. Wall*, 84, 576.

## III. Sales of goods.

### 1. The contract.

Agreement on sale and delivery of damaged raisins that purchaser shall have return duties if any recovered by seller is valid by parol. *Allen v. Aguirre*, 7, 543.

Oral promise to sell goods to promisee no consideration for promise to pay antecedent debt of a third. *Pfeiffer v. Adams*, 37, 164.

Whether rescission or new contract—written contract for sale of goods may be

modified by parol. *Blanchard v. Trim*, 38, 225.

When sale of goods complete—usage cannot affect. *Bradley v. Wheeler*, 44, 495.

Contract to manufacture and deliver is not within. *Parsons v. Loucks*, 43, 17; 8 Am. Rep. 517.

Contract to sell gold above fifty dollars must be in writing—when two papers together constitute sufficient memorandum. *Peabody v. Speyers*, 56, 230.

What acts necessary on sale of more than fifty dollars—acceptance—delivery, etc. *Brand v. Focht*, 1 Abb. 185.

Agreement to deliver firewood to be cut from standing trees is for sale, not manufacture. *Smith v. New York Cent. R. Co.*, 4 Abb. 262.

### 2. Payment.

When consideration is payment of note or discharge of debt it must be consummated at the time. *Brabin v. Hyde*, 32, 519.

Contract deemed made at time of payment—what is delivery of cattle. *Bissell v. Balcom*, 39, 275.

Sale void under, not ratified by vendor's assignment of an account therefor. *Hicks v. Cleveland*, 48, 84.

When payment made at time of contract. *Hawley v. Keeler*, 53, 114.

When subsequent payment is operative—authorities on, collated. *Hunter v. Wetsell*, 57, 375; 15 Am. Rep. 508.

Payment for goods already sold is no consideration for new agreement to sell others, although vendee claims that all were included in first contract. *Organ v. Stewart*, 60, 413.

Agreement to apply existing debt of the seller to the purchaser is not a payment. *Mattice v. Allen*, 3 Keyes, 492; 3 Abb. 248.

### 3. Delivery.

Requisites. *Marsh v. Rouse*, 44, 643.

Mere words do not constitute delivery. *Shindler v. Houston*, 1, 261.

Delivery and sale need not be simultaneous. *McKnight v. Dunlop*, 5, 537.



What sufficient evidence of receipt and acceptance of goods to go to jury. *Gray v. Davis*, 10, 285.

When delivery to carrier does not pass title. *Rodgers v. Phillips*, 40, 519.

Delivery to carrier designated by purchaser is valid. *Cross v. O'Donnell*, 44, 661; 4 Am. Rep. 721.

Acceptance or estoppel of purchase. *Allis v. Read*, 45, 142.

Evidence of an attempt to communicate a message declining to receive the goods is competent to rebut acceptance. *Caulkins v. Hellman*, 47, 449; 7 Am. Rep. 461.

There must be not only receipt but acceptance of goods. *Stone v. Browning*, 51, 211; 68, 598.

Delivery must be by seller with intent to vest, and must be accepted by purchaser. *Brand v. Focht*, 3 Keyes, 409.

On sale without delivery claimant need not show excuse for leaving property in seller's hands. *Mitchell v. West*, 55, 107.

Change of possession on sale of chattels must be continued. *Tilson v. Tervilliger*, 56, 273.

Entire contract for goods—delivery to carrier. *Allard v. Greasert*, 61, 1.

Sale of lumber to be dressed and cut—no acceptance—authorities collated. *Cooke v. Millard*, 65, 352; 22 Am. Rep. 619.

Valid partial delivery and acceptance. *Van Woert v. Albany & Susquehanna R. Co.*, 67, 538.

Acceptance by agent after agency is terminated may bind principal. *Barkley v. Rensselaer & Saratoga R. Co.*, 71, 205.

When acceptance by agent is binding. *Wilcox Silver Plating Co. v. Green*, 72, 17.

Applies to execution sales as to change of possession—municipal corporation may be creditor—tax sale—bulky property. *Stimson v. Wrigley*, 86, 332.

#### IV. Sale of lands.

##### 1. Miscellaneous.

Consent of owner of lands to their taking for public purposes need not be in writing. *Embury v. Conner*, 3, 511.

Parol lease of lands for a year to commence at a future day is valid. *Young v. Dake*, 5, 463.

Parol promise by seller of land to pay for materials for building on it by purchaser, the deed to be delivered on completion, is void—so to accept bill drawn on him for such materials. *Loonie v. Hogan*, 9, 435.

Authority of agent to sell lands need not be in writing—requisites of ratification by principal of unauthorized sale by agent. *Newton v. Bronson*, 13, 587.

There can be no recovery on oral agreement to pay for services in negotiating purchase of land by permanent lease of the land. *Erben v. Lorillard*, 19, 299.

Contract for sale of lands, fixing price, but referring to "terms as specified" not in the memorandum, cannot be perfected by parol. *Wright v. Weeks*, 25, 153.

Where tenant for five years orally relet part to landlord for same term, it inures from year to year. *Lounsbery v. Snyder*, 31, 514.

What is not valid contract for sale of land—acceptance of terms in broker's authority. *Haydock v. Stow*, 40, 363.

When contract not for sale of land. *Burrell v. Root*, 40, 496.

Oral agreement to buy land at auction and convey interest void. *Levy v. Brush*, 45, 589.

Contract to cut standing trees on contractor's land and deliver at so much a cord is not within. *Killmore v. Howlett*, 48, 569.

Agreement of partnership for purchase of lands not within statute. *Traphagen v. Burt*, 67, 30.

Oral agreement for sale of standing timber void—acceptance. *Smith v. New York Cent. R. Co.*, 4 Keyes, 180.

##### 2. Effect of part performance.

Oral agreement for exchange of lands performed, save in a single particular, is not within the statute. *Thomas v. Dickinson*, 12, 364.

Part payment does not take oral contract for sale of lands out of statute—escrow

does not make contract. *Cagger v. Lansing*, 43, 550.

Where grantee repudiates agreement partly performed void under the statute, grantor can recover value of lands less value of partial performance — tender. *Day v. New York Cent. R. Co.*, 51, 583.

Sale of land — sufficient part performance. *Miller v. Ball*, 64, 286.

When parol agreement in reference to land not taken out of statute by part performance. *Wheeler v. Reynolds*, 66, 227.

Not a bar to specific performance of oral agreement to convey lands when vendee has been fraudulently induced to accept part conveyance. *Beardsley v. Duntley*, 69, 577.

Where one agrees to take pay for lands in work and fails to convey, the statute does not prevent recovery quantum meruit. *Moody v. Smith*, 70, 598.

#### V. Promise to answer for another.

##### 1. Valid contracts.

A parol agreement by one surety to indemnify his co-surety. *Barry v. Ransom*, 12, 462.

Undertaking of del credere factor. *Sherwood v. Stone*, 14, 267.

Parol warranty of chattel note of third person delivered in payment. *Cardell v. McNiel*, 21, 336.

Oral promise of A. to B. upon consideration to pay C.'s debt to B., valid although without C.'s knowledge. *Barker v. Bradley*, 42, 316; 1 Am. Rep. 521.

Oral promise to assume debt if creditor will release debtor. *Meriden Britannia Co. v. Zingsen*, 48, 247; 8 Am. Rep. 549.

Agreement by indorsers for payment of note, when valid. *Sanders v. Gillespie*, 50, 250.

When acceptance of order of contract in favor of sub-contractor valid. *Gallagher v. Nichols*, 60, 438.

Oral promise of vendor of lands to pay assessment. *Remington v. Palmer*, 62, 31.

Parol warranty of note of third person given in payment. *Bruce v. Burr*, 67, 237.

Holder's oral guaranty of note on sale of it. *Milks v. Rich*, 80, 261.

Oral agreement of grantee of premises subject to mortgage to pay interest — when valid. *Prime v. Koehler*, 77, 91.

Oral agreement of attorney to serve gratuitously if client would reject offer of settlement, not void as undertaking to answer for debt of another. *Fitch v. Gardenier*, 2 Keyes, 516; 2 Abb. 153.

##### 2. Void contracts.

Oral promise by A. to pay to B. amount of his lien for repairs on a boat of C. in his possession, upon delivery of the boat to A. *Mallory v. Gillett*, 21, 412.

Oral promise to pay debt of another in consideration of discontinuance of suit. *Duffy v. Wunsch*, 42, 243; 1 Am. Rep. 514.

Oral agreement by successor to pay wages due employee from former employer if he will continue working. *Belknap v. Bender*, 75, 446; 31 Am. Rep. 476.

Oral promise by drawee of bill of exchange to pay it. *Matteson v. Moulton*, 79, 627.

Contract to pay debt of another void because not in writing. *Roe v. Barker*, 82, 431.

##### 3. Miscellaneous.

What is agreement to answer for debt of another. *Brown v. Weber*, 38, 187.

Charging goods to promisor not conclusive. *Cowdin v. Gottgetreu*, 55, 650.

#### VI. Agreement not to be performed within year.

Oral agreement for renewal of fire insurance policy from year to year is valid. *Trustees of First Baptist Church v. Brooklyn F. Ins. Co.*, 19, 305.

Agreement to work for a year, commencing in future — entry on service does not take case out of statute. *Oddy v. James*, 48, 685.

Agreement for work to be paid for at death of employer is not within statute. *Kent v. Kent*, 62, 560; 20 Am. Rep. 502.

VII. *Trusts.*

Contract fiduciary in character for sale of stock performed by purchaser not void. *Johnson v. Brooks*, 93, 337.

One who buys lands in his own name, and with his own money, by agreement for benefit of another, cannot set up the statute. *Sandford v. Norris*, 4 Abb. 144; 1 Trans. App. 350.

See CONTRACT; SALES; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

**STATUTE OF LIMITATION.**

- I. *When action is deemed commenced.*
- II. *Effect of statute.*
- II. *When statute begins to run.*
- IV. *When available as defense.*
- V. *What suspends statute.*
- VI. *Absence of debtor.*
- VII. *Equitable action.*
- VIII. *Criminal actions.*
- IX. *Open accounts.*
- X. *What removes bar of statute.*
  1. *Payment.*
  2. *Acknowledgment.*

I. *When action is deemed commenced.*

Commencement of action by delivery of summons to sheriff — subsequent change of title of defendants. *Shaw v. Cock*, 78, 194.

Action on joint liability commenced when service made on one debtor. *Maples v. Mackey*, 89, 146.

In action against non-resident commenced before Code of Civil Procedure went into effect. *Clark v. Lake Shore, etc., R. Co.*, 94, 217.

II. *Effect of statute.*

Provisions of Code of Procedure do not apply to causes of action accrued before its passage. *Van Alen v. Feltz*, 1 Keyes, 332.

Laws of 1864, chapter 578, not retroactive. *Stone v. Flower*, 47, 566.

Amendment of section 94 of Code of Procedure, as to actions for injury to person, was not retroactive. *Goillotel v. Mayor, etc.*, 87, 441.

III. *When statute begins to run.*

When begins to run against one of several attaching creditors. *Davy v. Field*, 1 Abb. 490.

Where debtor lived out of State when action accrued, and at his death, statute attaches on granting of letters of administration in this State. *Davis v. Garr*, 6, 124.

In action by vendee for performance of sealed contract for conveyance of lands on payment, the lapse of twenty years raises no sufficient presumption of payment. *Morey v. Farmers' Loan and Trust Co.*, 14, 302; S. P., *Lawrence v. Ball*, 14, 477.

Action to enforce lien for purchase-money of land barred in six years. *Borst v. Corey*, 15, 505.

How hiring will be construed, of farm servant. *Davis v. Gorton*, 16, 255.

When does not attach until knowledge of assertion of claim. *Bartlett v. Judd*, 21, 200.

Attaches against right to action for specific performance of agreement to convey land at moment of breach, without request for performance. *Bruce v. Tilson*, 25, 194.

Does not attach to loan payable on demand with interest, until demand. *Payne v. Gardiner*, 29, 146.

When attaches to attorney's claim. *Mygatt v. Wilcox*, 45, 306; 6 Am. Rep. 90.

Does not attach to attorney's claim for services until his relation to suit is ended. *Bathgate v. Haskin*, 59, 533; *Adams v. Fort Plain Bk.*, 36, 255.

Rule as to discovery of fraud. *Foot v. Farrington*, 41, 164.

Runs against insurance premium note given before 1853 from its date. *Sands v. Lilienthal*, 46, 541.

Disability of marriage — statute attaches in one year after death of woman. *Dunham v. Sage*, 52, 229.

Statute runs against cause of action for conversion from demand. *Roberts v. Berdell*, 52, 644.

What constitutes discovery of facts constituting fraud. *Erickson v. Quinn*, 47, 410.

Cause of action for fraud in purchase of land runs from purchase and not from eviction. *Northrop v. Hill*, 57, 351; 15 Am. Rep. 501.

Statute does not attach to a testamentary trust until appointment of a trustee. *Dunning v. Ocean Nat. Bk.*, 61, 497; 19 Am. Rep. 293.

Does not attach to bank certificate of deposit until demand. *Howell v. Adams*, 68, 314.

On contract to indemnify against payments to be made to State on sale of lands, runs from eviction. *Taylor v. Barnes*, 69, 430.

Does not run after adjudication in bankruptcy against claim not then barred. *Von Sachs v. Kretz*, 72, 548.

Runs on due bill on demand, from date. *De Lavallette v. Wendt*, 75, 579; 31 Am. Rep. 494, note.

When attaches in case of resulting trust. *Reitz v. Reitz*, 80, 538.

Refusal to pay deposit sets statute running. *Thomson v. Bank of North America*, 82, 1.

Begins to run from date of check, where drawer has no funds. *Brush v. Barrett*, 82, 400; 37 Am. Rep. 569.

Check, good when drawn, and payable on presentation is payment "at the time." *Hunter v. Wetsell*, 84, 549; 38 Am. Rep. 544.

One writing his name on the back of a non-negotiable note on demand becomes immediately liable and the statute runs — effect of payments. *McMullen v. Rafferty*, 89, 456.

Where check paid by mistake statute does not run until mistake discovered. *Bank of Brit. N. Amer. v. Merchants' Nat. Bank*, 91, 106.

For loss by neglect of executor to collect debt, statute runs from time of loss. *Harrington v. Keteltas*, 92, 40.

Does not run as to moneys of wife invested by husband in his favor. *Matter of Frazer*, 92, 239.

Claim of legacy — agreement of person charged with payment, to hold in trust — concurrent remedies at law and in equity — stale demand. *Matter of Accounting of Neilley*, 95, 382.

As to suit to enforce individual liability of stockholder. *Corning v. McCullough*, 1, 47.

When action barred by removal and death of debtor out of State. *Christophers v. Garr*, 6, 61.

Is a bar to an action to recover securities assigned on an usurious loan brought after six years. *Schroeppe v. Corning*, 6, 107.

Does not bar a suit in equity to set aside a deed for fraud unless the plaintiff knew of the fraud more than six years before suit. *Sears v. Shafer*, 6, 268.

Lapse of twenty years from maturity of mortgage raises presumption of payment. *Belmont v. O'Brien*, 12, 394; *Ingraham v. Baldwin*, 9, 45.

When attaches to cause of action against sheriff for returning execution unsatisfied. *Davy v. Field*, 2 Keyes, 608.

Of proceeding to compel administrator to account to legatee. *Clark v. Ford*, 3 Keyes, 370.

Action for penalty against trustees of manufacturing corporations for not filing report is barred in three years. *Merchants' Bank v. Bliss*, 35, 412.

Deputy sheriff entitled to protection under Code of Procedure, section 92, subdivision 1 — "act in official capacity." *Cumming v. Brown*, 43, 514.

When right of subrogation not barred. *Bennett v. Cook*, 45, 268.

Of action to enforce personal liability of stockholder of plankroad company. *Conklin v. Furman*, 48, 527.

Action for specific performance. *Peters v. Delaplaine*, 49, 362.

Action by mortgagor against mortgagee in possession for accounting and possession is barred in ten years from entry. *Hubbell v. Sibley*, 50, 468.

Note on demand is due forthwith, barred in six years as to maker. *Wheeler v. Warner*, 47, 519; 7 Am. Rep. 478.

As to claim against estate — when claim not barred. *Hoyt v. Bonnett*, 50, 538.

Action for money awarded for damages for street widening in New York city. *Fisher v. Mayor, etc.*, 67, 73.

Action for legacy against devisee of land charged with payment, barred in less than twenty years. *Loder v. Hatfield*, 71, 93.

Second action on reversal of Marine Court judgment, under section 103 of Code of Procedure, may be brought within a year after affirmance here. *Wooster v. Forty-second Street, etc., R. Co.*, 71, 471.

In ejectment by a married woman, twenty years' adverse possession is good defense. *Clarke v. Gibbons*, 83, 107.

Right of owner as against purchaser under void foreclosure not barred until twenty years. *Shriver v. Shriver*, 86, 575.

Of action against stockholder of corporation for debts. *Handy v. Draper*, 89, 334.

Action to declare legacy a lien may be brought within ten years. *Scott v. Stebbins*, 91, 605.

Bar of three years applies to action against New York city for personal injury from icy streets. *Dickinson v. Mayor of New York*, 92, 584.

Under section 375, Code of Civil Procedure, a party has twenty years to bring action to recover land, and in case of disability to so much more as the period would add, except that the addition must not be more than ten years after the termination of the disability. *Howell v. Leavitt*, 95, 617.

In proceedings to sell decedent's land for debts—purchaser in good faith. *Mead v. Jenkins*, 95, 31.

Action for negligence causing injury in April, 1877, held not barred in January, 1880, being embraced in the three years' limitation of the Code of Civil Procedure, section 383, subdivision 5. *Watson v. Forty-second Street, etc., R. Co.*, 93, 522.

#### IV. When available as defense.

Not available to a foreign corporation in the courts of this State. *Mallory v. Tioga R. Co.*, 3 Abb. 139; *Olcott v. Tioga R. Co.*, 20, 210; *Rathbun v. Northern Cent. Ry. Co.*, 50, 656; *Boardman v. Lake Shore, etc., R. Co.*, 84, 157.

When available as bar to offset, though not pleaded. *Mann v. Palmer*, 3 Abb. 162.

Executor may set up, on citation to account. *Martin v. Gage*, 9, 398.

Does not run against infant cestui que trust. *Bucklin v. Bucklin*, 1 Keyes, 141.

A corporation is a "person" within. *People v. Rector, etc., of Trinity Church*, 22, 44.

Ineffectual when affirmative relief based on allegations of payment. *Johnson v. Albany & Susquehanna R. Co.*, 54, 416; 13 Am. Rep. 607.

When statute does not apply to action to set aside fraudulent conveyance by decedent. *Kent v. Kent*, 62, 560; 20 Am. Rep. 502.

Plea of statute of another State where contract was made, no bar to action here. *Miller v. Brenham*, 68, 83.

Where statute is pleaded, but point not raised at trial, it cannot be raised on appeal. *Bommer v. Am. Spiral Spring, etc., Co.*, 81, 468.

#### V. What suspends statute.

Injunction on receiver of insolvent insurance company. *Sands v. Campbell*, 31, 345.

Idiocy does not postpone—death of debtor simply adds eighteen months. *Sanford v. Sanford*, 62, 553.

#### VI. Absence of debtor.

Return of debtor to State—construction of statute. *Cole v. Jessup*, 10, 96.

How pleaded. *Id.*

Absence of one of two joint debtors suspends. *Denny v. Smith*, 18, 567.

Absence from State—residing in New Jersey and doing business in New York. *Bennett v. Cook*, 43, 537; 3 Am. Rep. 727.

#### VII. Equitable action.

Court of equity will not allow proceedings for distribution of estate after time fixed by law. *Clark v. Ford*, 1 Trans. App. 22.

In an equitable action the plaintiff cannot recover on proving a cause of action at law merely which was barred by the statute of limitations. *Mann v. Fairchild*, 3 Abb. 152.

Is not barred by devise or power in trust to executor for payment of debts generally. *Martin v. Gage*, 9, 398.

Where equitable and legal remedies, and former imperfect, the bar applicable to latter will be enforced. *Rundle v. Allison*, 34, 180.

In equitable action for recovery of lands—redemption from mortgage. *Miner v. Beekman*, 50, 337.

### VIII. *In criminal actions.*

Requisites of plea of. *People v. Arnold*, 4, 508.

Action for false imprisonment—discharge, rearrest and voluntary submission. *Dusenbury v. Keiley*, 85, 383.

### IX. *Open accounts.*

An open account purchased from a third party, without recognition of its validity, does not become a part of a mutual account. *Green v. Ames*, 14, 225.

Application of statute to accounting in case of absolute deed alleged to have been intended as mortgage. *Morris v. Budlong*, 78, 543.

When action for accounting and not for fraud—demand. *Carr v. Thompson*, 87, 160.

### X. *What removes bar of statute.*

#### 1. *Payments.*

Presumption as to time of payment. *Martin v. Gage*, 9, 398.

One joint and several maker of a note is not affected by a payment by another before the statute has run. *Shoemaker v. Benedict*, 11, 176; *Littlefield v. Littlefield*, 91, 203; 43 Am. Rep. 663.

Reference of creditor by surety to principal and payment by him, sufficient acknowledgment as to surety making refer-

ence, but not as to others. *Winchell v. Hicks*, 18, 558.

Payment by assignee for creditors does not take debt out of. *Pickett v. Leonard*, 34, 175.

Demand barred at decedent's death cannot be revived by partial payment by administrator. *McLaren v. McMartin*, 36, 88.

When payment of interest by maker binds indorser. *First Nat. Bk. of Utica v. Ballou*, 49, 155.

Action against trustee for accounting concerning trust property purchased by him barred in ten years. *Hubbell v. Medbury*, 53, 98.

Part payment must be made by party or some one authorized. *Harper v. Fairley*, 53, 442.

When payment by assignees of dividend takes debt out of statute. *Miller v. Talcott*, 54, 114.

Presumption as to application of payments for continuous service. *Smith v. Velie*, 60, 106.

Delivery to creditor of note of third person operates as payment by debtor—statute attaches from such delivery and not from its payment. *Smith v. Ryan*, 66, 352; 23 Am. Rep. 60.

When statute attaches to mortgage belonging to married woman—collateral insurance policy—what not sufficient payment to bar statute. *Acker v. Acker*, 81, 143.

Payments on open account and effect of. *Rauz v. Brand*, 90, 309.

Payment on running account for board bearing interest from close of each year renews liability for unpaid amounts for six years previous. *Gilbert v. Comstock*, 93, 484.

Payments of interest on usurious note given for previous valid loan may be considered as made on original loan. *Matter of Accounting of Consaulus*, 95, 340.

#### 2. *Acknowledgment.*

Writing not necessary to bar demand accrued, but not barred before Code of Procedure took effect. *VanAlen v. Felts*, 4 Abb. 439.

Debt barred when Code of Procedure took effect is not revived by oral subsequent promise to pay. *Esselstyn v. Weeks*, 12, 635.

Acknowledgment and promise by one partner after dissolution will not revive a barred debt as against the other partners. *Van Keuren v. Parmelee*, 2, 523.

New promise—to stranger, or in answer in Chancery, or drawn out in testimony, or by surviving partner or executor, insufficient. *Bloodgood v. Bruen*, 8, 362.

To authorize recovery on a conditional new promise, performance of the condition must be shown. *Wakeman v. Sherman*, 9, 85.

Promise must be to the creditor or some one acting for him. *Id.*

Oral promise not to plead if note allowed to outlaw, is invalid. *Shapley v. Abbott*, 42, 443; 1 Am. Rep. 548.

Code has no effect upon prior oral promise to pay subsisting debt. *Lansing v. Blair*, 43, 48.

Acknowledgment in writing—when sufficient—parol evidence of date of execution, competent. *Kincaid v. Archibald*, 73, 189.

Sufficiency of written admission. *City Nat. Bk. of Poughkeepsie v. Phelps*, 86, 484.

See CONSTITUTIONAL LAW; CONTRACT; PLEADING; SURROGATE.

## STEAMBOATS.

Acts of congress, July 7, 1838, August 30, 1852, do not impair common-law right of action by passenger injured—certificate of inspection of boilers not conclusive. *Swarthout v. New Jersey Steamboat Co.*, 48, 209; 8 Am. Rep. 541.

See NEGLIGENCE; SHIP AND SHIPPING.

### Steam Boilers.

See NEGLIGENCE.

### Steamship Company.

See CORPORATION.

## STENOGRAPHER.

Order of court to county treasurer to pay fees unauthorized by statute, invalid. *Matter of Tinsley*, 90, 231.

See COSTS.

## STIPULATION.

Not to be retracted on subsequent trial except by leave of court. *Owen v. Cawley*, 36, 600.

To waive right of appeal—when valid. *People v. Stephens*, 52, 306.

Oral agreement as to referee's fees—when binding. *First Nat. Bk. of Cooperstown v. Tamajo*, 77, 476.

As to question to be decided—construction of, as to defense of bona fide holding. *Atlantic Nat. Bk. v. Franklin*, 55, 235.

As to evidence—construction of. *Friedickar v. Guar. Mut. Ins. Co.*, 62, 392.

If executed without fraud, court has no power over it. *Mark v. City of Buffalo*, 87, 184.

As to facts does not preclude evidence. *Dillon v. Cockcroft*, 90, 649.

That cause shall not abate as condition of putting over, valid. *Cox v. New York Cent., etc., R. Co.*, 63, 414.

Must be strictly construed where claimed to cut off right of appeal to prevent such effect. *Stedeker v. Bernard*, 93, 589.

See PRACTICE; TRIAL.

## STOCK BROKER.

When may be employed under power of attorney to buy and sell stocks—power of sale. *Wicks v. Hatch*, 62, 535.

When not bona fide holder of stolen United States coupon bonds. *Taft v. Chapman*, 50, 445.

Sale for default of margins. *Stewart v. Drake*, 46, 449.

When authorized on order to sell to borrow stock for delivery, and to buy in default of margins. *Knowlton v. Fitch*, 52, 288.

Right to close transactions—has no right to buy in stock to cover sale—measure of damages. *White v. Smith*, 54, 522.

Legality of "straddles"—when negligence question for jury—damages—custom. *Harris v. Tumblebridge*, 83, 92; 38 Am. Rep. 398.

Cannot buy of himself—duty to keep stock on hand. *Taussig v. Hart*, 58, 425.

Cannot recover payment of deficiency on sale of stock on being cited before arbitration committee of board—evidence. *Quincey v. White*, 63, 370.

May recover for advances although he has sold stock without authority—measure of damages for such sale. *Gru-man v. Smith*, 81, 25.

Conversion of customer's stock—may recover for purchase less damages for conversion. *Capron v. Thompson*, 86, 418.

Purchase of bonds for future delivery—stop-order—unauthorized sale by broker—sale in ordinary way presumed fair. *Porter v. Wormser*, 94, 431.

May sell without notice to customer, such being the usage, and the customer consenting to be subject to usage—damages. *Baker v. Drake*, 66, 518; 23 Am. Rep. 80.

When authorized to settle with lender of gold on failure of customer to put up margins—evidence. *Cameron v. Durkheim*, 55, 425.

Sale by, in ordinary way, presumed fair. *Porter v. Wormser*, 94, 431.

Selling short, and in accordance with custom borrowing for delivery and becoming personally responsible for return of borrowed stock, may continue that course after customer's death until appointment of legal representative authorized to receive notice to close. *Hess v. Ran*, 95, 359.

Advancing purchase-money may buy in his own name—need not keep separate. *Horton v. Morgan*, 19, 170.

See AGENCY; CONTRACT; DAMAGES.

### STREET.

When adjacent owner does not own fee of street he has no remedy for inconven-

ience of access caused by street railway. *Kellinger v. Forty-second St., etc., R. Co.*, 50, 206.

See EMINENT DOMAIN; CONSTITUTIONAL LAW; DEDICATION; HIGHWAY; MUNICIPAL CORPORATION; WAY.

### SUBMISSION OF CONTROVERSY.

Under section 372 of Code—what is not capable of submission—construction of will. *Hobart College v. Fitzhugh*, 27, 130.

Immaterial questions of law cannot be submitted. *Wood v. Squires*, 60, 191.

Case must present only questions of law—validity of general assignment not capable of submission. *Clark v. Wise*, 46, 612.

Of action by State to restrain corporation from exercising franchises unlawfully, not allowed. *People v. Mutual Endowment Association*, 92, 622.

Effect of admission involving legal conclusion. *Fearing v. Irwin*, 55, 486.

Limited to questions between the parties. *Union Nat. Bank v. Kupfer*, 63, 617.

Case must state facts and be submitted by parties to be affected. *Dickinson v. Dickey*, 76, 602.

Defendant offered to submit controversy in 1874—plaintiff accepted in 1876—defendant did not reply—not waiver of statute—acceptance should have been within six months, followed by submission. *Cornes v. Wilkin*, 79, 129.

Affidavit must be by party, and not by attorney, where there is a natural person a party. *Bloomfield v. Ketcham*, 95, 657.

### Subpoena.

See WITNESS.

### SUBROGATION.

Right of, depends not on contract but on justice and equity—when guardian entitled to. *Mathews v. Aikin*, 1, 595.



One who pays a debt for which his property is not bound is not entitled to the creditor's lien on the debtor's estate. *Wilkes v. Harper*, 1, 586.

Judgment setting aside fraudulent conveyance — when heir of vendee entitled to assignment on payment of. *Cole v. Malcolm*, 66, 363.

See MORTGAGE; SURETY.

### SUBSCRIPTION.

When valid without expressing consideration. *Trustees of First Bap. Soc. v. Robinson*, 21, 234.

For formation of stock company — not binding where company is formed for additional purposes not contemplated. *Dorris v. Sweeney*, 60, 463.

To stock for building seminary — evidence of acceptance of building — consideration. *Richmondville Union Seminary v. McDonald*, 34, 379.

To stock to establish a seminary — does not render subscribers liable as partners nor to contribution. *Shibley v. Angle*, 37, 626.

Endowment of literary institution not sufficient consideration to uphold. *Trustees of Hamilton College v. Stewart*, 1, 581.

When request cannot be implied. *Id.*

On condition that it is not to be binding unless a specified sum is subscribed, is not enforceable unless that sum is subscribed in good faith — parol evidence competent to show character of other subscriptions. *New York Exchange Co. v. De Wolf*, 31, 273.

For religious society, binds subscriber when expense has been incurred on faith of it. *Barnes v. Perine*, 12, 18.

For building church — when binding after action on faith of it. *Presbyterian Society v. Beach*, 74, 72.

For use of religious society, before incorporation, enforceable on incorporation. *Reformed Prot. Dutch Church v. Brown*, 4 Abb. 31.

See CONTRACT; CORPORATION; RELIGIOUS SOCIETIES.

### SUBSTITUTION.

Of plaintiff acquiring interest in equity proceedings — order determines title where no pleadings directed. *Smith v. Zalinski*, 94, 519.

See ATTORNEY AND CLIENT; PARTIES.

### Summary Proceedings.

See INJUNCTION; LANDLORD AND TENANT.

### SUMMONS.

Fictitious name cannot be used to designate known defendant. *Town of Hancock v. First Nat. Bk. of Oxford*, 93, 82.

Mis-statement of time to answer not jurisdictional error, and amendable. *Gribbon v. Freel*, 93, 93.

Service on director of foreign corporation — when cause of action arises in this State. *Hiller v. Burlington, etc., R. Co.*, 70, 223.

Service within this State on officer of foreign corporation — when valid. *Pope v. Terre Haute Car Manuf. Co.*, 87, 137.

How served on sheriff. *Dunford v. Weaver*, 84, 445.

May not be served on non-resident defendant attending as a creditor on bankruptcy proceedings. *Matthews v. Tufts*, 87, 568.

Service by publication — requisites of affidavit. *Belmont v. Cornen*, 82, 256.

Requisites of service by publication. *Van Wyck v. Hardy*, 4 Abb. 496.

Affidavit for publication must allege that defendant cannot be found in State. *Carlton v. Carlton*, 85, 313.

Statement of place of filing complaint may be appended and need not be incorporated. *Cook v. Kelsey*, 19, 412.

Where publication is ordered, personal service out of the State is equivalent to publication and mailing. *Jenkins v. Fahy*, 73, 355.

By publication or out of State in lieu thereof not complete until expiration of six weeks. *Market Nat. Bk. v. Pacific Nat. Bk.*, 89, 397.

Order for substituted service of, only necessary to show defendant's residence in this State. *Huswell v. Lincks*, 87, 637.

Mailing to defendant at different place from that ordered, renders void. *Smith v. Wells*, 69, 601.

Service on infant under Code of Procedure, section 135, subdivision, 6, is valid. *Wheeler v. Scully*, 50, 667.

Not complete until expiration of prescribed time, and defendant may answer within twenty days thereafter. *Brooklyn Trust Co. v. Blumer*, 49, 84.

Voluntary appearance equivalent to service. *Catlin v. Ricketts*, 91, 668.

Where complaint served with summons should not be set aside because summons is in wrong form. *McCoun v. New York Cent., etc., R. Co.*, 50, 176.

Nonsuit not granted for defect of. *Graves v. Waite*, 59, 156.

When this court will not amend in action against trustees of union free school by substituting corporation as defendant. *Bassett v. Fish*, 75, 303.

### SUNDAY.

Contract for advertising in Sunday newspaper void. *Smith v. Wilcox*, 24, 353.

Carrier liable for negligent injury to passenger on. *Carroll v. Staten Island R. Co.*, 58, 126 ; 17 Am. Rep. 221.

Carrier liable for loss of property, although contract of carriage was made on Sunday. *Merritt v. Earle*, 29, 115.

Unloading goods on, by carrier, where not evidence of negligence. *Shelton v. Merchants' Dispatch Trans. Co.*, 59, 258.

City liable for injury from defect in street to one traveling on Sunday. *Platz v. City of Cohoes*, 89, 219 ; 42 Am. Rep. 286.

Allowance for care of armory on, permitted. *People v. Supervisors of Ulster*, 91, 672.

Private sale of property not exposed on, valid. *Eberle v. Melrbach*, 55, 682.

Verdict on, in justice's court, may be entered Monday. *Allen v. Godfrey*, 44, 433.

When Sunday is last day to serve it is excluded from computation. *Gribbon v. Freel*, 93, 93.

Construction of act prohibiting dramatic representations in New York city on Sunday. *Neuendorff v. Duryea*, 69, 557 ; 25 Am. Rep. 235, note.

Action under civil damage act for death of horse on Sunday is maintainable. *Bertholf v. O'Reilly*, 74, 509 ; 30 Am. Rep. 323.

See CONSTITUTIONAL LAW ; CONTRACT ; MUNICIPAL CORPORATION ; NEGLIGENCE ; NEGOTIABLE INSTRUMENT.

### Superior Courts.

See COURTS ; JURISDICTION.

### SUPERVISOR.

Has no authority to receive money from collector for relief of poor. *People v. Pennock*, 60, 421.

May not authorize any one but present county clerk to index records. *People v. Nask*, 62, 484.

A supervisor cannot maintain action against predecessor for conversion of town funds. *Hagadorn v. Raux*, 72, 583.

May not review amount of compensation for care of armory. *People v. Supervisors of Ulster*, 91, 672.

Bond to town clerk — form — liability — for excess of moneys for uncollected taxes action maintainable by supervisor of town. *Sutherland v. Carr*, 85, 105.

When claim for refunding illegal tax has been allowed it is still subject to repeal of the statute authorizing it. *People v. Supervisors of Montgomery Co.*, 67, 109 ; 23 Am. Rep. 94.

When town may sue for accounting — counter-claim. *Town of Guilford v. Cooley*, 58, 116.

Board may rescind an audit for mistake. *People v. Board of Supervisors of Broome Co.*, 65, 222.

Board may not audit account — for officer's legal expenses in establishing right to

office — payment not conclusive — mileage. *Board of Supervisors v. Ellis*, 59, 620.

Board cannot change rule of statute that majority are a quorum. *People v. Brinkerhoff*, 68, 259.

Board cannot be compelled to re-audit at a greater amount but may be compelled to audit a proper item rejected. *People v. Supervisors of Delaware Co.*, 45, 196.

Liable in damages for false return to mandamus — proper form of judgment. *People v. Supervisors of Richmond*, 28, 112.

Not liable to action for counsel fees. *Brady v. Supervisors*, 10, 260.

Estopped from denying legality of town bonds which he has issued under specific statutory authority. *Ross v. Curtiss*, 31, 606.

When money is raised on credit of county rather than of towns. *People v. Supervisors*, 34, 516.

Assessments by board for improvements by, in counties containing city of over 100,000 inhabitants. *Matter of Church*, 92, 1.

See COUNTY ; MANDAMUS ; OFFICE AND OFFICER ; TAXATION.

## SUPPLEMENTARY PROCEEDINGS.

Trust funds cannot be reached under. *Locke v. Mabbett*, 2 Keyes, 457.

Receiver cannot enforce trust in favor of creditors of one paying consideration for lands conveyed to another. *Underwood v. Sutcliffe*, 77, 58.

Judgment for unlawful sale of exempt property not subject to supplementary proceedings — County Court may order receiver to release it. *Tillotson v. Wolcott*, 48, 188.

Payment under final order under Code of Procedure, section 294, protects debtor against creditor or one not a prior bona fide assignee for value. *Lynch v. Johnson*, 48, 27.

Payment by debtor of judgment debtor — sections 292, 294, Code — notice. *Gibson v. Haggerty*, 37, 555.

Injunction does not protect debtor of judgment debtor. *Glenville Woolen Co. v. Ripley*, 43, 206.

Order requiring third person to pay to judgment creditor does not protect him as against true owner not party to proceeding — previous denial of motion no bar to action for such money. *Schrauth v. Dry Dock Savings Bank*, 86, 390.

Judge cannot order debt due to judgment debtor to be paid — contempt. *West Side Bank v. Pugsley*, 47, 368.

Debtor may apply earnings within sixty days to own use after service of order without consent of court. *Hancock v. Sears*, 93, 79.

Court may not, without notice to debtor, direct receiver to pay attorney compensation. *Goddard v. Stiles*, 90, 199.

When debtor liable for contempt in drawing funds deposited in bank in trust. *People v. Kingsland*, 3 Abb. 526.

Practice — transcript — execution — residence — husband and wife — witness. *Bingham v. Disbrow*, 5 Trans. App. 198.

Receiver of bank — partnership. *Wright v. Nostrand*, 94, 31.

Receiver gets title without assignment ; may set aside fraudulent assignment. *Porter v. Williams*, 9, 142.

Order in supplementary proceedings that judgment debtor deliver property, held by him avowedly as agent, to receiver, is improper. *Rodman v. Henry*, 17, 482.

When defendant must pay costs — when he may be imprisoned — contempt. *Brush v. Lee*, 1 Abb. 238 ; 2 Trans. App. 95.

See CONTEMPT ; EXECUTION ; RECEIVER.

## Supreme Court.

See APPEAL ; COURTS ; JURISDICTION.

## SURETY.

I. *Rights and liabilities.*

II. *When liable.*

III. *Actions by or against.*

1. *Generally.*
2. *Undertaking on appeal.*
3. *Contracts.*
4. *Official bonds.*
5. *Contribution.*
6. *Subrogation.*

IV. *Discharge.*

1. *Generally.*
2. *Laches.*
3. *Extension of time.*

I. *Rights and liabilities.*

Collaterals inure to benefit of creditor.  
*Vail v. Foster*, 4, 312.

Assignment of judgment against principal to third person at surety's request is in legal effect as if assigned to surety.  
*Eno v. Crooke*, 10, 60.

When creditor renders valueless a security which surety was entitled to, he may recover its amount from the creditor, having paid the debt. *Chester v. Bank of Kingston*, 16, 336.

Surety having paid judgment against principal, and principal having procured reversal, surety cannot recover from creditor. *Garr v. Martin*, 20, 306.

On request to enforce securities creditor bound to proceed with reasonable promptness. *Black River Bk. v. Page*, 44, 453.

Surety for accounting of a third, not affected by his taking a partner in the business. *Palmer v. Bagg*, 56, 523.

Surety for faithful performance — failure of employer to notify of previous default, not dishonest, is no defense. *Atlantic & Pacific Tel. Co. v. Barnes*, 64, 385; 21 Am. Rep. 321.

Surety for faithful performance — circumstances may be shown — surety must ascertain situation of principal for himself. *Western New York Life Ins. Co. v. Clinton*, 66, 326.

II. *When liable.*

Surety of principal administrator, liable for moneys received by him before appointment. *Gottberger v. Taylor*, 19, 150.

Surety for faithful discharge of duties of assistant book-keeper of bank is liable for his embezzlement. *Rochester City Bank v. Elwood*, 21, 88.

Surety for fidelity of one as book-keeper, not liable for his embezzlement as teller. *National Mech. Bank. Assoc. v. Conkling*, 90, 116; 43 Am. Rep. 146.

Surety for fidelity of one as actuary, not liable for his default as clerk and book-keeper. *Jennery v. Olmstead*, 90, 363.

Surety of corporation cannot plead usury. *Rosa v. Butterfield*, 33, 665.

Surety for firm, taking assignment, and assuming liabilities, becomes principal. *Williams v. Shelly*, 37, 375.

Surety on lease, when bound by acts of lessee in fixing time for commencement of rent and appointing arbitrators. *Binsse v. Wood*, 37, 526.

Surety on bond for discharge from arrest, not liable where process not issued against principal. *Toles v. Adeo*, 91, 562.

Surety for mortgage on taking title to mortgaged premises, not primarily liable — payment not applicable. *Carter v. Holahan*, 92, 498.

III. *Actions by or against.*1. *Generally.*

Effect of judgment against principal. *Bridgeport Ins. Co. v. Wilson*, 34, 275.

Promise to indemnify creditor for suing principal is valid. *Wells v. Mann*, 45, 327; 6 Am. Rep. 93.

Indemnitor bound by foreign judgment against surety, of which he had notice. *Konitzky v. Meyer*, 49, 571.

Surety cannot set up independent cause of action of principal against creditor. *Lasher v. Williamson*, 55, 619.

Surety not liable for defalcation of principal in prior term of office. *Bissell v. Saxton*, 77, 191.

Surety of village tax collector — when not liable for town taxes. *Ward v. Stahl*, 81, 406.

When retiring partner has cause of action as surety — agreement for royalties. *Sizer v. Ray*, 87, 220.

## 2. Undertaking on appeal.

Undertaking on appeal may not be amended by court without consent of. *Langley v. Warner*, 1, 606.

In undertaking on appeal, estate of deceased co-surety not liable. *Wood v. Fisk*, 63, 245; 20 Am. Rep. 528; *Davis v. Van Buren*, 72, 587.

Release of surety on appeal bond, by judgment creditor, destroys lien of judgment as to purchaser of land. *Barnes v. Mott*, 64, 397; 21 Am. Rep. 625.

But death of one surety does not relieve his estate from contribution to co-surety. *Johnson v. Harvey*, 84, 363; 38 Am. Rep. 515.

Discharged by failure to justify. *Man-ning v. Gould*, 90, 476.

## 3. On contract.

When creditor may deduct counsel fees from proceeds of collaterals. *Griggs v. Howe*, 2 Abb. 291.

Surety on note liable only to amount paid on discount. *Cobb v. Titus*, 10, 198.

Surety on note not discharged by extension of time of payment for a third in consideration of a new indorsement by him. *Kennedy v. Goss*, 38, 330.

Recoupment by principal inures to benefit of surety. *Springer v. Dwyer*, 50, 19.

Surety on lease — bond of indemnity — evidence of circumstances — damages. *Belloni v. Freeborn*, 63, 383.

Accommodation indorser's right to costs and expenses of suit in holder's name against maker's estate. *Thompson v. Taylor*, 72, 32.

Junior mortgagee may pay senior, and upon tender may compel assignment though not surety — motion before judgment in foreclosure — other defendants need not be notified — to whom assignment made. *Twombly v. Cassidy*, 82, 155.

When surety precluded by assent to renewal of loan. *City Nat. Bk. of Poughkeepsie v. Phelps*, 86, 484.

Assumption of mortgage — when only agreement of indemnity. *Slawson v. Watkins*, 86, 597.

## 4. On official bonds.

Surety of sheriff, compelled to pay judgment for erroneous seizure, entitled to be subrogated to his indemnity. *People v. Schuyler*, 4, 173.

Surety on bond of deputy sheriff not concluded by judgment against sheriff for misconduct of deputy, on notice to the deputy, but without notice to surety. *Thomas v. Hubbell*, 15, 405.

Surety on deputy sheriff's bond not concluded by recovery against sheriff, where no opportunity to defend. *Thomas v. Hubbell*, 35, 120.

Surety on administrator's bond not bound by recovery against principal where no opportunity to defend. *Annett v. Terry*, 35, 256.

Surety of tax collector — direction to county treasurer to issue warrant against delinquent in twenty days is merely directory. *Looney v. Hughes*, 26, 514.

Surety on bond of public officer not discharged by imposition of new duties. *People v. Vilas*, 36, 459.

Nor by legislative enlargement of duties. *Mayor, etc. v. Ryan*, 4 Trans. App. 363; *Supervisors of Monroe v. Clark*, 92, 391.

Surety on tax collector's bond — when liable. *Fake v. Whipple*, 39, 394.

Surety of supervisor not liable for moneys received by him from collector for relief of poor although warrant directs such payment. *People v. Pennock*, 60, 421.

Surety of public officer, not liable for previous defaults — his reports not conclusive evidence against surety — default of commissioner for town bonding. *Bissell v. Saxton*, 66, 55.

Surety of administrator — when concluded by decree against principal. *Gerould v. Wilson*, 81, 573.

Surety of receiver not liable for previous defaults — when not bound by order against principal. *Thomson v. MacGregor*, 81, 592.

Official bond of bank cashier — knowledge of directors of irregularities not defense — concealment of acts of predeces-

sor — notice of surety limiting liability. *Bostwick v. Van Voorhis*, 91, 353.

#### 5. Contribution.

Joint obligors — one assuming whole and indemnifying the other, his discharge in bankruptcy bars the other's claim to recover for what he has been compelled to pay. *Crafts v. Mott*, 4, 603.

Right of contribution exists between several sureties, and cannot be varied by parol. *Norton v. Coons*, 6, 33.

Right of contribution discharged by discharge in bankruptcy. *Tobias v. Rogers*, 13, 59.

Surety on replevin bond estopped by recitals — entitled to contribution from co-sureties. *Decker v. Judson*, 16, 439.

One of several stockholders executing note for debt of corporation may enforce contribution. *Coburn v. Wheelock*, 34, 440.

Rule of contribution where there are several obligations. *Armitage v. Pulver*, 37, 494.

In action by surety for contribution, co-surety cannot set off claim of principal against plaintiff. *O'Brien v. Karing*, 57, 649.

When surety not entitled to contribution from co-surety — estoppel. *Wells v. Miller*, 66, 255.

Partner selling his partnership interest to another partner, who assumes the debts, and requesting firm creditor to sue him, is released by his failure to sue and subsequent insolvency of the other partner. *Colegrove v. Tallman*, 67, 95; 23 Am. Rep. 90.

Right to enforce contribution against co-surety — surety not discharged by new agreement conditioned not to affect his liability. *Morgan v. Smith*, 70, 537.

Death of one surety does not relieve his estate to contribution to co-surety. *Johnson v. Harvey*, 84, 363; 38 Am. Rep. 515.

#### 6. Subrogation.

Surety refusing creditor's offer of control of judgment against principal, loses right

to demand subrogation when sued. *Hubbell v. Carpenter*, 5, 171.

Surety entitled to subrogation. *Lewis v. Palmer*, 28, 271.

Right of indorser to collaterals held by creditor. *Cory v. Leonard*, 56, 494.

#### IV. Discharge of sureties.

##### 1 Generally.

Surety on bond of public officer, not released by legislative enlargement of duties. *Mayor, etc. v. Ryan*, 4 Trans. App. 363.

An indorser is not discharged by the indorsee's surrender of collateral security without his consent. *Pitts v. Congdon*, 2, 352.

Mere indulgence of principal or of third person liable on collateral does not discharge surety. *Schroepf v. Shaw*, 3, 446.

Surety on bond on writ of error, failing to justify when excepted to, discharged by superseding of writ. *Ward v. Syme*, 4, 171.

Surety not discharged by assignment of judgment against principal to a third person, reserving right of collection against surety. *Hubbell v. Carpenter*, 5, 171.

Surety of agent of board of supervisors not liable for money borrowed by him in excess of authority and embezzled. *Supervisors of Rensselaer v. Bates*, 17, 242.

Surety excused by inability of principal from sickness to attend to answer to indictment. *People v. Tubbs*, 37, 586.

Surety discharged by material change in principal's contract. *Grant v. Smith*, 46, 93.

Estate of deceased joint maker of note, who was only surety, is discharged. *Getty v. Binasse*, 49, 385; 10 Am. Rep. 379.

On death of maker of joint note, signing simply as surety, his estate is discharged, even after recovery of judgment and pending appeal. *Risley v. Brown*, 67, 160.

Unauthorized sale by creditor of collaterals discharges surety pro tanto. *Vose v. Florida R. Co.*, 50, 369.

Surety not discharged by offer of debtor to pay, request of creditor that he retain

the money, and his subsequent insolvency. *Clark v. Sickler*, 64, 231; 21 Am. Rep. 607.

Estate of deceased surety on joint undertaking on arrest is absolutely discharged. *Davis v. Van Buren*, 72, 587; *Wood v. Fisk*, 63, 245; 20 Am. Rep. 528.

When surety not discharged by creditor's neglect to proceed after notice—must be injured by failure—burden on surety to show. *Hunt v. Purdy*, 82, 486; 37 Am. Rep. 587.

Failure of sureties on appeal undertaking to justify on exception discharges them. *Manning v. Gould*, 90, 476.

Official bondsmen not discharged by reason of increased duties of principal—liability for interest on deficit. *Supervisors of Monroe v. Clark*, 92, 391.

Release of principal from arrest by creditor held not to discharge sureties for fidelity—notice by sureties to creditor after default limits liability as to subsequent acts. *Emery v. Baltz*, 94, 408.

Acts of plaintiffs injuring rights of guarantors held to discharge them to extent of injury. *Humphrey v. Hayes*, 94, 594.

## 2. Laches.

Surety in replevin not discharged by delay in prosecution of suit. *Daniels v. Patterson*, 3, 47.

Neglect of creditor to prosecute principal on surety's request releases surety. *Remsen v. Beekman*, 25, 552.

Having assumed primary liability may re-establish himself as surety without creditor's consent. *Id.*

Surety for purchaser of goods not discharged by mere forbearance—effect of failure to notify surety of default—pleading. *McKechnie v. Ward*, 58, 541; 17 Am. Rep. 281.

Surety on county treasurer's bond not discharged by laches of supervisors. *Board of Supervisors v. Otis*, 62, 88.

Surety discharged by stipulation postponing collection of judgment against principal. *Ducker v. Rapp*, 67, 464.

What surety claiming to be discharged by delay of principal must show. *Howe Machine v. Farrington*, 82, 121.

When failure to enforce security does not discharge surety. *Id.*

## 3. Extension of time.

Surety not exonerated by principal's extending debtor's time with surety's consent. *Rice v. Isham*, 4 Abb. 37.

Surety not discharged by usurious agreement of creditor with debtor to extend time of payment. *Vilas v. Jones*, 1, 274.

Surety discharged by an award of arbitrators extending time of payment. *Coleman v. Wade*, 6, 44.

Wife's mortgage as security for husband's notes discharged by creditor's extension of time of payment without renewal. *Smith v. Townsend*, 25, 479.

Surety not discharged by extension of principal's time to pay balance of note in consideration of part payment—evidence. *Halliday v. Hart*, 30, 474.

Principal extending debtor's time with assent of surety does not discharge surety. *Wright v. Storrs*, 32, 691.

Agreement to extension of principal's time does not release surety if without consideration or void. *Lowman v. Yates*, 37, 601.

When notice by surety operates as extension of time for performance. *Hunt v. Roberts*, 45, 691.

Surety for tenant—when not released by extension—interest in property mortgaged to landlord as security. *Coe v. Cassidy*, 72, 133.

Surety not released by invalid extension of time of payment not where right to proceed against him is reserved. *National Bank of Newburgh v. Bigler*, 83, 51.

When retiring partner not surety for rent—extension of time no defense, when rights against surety reserved. *Palmer v. Purdy*, 83, 144.

Consideration for agreement to extend time of principal—surety not being present, presumed not to assent. *McNulty v. Hurd*, 86, 547.

See BONDS; GUARANTY; NEGOTIABLE INSTRUMENT; OFFICE AND OFFICER; SURREGATE.

## SURROGATE.

- I. *Jurisdiction.*
- II. *Duties and powers.*
- III. *Decrees and powers.*

I. *Jurisdiction.*

Has due jurisdiction to construe will under Code of Civil Procedure. *Matter of Verplanck*, 91, 439.

Has jurisdiction to determine validity, etc., of ante-nuptial contract as to widow's rights. *Matter of Young*, 92, 235.

Of New York county, in respect to objections to jurisdiction, is on footing of court of general jurisdiction. *Bearns v. Gould*, 77, 455.

Of New York county is local officer — election to fill vacancy only fills unexpired term. *People v. Carr*, 86, 512.

Effect of Laws of 1837, chapter 460, section 71, on jurisdiction. *Sipperly v. Baucus*, 24, 46.

As to will of personalty executed abroad — codicil and will construed together — translation of will into English part of probate. *Caulfield v. Sullivan*, 85, 153.

To prove will having been acquired is not divested by death of a party. *Brick v. Brick*, 66, 144.

To grant letters of administration. *Sheldon v. Wright*, 5, 497.

Has jurisdiction to issue letters testamentary where non-resident testator died out of State leaving a bond in the State. *Beers v. Shannon*, 73, 292.

To compel guardian to account. *Seaman v. Duryea*, 11, 324.

Has jurisdiction as to claim by executor in any capacity against estate. *Neilley v. Neilley*, 89, 352.

Has jurisdiction to decide a disputed claim of executor — limitation — reopening — interest — proceedings before auditor — burden of proof — exception. *Boughton v. Flint*, 74, 476.

As to executor's claims — fees of auditor and counsel in support not allowable. *Shakespeare v. Markham*, 72, 400.

On final accounting — disputed demand — arbitration — limitation. *Tucker v. Tucker*, 4 Keyes, 136.

Requisites of jurisdiction to sell lands of intestate for debts — infants — proceedings to reach funds do not lie against administrator. *Stillwell v. Swarthout*, 81, 109.

Has no jurisdiction to compel payment of legacy if right disputed and doubtful. *Flester v. Shepard*, 92, 251.

Has no jurisdiction to decide whether legacy is charged on residuary estate on settlement of executor's accounts. *Bevan v. Cooper*, 72, 317.

Possession of fund paid into court not disqualifying interest ousting jurisdiction. *Matter of Hancock*, 91, 284.

When evidence insufficient to warrant administration with will annexed executed in 1663. *Van Giessen v. Bridgford*, 83, 348.

Need not examine on oath person applying for letters — bond to obey orders of county judge is valid when he is surrogate. *Farley v. McConnell*, 52, 630.

What is sufficient prima facie evidence of domicile to authorize letters of administration. *Kennedy v. Ryall*, 67, 379.

Verification of petition for citation held sufficient. *Matter of Macaulay*, 94, 574.

Judgment against decedent's estate for misappropriation of funds by him as executor, not preferred claim. *Matter of Fox*, 92, 93.

Practice as to contested claims against estate before Code of Civil Procedure — effect of payment by testator to bar statute of limitations. *Gilbert v. Comstock*, 93, 884.

Proceedings to sell decedent's land for debts — limitations. *Mead v. Jenkins*, 95, 31.

II. *Duties and powers.*

Court may constitutionally appoint special surrogate where other officers disqualified. *Matter of Will of Hathaway*, 71, 238.

On an appeal from decision of surrogate Supreme Court acts in place of Circuit judge under former practice. *Marvin v. Marvin*, 3 Abb. 192.

Duty and liability on paying out funds of predecessor. *Disbrow v. Mills*, 62, 604.



May admit will in possession of court of foreign country to probate when there are assets in his county. *Russell v. Hartt*, 87, 19.

Probate of will of personalty is conclusive in collateral action of its validity. *Vanderpool v. Van Valkenburgh*, 6, 190.

Appointment of administrator, by clerk's filling up blank in his possession and attaching seal, void, unless surrogate has acted on application. *Roderigas v. East River Savings Inst.*, 76, 316 ; 32 Am. Rep. 309.

Administration of estate of living person — payment under, protects. *Roderigas v. East River Savings Inst.*, 63, 460 ; 20 Am. Rep. 555.

Claim against estate — burden of proof — widow's claim for wages — widow's rights. *Matter of Frazer*, 92, 239.

Sale of land to pay debts — service on legatees — discretion as to selling all — service on executors as devisees — objection not raised before surrogate — qualifying — refusal to complete purchase — petition. *Matter of Application of Dolan*, 88, 309.

When authorized to vacate sale of land for payment of debts. *Kain v. Master-ton*, 16, 174.

On sale of lands to pay debts must set apart one-third of gross amount for dower. *Higbie v. Westlake*, 14, 281.

Proceedings before, pending September 1, 1880, exempted from operation of chapter 18, Code of Civil Procedure, though not concluded. *Mills v. Hoffman*, 92, 181.

Cannot determine right to disputed legacy under 2 R. S. 220, § 1, but only on final accounting. *Riggs v. Cragg*, 89, 479.

Power to allow objections to executor's account — appointment of referee. *Buchan v. Rintoul*, 70, 1.

May compel accounting by executor, although he has become trustee of the fund claimed. *Harris v. Ely*, 25, 138.

Power to punish for contempt of decree. *Matter of Watson v. Nelson*, 69, 536.

Proceedings for contempt in failing to pay money, not maintainable until execution returned unsatisfied. *Matter of Dis-sosway*, 91, 235.

Powers of, as to judgment against decedent, presented as claim against estate. *McNulty v. Hurd*, 72, 518.

Upon accounting may determine as to construction of will if necessary. *Purdy v. Hayt*, 92, 446.

On final accounting cannot try validity of claim — omission to offer to refer — submission to surrogate — short limitation. *Tucker v. Tucker*, 4 Abb. 428.

No power to try validity of judgment of foreclosure — nor to try disputed claim on accounting. *Glacius v. Fogel*, 88, 434.

Has no power to set off mutual judgments. *Stilwell v. Carpenter*, 59, 414.

Has no authority to order executor to pay his counsel fees. *Seaman v. White-head*, 78, 306.

May open decree on final accounting to correct mistake — laches. *Sipperly v. Baucus*, 24, 46.

What must appear to justify reversal, decree of, under Code, section 2545. *Snyder v. Sherman*, 88, 656.

Cannot open decree after affirmance — cannot award allowances to counsel. *Reed v. Reed*, 52, 651.

When allowance of counsel fee acquiesced in by legatee executor. *Marsh v. Avery*, 81, 29.

May award taxable costs but no counsel fee. *Devin v. Patchin*, 26, 441.

Of New York may order reference of claim — costs — fees. *Kearney v. Mc-Keon*, 85, 136.

Taxation of costs in New York Surrogate's Court. *Matter of Weston*, 91, 502.

### III. Decrees and powers.

Decree on accounting conclusive as a judgment. *Matter of Hood*, 90, 512.

Decree that administrator pay debt, conclusive on sureties — bond may be assigned to creditor and he may sue. *Thayer v. Clark*, 4 Abb. 391.

Sureties of administrator concluded by decree against principal — of New York — power to revoke letters — decree not assailable collaterally. *Harrison v. Clark*, 87, 572.

Decree on final accounting cannot be collaterally questioned by administrator or sureties — may be made after revocation of letters. *Cason v. Jerome*, 58, 315.

Order removing administrator not assailable collaterally — decree on settlement of accounts of removed administrator binds his sureties. *Kelly v. West*, 80, 139.

Decree settling executor's account no bar to action against him as trustee. *Fulton v. Whitney*, 66, 548.

When decree settling executor's account does not conclude legatee. *Fisher v. Banta*, 66, 468.

Docketing decree against administrator in county clerk's office — effect of — remedies — sureties of administrator — subrogation — assignment. *Townsend v. Whitney*, 75, 425.

Decree for payment of debt before final accounting — if debt not so paid it must share with other debts. *Thomson v. Taylor*, 71, 217.

Decree on final settlement of administrator's account does not bar a creditor's claim not presented. *President, etc. v. Hasbrouck*, 6, 216.

— nor protect an administrator against a wrong payment. *Id.*

May direct payment of legacy before final accounting. *Gilman v. Gilman*, 63, 41.

May charge administrator personally with fees of auditor — may enforce decree by attachment. *Dunford v. Weaver*, 84, 445.

When may not be restrained from entering decree. *Wright v. Fleming*, 76, 517.

When action to restrain enforcement of decree enforceable. *McNulty v. Hurd*, 86, 547.

Proceedings to confirm order for sale of land. *Bostwick v. Atkins*, 3, 53.

Sale of decedent's real estate to pay debts — may confirm in part and vacate in part. *Delaplaine v. Lawrence*, 3, 301.

Sale of intestate's real estate under order of, void as to infant heirs without guardian. *Schneider v. McFarland*, 2, 459.

Sale of land for payment of debts — regularity of publication of order. *Sibley v. Waffle*, 16, 180.

Requisites of publication of order to show cause in proceedings to sell real estate to pay debts. *Sheldon v. Wright*, 5, 497.

Conclusiveness of decree of settlement of executors' account on re-adjustment after appeal — rights as between co-executors. *Adair v. Brimmer*, 95, 35.

See APPEAL; EXECUTOR AND ADMINISTRATOR; GUARDIAN AND WARD; MARRIAGE; WILLS.

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## SURVEYOR.

Requirement that claim shall conform to State standard does not apply to measurements of excavated material. *McManus v. Gavin*, 77, 36.

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## SURVIVORSHIP.

No presumption of, in common disaster. *Newell v. Nichols*, 75, 78; 31 Am. Rep. 424

See MARRIAGE.

## T.

## TAXATION.

- I. *Who liable.*
- II. *What liable to.*
- III. *What not liable to.*
- IV. *Exemptions.*
- V. *Residence.*
- VI. *Non-residence.*
- VII. *Corporations.*
- VIII. *Power of assessors.*
- IX. *Assessments.*
- X. *Equalization.*
- XI. *Certificates.*
- XII. *Levy.*
- XIII. *Collection.*
- XIV. *Roll.*
- XV. *Warrant.*
- XVI. *Fees.*
- XVII. *Sales.*
- XVIII. *How recovered back.*
- XIX. *Redemption.*

I. *Who liable.*

Taxation of mutual life insurance companies. *People v. Board of Supervisors*, 16, 424.

Holder of bank stock not liable to reduction on account of his debts — act of 1866, chapter 761. *People v. Dolan*, 36, 59.

Of stockholders in banks — deduction of real estate must be based on value of capital stock. *People v. Comm'rs of Taxes and Assessments*, 69, 91.

Of insurance companies — allowance should be made for contingent liability on outstanding policies. *People v. Ferguson*, 38, 89.

Of National banks — actual value of shares is basis. *People v. Comm'rs of Taxes and Assessments*, 67, 516.

Owner of mortgage without tax clause may pay tax to protect security. *Sidenberg v. Ely*, 90, 257; 43 Am. Rep. 163.

II. *What liable to.*

Tax on broker's sales — construction of statute of 1866. *People v. Moring*, 4 Trans. App. 522.

Insurance company having earned and invested premiums, producing income, is taxable thereon as capital. *Mutual Ins. Co. v. Supervisors of Erie*, 4, 442.

Accumulations of a mutual insurance are taxable as capital. *Sun Mutual Ins. Co. v. Mayor, etc.*, 8, 241.

Taxation of rents reserved in leases. *City of Buffalo v. Le Couteux*, 15, 451.

United States stock taxable. *People v. Comm'rs of Taxes and Assessments*, 23, 192; reversed, 2 Wall. 200; 2 Black, 620.

Goods of non-resident sent here for sale and not for reinvestment, not taxable. *Parker Mills v. Comm'rs of Taxes*, 23, 242.

Tax for roads through Indian reservations valid. *Fellows v. Denniston*, 23, 420.

Bank franchise taxable although funds invested in United States bonds. *Monroe Savings Bank v. City of Rochester*, 37, 365.

Gas mains not real estate for taxation. *People v. Board of Assessors*, 39, 81.

Taxation of leases in fee, etc. — requisites. *Cruger v. Dougherty*, 43, 107.

Taxation of railroad lands — mode and effect of. *People v. Barker*, 48, 70; *Buffalo & State Line R. Co. v. Supervisors of Erie County*, 48, 93.

Railroad rolling stock is taxable as personal property. *Randall v. Ethell*, 52, 521; 11 Am. Rep. 747.

Taxation of sea-going vessels — place of — of moneys paid on contract for building vessels. *People v. Comm'rs of Taxes*, 58, 242.

When foreign capital not liable to taxation. *People v. Comm'rs of Taxes, etc.*, 59, 40.

A pier is real estate for taxation. *Smith v. Mayor, etc.*, 68, 552.

Toll bridge taxable as real estate. *Hudson River Bridge Co. v. Patterson*, 74, 365.

Words "lands" and "real estate" in statute include foundation columns and superstructure of elevated railway — that

fee of land is in another or that it is not liable to taxation, immaterial. *People v. Comm'rs of Taxes*, 82, 459.

Surplus profits of corporation, for which certificates have been issued to stockholder, are taxable. *People v. Board of Assessors of Brooklyn*, 76, 202.

### III. What not liable to.

United States bonds not taxable even to extent of premium above par value. *People v. Comm'rs of Taxes*, 90, 63.

Award for condemned land not liable to invalid assessment on land. *Matter of New York Cent., etc., R. Co.*, 90, 342.

Foreign life companies not required to make deposit with comptroller — such deposit not taxable. *People v. New England Mut. Life Ins. Co.*, 26, 303.

### IV. Exemptions.

Foreign insurance taxable — where — exemption of deposited government stocks. *British Com. Life Ins. Co. v. Comm'rs of Taxes*, 1 Keyes, 303.

Private boarding school not exempt. *Chegary v. Mayor, etc.*, 13, 220.

Certificates of indebtedness issued under act of congress of March 1, 1862, not exempt from State taxation. *People v. Hoffman*, 37, 9; reversed, 7 Wall. 16.

So of legal tender notes. *People v. Board of Supervisors*, 37, 21; reversed, 7 Wall. 26.

Cemetery lands not exempt. *Buffalo City Cemetery v. City of Buffalo*, 46, 506.

Steamship company taxable on vessel being built out of State — affidavit for exemption must show value. *People v. Comm'rs of Taxes and Assessments*, 64, 541.

Exemption of National Guard. *People v. Board of Assessors of Brooklyn*, 84, 610.

Dry dock company not "manufacturing" corporation exempt under act of 1880, chapter 542. *People v. New York, etc., Dock Co.*, 92, 487.

Medical college hospital and dispensary held not exempt from taxation under 1 R. S. 388, § 4, subd. 3, as amended in 1852. *People v. Campbell*, 93, 196.

Building erected by a lessee on land of a benevolent society exempt by law from taxation may be assessed as real estate to the lessee where he is by the lease the owner of them. *People v. Assessors of Brooklyn*, 93, 308.

### V. Residence.

For bridge dividing two towns — property apportioned between the towns and the county. *Hill v. Board of Supervisors*, 12, 52.

Residence of individual banker is place specified in certificate filed. *Miner v. Prest. and Trustees of Village of Fredonia*, 27, 155.

Question of double residence — summer house. *Bell v. Pierce*, 51, 12.

Proceedings under act of 1842, chapter 318 — question of residence. *Matter of Nichols*, 54, 62.

Farm in two towns must be assessed where owner and occupant resides — otherwise assessors liable — their decision as to residence not conclusive. *Dorn v. Backer*, 61, 261.

Personal property of resident in hands of agent taxable at owner's residence. *Boardman v. Board of Supervisors of Tompkins Co.*, 85, 359.

Mortgage securities of resident here, in hands of agent in another State, and liable to taxation there, not "personal estate within this State" — assessment therefor erroneous. *People v. Smith*, 88, 576.

### VI. Non-residents.

Assessment of non-resident lands fatally defective if so false as probably to mislead owner, as where it describes land in a wrong tract. *Tallman v. White*, 2, 66.

Resident not taxable on personal property situate out of this State. *Hoyt v. Commissioners of Taxes*, 23, 224.

Tax against non-resident — irregular — proceedings to recover back — demand — audit. *Newman v. Supervisors of Livingston Co.*, 45, 676.

"Lands" defined — railroads not non-residents. *People v. Cassity*, 46, 46.

**Taxation of debts due to non-residents.** *People v. Trustees of Village of Ogdensburg*, 48, 390.

Supervisors may correct assessments of non-residents for rents only to same extent as those of residents. *People v. Supervisors*, 60, 381.

When bonds and mortgages of non-resident held for collection and on investment are exempt — refunding. *Williams v. Board of Supervisors of Wayne Co.*, 78, 561.

Assessment of lands of non-resident to owner — acquiescence by agent estops owner from recovery against assessors. *Hilton v. Fonda*, 86, 339.

## VII. Corporations.

**Taxation of foreign insurance companies.** *Fire Department of Troy v. Bacon*, 3 Keyes, 402.

Foreign insurance companies must pay tax on securities deposited with comptroller. *British Commercial Life Insurance Company v. Commissioners of Taxes*, 1 Abb. 199.

Right of commutation to corporations under chapter 654, Laws of 1854, extends only to taxes by supervisors. *Mayor, etc. v. Mutual Bank*, 20, 387.

Place of taxing manufacturing corporation is that named in its certificate as place of its operations. *Oswego Starch Factory v. Dolloway*, 21, 449.

Manufacturing corporation's stock is to be assessed as its actual value, irrespective of surplus or reserve. *Id.*

Corporations not in existence a year not entitled to commute when net profits less than five per cent on capital. *Park Bank v. Wood*, 24, 93.

Foreign corporation doing business here is taxable at principal place of business. *British Commercial Life Ins. Co. v. Comm'rs of Taxes*, 31, 32.

Taxation of foreign corporation — taxable only at place of principal office or business — waiver of objection. *People v. McLean*, 80, 254.

Rule of taxation of corporations. *People v. Board of Assessors*, 39, 81.

**Taxation of resident trustees of foreign corporation — allowance for debt.** *People v. Assessors*, 40, 154.

Municipal corporation may not lay tax to pay railway aid bonds. *Weismer v. Village of Douglas*, 64, 91; 21 Am. Rep. 586.

Taxation of insurance company — “unearned premiums,” when surplus earnings — United States and city bonds — evidence — hearing — costs. *People v. Board of Comm'rs of Taxes*, 76, 64.

Personal property of corporation taxable in county where principal place of business carried on, as designated in certificate of incorporation — if assessed otherwise may recover money paid — not confined to certiorari. *Union, etc. v. Buffalo*, 82, 351.

Taxation of corporations under act of 1880 — gas-light company liable as manufacturing corporation under act. *Nassau Gas L. Co. v. City of Brooklyn*, 89, 409.

Act of 1880 imposing tax on corporations does not relieve their property from local taxation — what must be shown to invalidate assessment. *People v. Davenport*, 91, 574.

Taxation of corporations under Laws of 1880, chapter 542, etc., a tax on franchise and valid though United States bonds not deducted. *People v. Home Ins. Co.*, 92, 328.

Taxation of corporations under act of 1880 — statute prospective — dividend of surplus not taxable. *People v. Albany Ins. Co.*, 92, 458.

Taxation of corporations — act of 1880, chapter 542, applies to corporations in existence less than one year before January, 1881. *People v. Spring Valley, etc., Co.*, 92, 283.

Of capital stock of corporations — assessment to be made at actual value, subject to deduction of assessed value of real estate, etc., according to act of 1857, chapter 456. *People v. Comm'rs of Taxes*, 95, 554.

## VIII. Powers of assessors.

Where assessors have enforced tax without jurisdiction, supervisors cannot be compelled to reimburse. *People v. Supervisors*, 11, 563.

Assessors have no power to enter omitted property except at valuation of last year when it was entered and valued. *People v. Goff*, 52, 434.

Assessors have no jurisdiction to assess non-resident for personal property. *Dorwin v. Strickland*, 57, 492.

Assessors may not sub-divide into lots — defect in collector's return. *Thompson v. Burhans*, 61, 52.

### IX. Assessments.

An assessment and tax warrant made by two or three trustees of a school district is void. *Lamoreaux v. O'Rourke*, 3 Abb. 15.

Assessment under Laws of 1829, page 141 — omission of names of owners. *Buel v. Trustees of Lockport*, 3, 197.

Action lies to set aside illegal or erroneous assessment, constituting on its face a valid lien on land, when necessary to prevent multiplicity of suits and not otherwise. *Heywood v. City of Buffalo*, 14, 534.

"The time when the assessment is made" is when assessors designate tax payer and amount of property. *Mygatt v. Washburn*, 15, 316.

Assessment of land to one neither owner nor occupant is void under Revised Statutes. *Whitney v. Thomas*, 23, 281.

When assessment remains in force, no action lies to recover tax, although property was not taxable. *Bank of Commonwealth v. Mayor, etc.*, 43, 184.

Taxation of rents — reassessment — regularity. *Overing v. Foote*, 43, 290.

Cemetery lands assessable to the association. *Buffalo City Cemetery v. City of Buffalo*, 46, 503.

Injunction does not lie to restrain assessment. *Western R. Co. v. Nolan*, 48, 513.

Name of person assessed cannot be changed after July first. *Clark v. Norton*, 49, 243.

Assessment-roll with affidavit of assessors made prior to the third Tuesday of August is a nullity, and does not protect the officer. *Westfall v. Preston*, 49, 349.

Assessment against stockholder cannot be enforced against property of bank — assessment of shares of National bank invalid under act of 1865. *First Nat. Bk. of Sandy Hill v. Fancher*, 48, 524.

Act of 1867, chapter 938, section 1, authorizing supervisors to review assessments on United States securities, is mandatory. *People v. Supervisors of Otsego Co.*, 51, 401.

In proceedings before supervisors to review assessment of United States securities, it is no answer that claimant did not object to assessment and voluntarily paid tax. *People v. Supervisors of Madison Co.*, 51, 442.

Assessment of bank stock — when void — remedy — jurisdiction of assessors — authorities collated. *National Bank of Chemung v. City of Elmira*, 53, 49.

Regularity of assessment — verification of roll — description — copy — certificate of treasurer. *Colman v. Shattuck*, 62, 343.

Assessment of lands owned by trustee must name his representative character. *Trowbridge v. Horan*, 78, 439.

Cost of drains running between different streets — assessment illegal. *Matter of Van Buren*, 79, 384.

Assessment-roll discharged erroneously cannot be restored to affect bona fide purchasers — who may have canceled. *Curtis v. Mayor, of New York*, 79, 511.

Proceeding to vacate assessment is special, governed by Code of Civil Procedure, sections 388, 414. *Matter of Manhattan Savings Bank*, 82, 142.

Indebtedness to be deducted from assessment in absence of evidence that it is device to escape assessment. *People v. Ryan*, 88, 142; 42 Am. Rep. 238.

Review of assessment by certiorari under act of 1880, when allowed. *People v. Commissioners of Taxes*, 91, 593.

Assessment of property omitted from roll of previous year. *People v. Assessors of Brooklyn*, 92, 430.

### X. Equalization.

Construction of act of 1876, chapter 49 — certification of decision — filing — evidence. *People v. Hadley*, 76, 337.

Appeal to State assessors—several supervisors may join—decision not reaching board of supervisors till next session. *People v. Board of Supervisors of Ontario County*, 85, 323.

State board of equalization—relation between State and counties—losses by non-collection borne by county. *Mayor of New York v. Davenport*, 92, 604.

### XI. Certificate.

Statute as to for an assessor's certificate attached to assessment-roll must be substantially followed, or the warrant will not protect the officer. *Van Rensselaer v. Witbeck*, 7, 517.

### XII. Levy.

Tax levied on debtor after sale of personally sold under voidable judgment is not a lien on the property. *Roraback v. Stebbins*, 4 Abb. 100.

Assessment-roll annexed to warrant is sufficient evidence of levy of tax. *Sheldon v. Van Buskirk*, 2, 473.

Where collector levies on goods before return day he may sell within a week after return day. *Id.*

In action of supervisors, when equivalent to refusal to enforce levy—constitutionality. *People v. Board of Supervisors of County of N. Y.*, 2 Keyes, 288.

School taxes to be levied and assessed like others. *Chadwick v. Crapsey*, 35, 196.

Omission, when not jurisdictional—improper item does not vitiate. *Parish v. Golden*, 35, 462.

### XIII. Collection of.

Collector may seize any goods in possession of person taxed. *Sheldon v. Van Buskirk*, 2, 473.

Action does not lie to test liability of a foreign corporation to. *Mutual Life Ins. Co. v. Supervisors*, 3 Keyes, 182.

Action does not lie to restrain collection of tax on mere ground that it is illegal. *Susquehanna Bank v. Supervisors of Broome County*, 25, 312.

County treasurer may be compelled by mandamus by any interested citizen to recognize validity of tax. *People v. Halsey*, 37, 344.

Seizure of chattels of one on lands assessed to another—when invalid. *Lake Shore, etc., Ry. Co. v. Roach*, 80, 339.

### XIV. Roll.

Charter of Buffalo construed as to authority to make new tax-roll. *Bennett v. City of Buffalo*, 17, 383.

Increase of valuation must be made by the board of supervisors and before delivery of warrant and assessment-roll. *Bellinger v. Gray*, 51, 610.

Mandamus does not lie to compel assessors to make oath to roll. *People v. Fowler*, 55, 252.

Adding property to roll after notice of completion. *Overing v. Foote*, 65, 263.

Sale invalid when verification defective. *Brevoort v. City of Brooklyn*, 89, 128.

### XV. Warrant.

Tax warrant may be signed individually, and evidence is competent to prove that signers were supervisors. *Sheldon v. Van Buskirk*, 2, 473.

Renewal of warrant, where not unconstitutional. *Bank of Chenango v. Brown*, 26, 467.

Affidavit of assessors need not be attached to roll and warrant—delivering after December 15 valid—extension of time for collection—filling in amounts after signing warrant. *Bradley v. Ward*, 58, 401.

Writ of certiorari granted after warrant of tax collector has issued, and levy made, should be quashed. *People v. Supervisors of Queens Co.*, 82, 275.

### XVI. Fees.

Act of 1863, chapter 393, section 5, as to county treasurers' fees—applies to whole State, and repeals local acts. *People v. Supervisors of Westchester Co.*, 73, 173.

XVII. *Sales.*

Comptroller's deed is conclusive of regularity only of proceedings after he acquired right and power to sell — essentials of that right. *Tullman v. White*, 2, 66.

What does not amount to actual occupancy — requiring notice before title becomes absolute under comptroller's deed. *Smith v. Sanger*, 4, 577.

Recitals in comptroller's deed prior to act of 1850, chapter 183, no evidence of the prior proceedings. *Beekman v. Big-ham*, 5, 366.

Taxation of sales of foreign merchandise by brokers — to what extent unconstitutional. *People v. Maring*, 3 Keyes, 374

Sale under apportionment act of 1855 cuts off contingent estates. *Jackson v. Babcock*, 16, 246.

Order for appropriation of proceeds of sale of lands devised to charity school. *Matter of Trustees of New York Prot. Epis. Public School*, 31, 574.

Where one's property is illegally sold, his receipt of the surplus over the tax does not bar his action for the trespass. *Westfall v. Preston*, 49, 349.

Publication of notice of sale of lands in Hamilton county. *People v. Supervisors of Hamilton Co.*, 73, 604.

Tax sale invalid where verification of roll defective. *Brevoort v. City of Brooklyn*, 89, 128.

XVIII. *How recovered back.*

Money paid for tax without objection cannot be recovered back. *New York & Harlem R. Co. v. Marsh*, 12, 308.

Supervisors bound to obey order of County Court to correct assessment and refund. *People v. Supervisors of Ulster Co.*, 65, 300.

County Court may not order supervisors to refund tax alleged to have been illegally assessed — "manifest error." *Matter of Application of Hermance*, 71, 481.

Where County Court may order supervisors to refund tax illegally collected.

*Matter of New York Catholic Protectory*, 77, 342.

Taxation of water-works of Rochester — when action not maintainable to recover back. *City of Rochester v. Town of Rush*, 80, 302.

Deduction for bank building on leased land — when allowed. *People v. Comm'rs of Taxes*, 80, 573.

Where tax on same land has been paid in two towns, mandamus lies to determine amount of recovery back. *People v. Board of Supervisors of Essex Co.*, 85, 612.

XIX. *Redemption.*

When failure to redeem not chargeable to officer. *Van Benthuyzen v. Sawyer*, 36, 150.

Publication by comptroller of notice of time to redeem from sale — deed not conclusive of — lapse of time not conclusive. *Westbrook v. Willey*, 47, 457.

Title of tax sale purchaser — redemption by mortgagee — foreclosure. *Becker v. Howard*, 66, 5.

See ASSESSMENT; COMPTROLLER; CONSTITUTIONAL LAW; NEW YORK CITY.

## TELEGRAPH COMPANY.

Not liable as common carrier. *Breese v. U. S. Telegraph Co.*, 48, 132; 8 Am. Rep. 526, note; *Leonard v. New York, etc., Telegraph Co.*, 41, 544; 1 Am. Rep. 446, note.

When cables laid in navigable rivers are nuisance. *Blanchard v. Western Union Tel. Co.*, 60, 510.

Company not liable for injury by breaking of post by storm of unusual severity. *Ward v. Atlantic & Pacific Tel. Co.*, 71, 81; 27 Am. Rep. 10.

When message does not constitute contract. *Beach v. Raritan, etc., R. Co.*, 37, 457.

May provide in blank for exemption unless message repeated. *Breese v. U. S. Telegraph Co.*, 48, 132; 8 Am. Rep. 526, note.



When company not liable for mistake in message. *Hart v. Direct U. S. Cable Co.*, 86, 633.

Negligence — measure of damages. *Rittenhouse v. Independent Line of Telegraph*, 44, 263 ; 4 Am. Rep. 673.

When company not liable for embezzlement occasioned by its negligence. *Lowery v. Western Union Tel. Co.*, 60, 198 ; 19 Am. Rep. 154.

When negligence to transmit message in name of one known not to be the sender. *Elwood v. Western Union Tel. Co.*, 45, 549 ; 6 Am. Rep. 140.

Connecting lines — liability for negligence — measure of damages. *Baldwin v. U. S. Telegraph Co.*, 45, 744. 6 Am. Rep. 155.

Limitation of time to prevent claim for damages — presentation of incorrect claim. *Young v. Western Union Tel. Co.*, 65, 163.

Right of one to purchase franchises of another. *Williams v. Western Union Tel. Co.*, 93, 162.

### TENANCY.

From year to year not applicable to personalty. *Chamberlain v. Pratt*, 33, 47.

Tenant holding over after determination of his estate is not entitled to notice to quit. *Torrey v. Torrey*, 14, 430.

#### Tenancy by Curtesy.

See MARRIAGE.

#### Tenancy by Entirety.

See MARRIAGE.

### TENANT FOR LIFE.

Liability for assessments, insurance and lightning rods *Peck v. Sherwood*, 56, 615.

Lien of judgment against, destroyed by his breach of covenant forfeiting estate. *Moore v. Pitts*, 53, 85.

Purchasing interest of one of several reversioners, and suffering the land to be sold for assessment, and purchasing it, must hold it for common benefit. *Burhans v. Van Zandt*, 7, 523.

### TENANT IN COMMON.

One has no right forcibly to oust another. *Wood v. Phillips*, 43, 152.

Cannot create easement. *Crippen v. Morss*, 49, 63.

One cannot maintain ejectment against his co-tenant without showing actual ouster or act amounting to total denial of right. *Edwards v. Bishop*, 4, 61.

Of personal property one cannot maintain replevin for, against his co-tenant. *Russell v. Allen*, 13, 173, *Davis v. Lottich*, 46, 393

When one tenant in common under will may maintain action for his proportion of crops. *Stall v. Wilbur*, 77, 158

When possession may become adverse. *Millard v. McMullin*, 68, 345 ; *Culver v. Rhodes*, 87, 348.

Liability for rent under judgment in partition. *Fisher v. Hersee*, 85, 633.

Of personal property — when purchaser of whole from one not liable as for conversion. *Osborn v. Schenck*, 83, 201.

Of grain — agreement for severance — action for conversion may lie thereafter for refusal to deliver. *Lobdell v. Stowell*, 51, 70.

Knowledge of one, attributed to others *Ward v. Warren*, 82, 265.

See LANDLORD AND TENANT ; MARRIAGE, WILL

### TENDER.

Must be paid into court and pleaded. *Becker v. Boon*, 61, 317, *Sidenberg v. Ely*, 90, 257 ; 43 Am. Rep. 163.

Title to thing tendered is material only so far as it affects ability to make valid transfer. *Champion v. Joslyn*, 44, 653.

Of bulky articles is unnecessary. *Hayden v. Demets*, 53, 426.

Requisites of, by seller, on executory contract of sale — separation — bulky articles — daylight. *Croninger v. Crocker*, 62, 151.

On payment — offer conditioned on release, not. *Clark v. Mayor, etc.*, 1 Keyes, 9.

Regulated by law of the land existing at time — legal tender notes tendered between conflicting decisions of U. S. Supreme Court. *Harris v. Jex*, 55, 421; 14 Am. Rep. 285, note.

Of performance of contract waived by inability of other party to perform. *Woolner v. Hill*, 93, 576.

Not necessary where vendee in contract for sale of lands gave notice to vendor of his refusal to perform. *Crary v. Smith*, 2, 60.

Of amount of execution — when sufficient. *Tiffany v. St. John*, 65, 314; 22, Am. Rep. 612.

To discharge mortgage — what requisite — must be kept good. *Tuthill v. Morris*, 81, 94.

Of amount due on mortgage bars right to foreclose for installment not due. *Green v. Fry*, 93, 353.

On promissory note before last day of grace proper. *Wyckoff v. Anthony*, 90, 442.

Of payment of assessment on stock after notice of sale for non-payment. *Mitchell v. Vermont Copper Mining Co*, 67, 280.

Not admission of claim where refused. *Talmage v. Third Nat. Bk.*, 91, 531.

Objection on one ground is waiver of other. *Duffy v. O'Donovan*, 46, 223; *Carman v. Pultz*, 21, 547.

Of chattel, when passes title, although refused. *DesArts v. Leggett*, 16, 582.

When tender to official agent is not to principal. *Levy v. Burgess*, 64, 390.

Of railroad aid bonds — when not necessary in suit brought by town to invalidate. *Town of Springport v. Teutonia Sav. Bk.*, 84, 403.

Waived by announcement that it will not be accepted. *Hayner v. American Popular Life Ins. Co.*, 69, 435; *Lawrence v. Miller*, 86, 131; *Selleck v. Tallman*, 87, 106.

See CONTRACT; MORTGAGE — Foreclosure; PAYMENT; SALES; VENDOR AND PURCHASER.

## TOW-BOATS.

Tow-boat owners may restrict their liability by special agreement — not liable as common carriers. *Wells v. Steam Navigation Co*, 2, 204.

Contract for towing, "at risk of master and owners," does not exempt from liability for gross negligence. *Wells v. Steam Navigation Co.*, 8, 375.

Contract for towing construed — "as far as ice will permit, at owner's risk." *Vanderslice v. Newton*, 4, 130.

Mutual duties — contributory negligence. *Arctic Fire Ins. Co. v. Austin*, 69, 470; 25 Am. Rep. 221.

Charterer of steam tow-boat not liable for negligence of its crew, owner retaining control. *Bissell v. Torrey*, 60, 635.

Tow-boat owner, when liable to owner of property lost on boat in tow by his negligence. *Baird v. Daly*, 57, 236; 15 Am. Rep. 488.

See CARRIER; CONTRACT; NEGLIGENCE; SHIP AND SHIPPING.

## TOWNS.

Erection of. *People v. Carpenter*, 24, 86.

Duty of auditors to pass on items of claim separately — reduction in gross. *People v. Town Auditors*, 82, 80.

When one can recover from another a refund of bounties paid by State to latter. *Hathaway v. Town of Cincinnati*, 62, 434.

Electors have power to adjourn town meeting to another place. *People v. Martin*, 5, 22.

Duty to assist in maintaining bridge on town line. *Day v. Day*, 94, 153.

Ejectment not maintainable against, under act of 1875, chapter 49. *People v. New York, etc., Ry. Co.*, 84, 565.

Commissioners of highways have no authority to bind town by highway contracts. *People v. Supervisors of Ulster*, 93, 397.

Not liable for judgment against commissioner of highways for injury by neglect to repair. *People v. Board of Town Auditors of Little Valley*, 75, 316.

Collection of judgment against, Laws of 1880, chapter 554, does not apply to divided town. *People v. Supervisors of Ulster*, 94, 263.

Lease by, of right to take oysters from land under water. *Hand v. Newton*, 92, 88.

County liable to, for taxes on Midland railroad, under Laws of 1874, chapter 296—remedy and defense. *Bridges v. Supervisors of Sullivan*, 92, 570.

Mandamus lies to compel assessment of debt due from divided town. *People v. Supervisors of Ulster*, 94, 263.

Not liable for acts of assessors in assessing property not taxable. *Lorillard v. Town of Monroe*, 11, 392.

Statute authorizing mortgage must be strictly construed. *People v. Hulbert*, 46, 110.

When liable to one furnishing substitute jointly with town for share of State bounty paid town—act of 1870, chapter 436. *Holden v. Putnam Fire Ins. Co.*, 46, 1; 7 Am. Rep. 287.

Effect of division and statute requiring officer to act for both towns. *People v. Hayt*, 66, 606.

Contract with, under statute, subject to abrogation of statute. *Richmond Gas-light Co. v. Town of Middletown*, 59, 228.

When not subject to action by another town for bounty moneys erroneously paid to it. *Hathaway v. Town of Homer*, 54, 655.

See CONSTITUTIONAL LAW; ELECTION; HIGHWAYS; MUNICIPAL CORPORATION; TAXATION; TOWN BONDING.

## TOWN BONDING.

- I. Generally.
- II. Authority.
- III. Special acts.
- IV. Petition.
- V. Actions regarding.

### I. Generally.

Tax payer cannot restrain commissioners from paying out moneys on railroad aid bonds alleged to be void. *Kilbourne v. St. John*, 59, 21; 17 Am. Rep. 291.

Unverified assessment-roll produced to county judge is not "completed," and does not warrant his action. *People v. Suffern*, 68, 321.

Revocation of tax payers' consents—omission to file—tender—affidavit of assessors not conclusive. *Town of Springport v. Teutonia Sav. Bk.*, 84, 403.

Town claiming proceeds of, from agent selling, must allow him compensation for expenses and commissions. *Town of Lyons v. Chamberlain*, 89, 578.

### II. Authority.

Legislature may change the mode in which the assent of the town is to be expressed. *Town of Duaneburgh v. Jenkins*, 57, 177.

Prohibited by amendment of Constitution of 1875, unless prior right had vested. *Falconer v. Buffalo, etc., R. Co.*, 69, 491.

Requisites of election—notice—"majority vote"—constitutional amendment of 1875. *People v. Trustees of Village of Fort Edward*, 70, 28.

Railroad commissioners having received money from tax to pay bonds may not assert the invalidity of bonds, although so directed by town. *First Nat. Bank of Oxford v. Wheeler*, 72, 201.

When authority wanting—question of constitutional law—estoppel. *Dodge v. County of Platte*, 82, 218.

Trustees have no implied power to petition for. *People v. Hulbert*, 46, 110.

Effect of act of 1871, chapter 925, on pending proceedings—bonds all payable

thirty years from date. *Syracuse Sav. Bank v. Town of Seneca Falls*, 86, 317.

### III. *Special acts.*

Construction of act of 1866, chapter 398, sections 2, 4 — New York and Oswego Midland R. Co. — mandamus. *People v. Brown*, 55, 180.

Under acts concerning construction of New York and Oswego Midland R. Co., it must appear that a branch road had been established. *People v. Morgan*, 55, 587.

May be restrained by tax payer under act of 1872, chapter 161 — complaint. *Ayres v. Lawrence*, 59, 192.

Railway aid bonds defectively issued in 1862, made valid by act of 1864, chapter 402. *Williams v. Town of Duaneburgh*, 66, 129.

Exchange of bonds for stock, invalid — when validation effectual under act of 1871, chapter 809. *Horton v. Town of Thompson*, 71, 513.

### IV. *Petition.*

Requisites of signing of petition — demanding. *People v. Knowles*, 47, 415.

Petitioner may withdraw his name before submission. *People v. Sawyer*, 52, 296.

Signers of petition may revoke under act of 1869, chapter 314. *People v. Allen*, 52, 538.

Proceedings to obtain — petition must show that the railroad is in this State. *People v. Spencer*, 55, 1.

And that petitioners are majority of tax payers "not including those taxed for dogs or highway tax only." *People v. Smith*, 55, 135.

Construction of petition — averment as to dog and highway tax. *Town of Wellsborough v. N. Y. & Can. R. Co.*, 76, 182.

Under railroad aid act of 1869 — recital in, does estop town from questioning validity against bona fide holder — jurisdiction of county judge may be questioned — requirements of petition — it cannot be conditional, and act of 1871 does not apply to orders made previously. *Craig v. Town of Andes*, 93, 405.

### V. *Actions regarding.*

Equitable action not maintainable to restrain transfer and for cancellation of void railroad aid bonds, it not appearing that holders are not bona fide. *Town of Venice v. Woodruff*, 62, 462; 20 Am Rep. 495.

Equitable action lies to restrain negotiation, or payment of, issued under and by virtue of void judgment, and to compel their cancellation — act of 1872, chapter 161. *Metzger v. Attica*, 79, 171.

Holder may sue on, for bounties — regularity of bonds — vested rights of holders not defeated by subsequent legislation. *Marsh v. Town of Little Valley*, 64, 112.

Certiorari does not lie to commissioners — nor to assessors after delivery of bonds for stock. *People v. Walter*, 68, 403.

When town liable for interest on railroad subscription — when conditional sale of town stock valid without cash payment. *Gould v. Town of Oneonta*, 71, 298.

When town may maintain action to cancel and restrain transfer of illegal town bonds — effect of former judgment of invalidity of bonds. *Town of Springport v. Teutonia Sav. Bank*, 75, 397.

In action on coupons, town may contradict assessor's affidavit of consent of majority of tax payers. *Ogwin v. Town of Hancock*, 84, 532.

### TRADE-MARK.

Need not indicate maker of article. *Godillot v. Harris*, 81, 263.

Designations used to indicate quality or grade are not permissible. *Royal Baking Powder Co. v. Sherrell*, 93, 331; 45 Am. Rep. 229.

Of what may consist — what constitutes infringement — remedy — need not establish right to in action at law — "Pride." *Hier v. Abrahams*, 82, 519; 37 Am Rep. 589, note.

In action to restrain use of, imitation need not be exact — bull's head — there need be no fraudulent intent. *Colman v. Crump*, 70, 573.

"Congress," applied to mineral water, valid. *Congress Spring Co. v. High Rock Spring Co.*, 45, 291; 6 Am. Rep. 82.

"303" is valid, for pens. *Gillott v. Esterbrook*, 48, 374; 8 Am. Rep. 553.

Name of place, when valid. *Newman v. Alvord*, 51, 189; 10 Am. Rep. 588.

"Sliced animals," etc., held a name capable of constituting, though articles generally known by the name. *Selchow v. Baker*, 93, 59; 45 Am. Rep. 169.

"Cocaine" is infringement of "cocaïne." *Burnett v. Phalon*, 3 Keyes, 594; 3 Trans. App. 167; 1 Abb. 267.

"Ferro-phosphorated Elixir of Calisaya Bark," not valid. *Caswell v. Davis*, 58, 223; 17 Am. Rep. 233.

"Number 10" — street number — counter-claim — authorities collated. *Glen & Hall Manufg. Co. v. Hall*, 61, 226; 19 Am. Rep. 278.

"Gold medal" not valid. *Taylor v. Gillies*, 59, 331; 17 Am. Rep. 333.

Resemblance not fraudulent — hog, wild boar. *Popham v. Cole*, 66, 69; 23 Am. Rep. 22, note.

One cannot use his surname as to exclusion of another member of family. *Meneely v. Meneely*, 62, 427; 20 Am. Rep. 489.

Representation of capacity of bottles as "quart" or "pint" — when not fraudulent. *Hennessy v. Wheeler*, 69, 271; 25 Am. Rep. 188, note.

To entitle to exclusive right must be new — must indicate origin — not nature or kind or quality — "rye and rock." *Van Biel v. Prescott*, 82, 630.

Labels and packages of soap held not infringement. *Enoch Morgan's Sons Co. v. Troxell*, 89, 292; 42 Am. Rep. 294, note.

When on dissolution of partnership either party may use — if not local does not pass as incident. *Huwer v. Dannenhoffer*, 82, 499.

Of partnership is a salable asset on dissolution — either partner may use if right not transferred — assignment of business and stock in trade does not transfer. *Hazard v. Caswell*, 93, 259; 45 Am. Rep. 198.

Single sale of imitated article will authorize injunction. *Low v. Hart*, 90, 457.

Injunction will not issue to restrain threatened action for infringement. *Wolfe v. Burke*, 56, 115.

Evasion of injunction. *Devlin v. Devlin*, 69, 212; 25 Am. Rep. 173.

See CONTRACT; INJUNCTION; PARTNERSHIP.

## TREATY.

Pulteney estate — judicial notice — performance of conditions. *Howard v. Moot*, 64, 262.

See CONSTITUTIONAL LAW; INDIANS.

## TRESPASS.

When one enters on land of another to dig channel remedy is action at law — equitable relief not proper. *Avery v. Empire, Woolen Company*, 82, 582.

When does not lie against sheriff. *Wood v. Orser*, 25, 348.

Sheriff liable for taking goods of defendant's wife in action of claim and delivery — former judgment. *Otis v. Williams*, 70, 208.

When party not liable for, of officer in levying. *Welsh v. Cochran*, 63, 181; 20 Am. Rep. 519.

Cannot be defended by proof of breach of condition of plaintiff's deed. *Robie v. Sedgwick*, 4 Abb. 73.

Party liable for sale under void attachment directed by him although other parties were concerned. *Wehle v. Butler*, 61, 245.

Does not lie in this State for entry on land in another State. *American Union Telegraph Co. v. Middleton*, 80, 408.

No action lies for explosion of steam boiler on premises unless there is negligence or a nuisance — authorities collated. *Losee v. Buchanan*, 51, 476; 10 Am. Rep. 623.

Lies for destruction of live trees by adjoining proprietor. *Dubois v. Beaver*, 25, 123.

Contractor for State liable for injury to lands by blasting in construction of canal. *St. Peter v. Denison*, 58, 416; 17 Am. Rep. 258.

Husband may maintain action against third person for, on his house, although his wife owns the land. *Alexander v. Hard*, 64, 228.

When remainderman may maintain. *Van Deusen v. Young*, 29, 9.

A trespasser cannot invoke equity to protect his possession. *Littlejohn v. Atwill*, 94, 619.

Evidence of locus in quo — agreement as to location of line. *Wood v. Lafayette*, 68, 181.

Requisites of proof of ownership where plaintiff is not in actual possession. *Edwards v. Noyes*, 65, 125.

What evidence admissible — photograph of premises. *Cozzens v. Higgins*, 1 Abb. 451.

What sufficient evidence of adverse possession of locus in quo — evidence of actual possession sufficient to maintain. *Argotsinger v. Vines*, 82, 303.

Effect of reversal of proceedings of commissioners discontinuing highway — collateral attack. *Briggs v. Bowen*, 60, 454.

Owner of ferocious animal — one injured who had no knowledge of animal's propensities — that injury first dog has inflicted no defense. *Rider v. White*, 65, 54; 22 Am. Rep. 600.

When purchaser of leased property not liable for removal of lessee's property. *Morton v. Thurber*, 85, 550.

Officer may justify under attachment after it has been set aside. *Day v. Bach*, 87, 56.

One who incites equally guilty as principal. *Coats v. Darby*, 2, 517.

Judgment creditor directing levy on exempt property liable for — referring officer to his attorney. *Armstrong v. Dubois*, 4 Keyes, 291; 1 Abb. 8.

One entering on licensee's invitation not trespasser. *Kelly v. Tilton*, 2 Abb. 495.

When lies between tenants in common. *Dubois v. Beaver*, 25, 123.

See ADVERSE POSSESSION; OFFICE AND OFFICER; PARTIES; PLEADING; SHERIFF.

## TRIAL.

- I. *When by jury.*
- II. *Conduct of.*
- III. *Reception of evidence.*
- IV. *Amendment.*
- V. *Nonsuit and dismissal of complaint.*
- VI. *Instruction to jury.*
- VII. *Objection and exception.*
- VIII. *Submission to jury.*
- IX. *Verdict.*
- X. *Trial by court or referee.*
- XI. *General matters.*

### I. *When by jury.*

Claim of jury trial — when improperly made. *McKeon v. See*, 51, 300; 10 Am. Rep. 659.

When relief asked is money judgment. *Hun v. Cary*, 82, 65; 37 Am. Rep. 546.

Not compellable in equitable action. *Powell v. Waldron*, 89, 328; 42 Am. Rep. 301, note; *Farwell v. Importers, etc.*, Bk. 90, 483.

When jury waived in action for equitable and legal relief. *Pennsylvania Coal Co. v. Delaware, etc., Canal Co.*, 1 Keyes, 72.

### II. *Conduct of.*

Judge may allow jury to take out deposition. *Howland v. Willetts*, 9, 170.

General exception to charge unavailing if any portion of charge is correct. *Id.*

Objection to judge because he has tried cause before, not valid. *Fry v. Bennett*, 28, 324.

Sham or irrelevant defenses cannot be struck out on trial. *Smith v. Countryman*, 30, 655.

When defendant has the affirmative. *Millerd v. Thorn*, 56, 402.

Defendant holding affirmative is entitled to close to jury. *Elwell v. Chamberlain*, 31, 611.

Judge may keep jury till agreement. *White v. Calder*, 35, 183.

Reopening case — examination of witness — keeping jury out. *Caldwell v. New Jersey Steamboat Co.*, 47, 282.

Counsel may not read books not in evidence to jury on argument. *Koelges v. Guardian Life Ins. Co.*, 57, 638.

At what stage party shall be put to election is discretionary. *Southworth v. Bennett*, 58, 659.

Suppression of deposition. *Hewlett v. Wood*, 67, 394; *Newton v. Porter*, 69, 133; 25 Am. Rep. 152.

When party holding affirmative rests, introduction of additional evidence is discretionary in court. *Marshall v. Davies*, 78, 414.

In criminal case discretionary with court to allow prosecution to reopen after defense has rested. *Leighton v. People*, 88, 117.

Interference of court with counsel matter of discretion — not subject to exception. *Walsh v. People*, 88, 458.

Practice as to opening and closing at. *Mead v. Shea*, 92, 122.

Court has discretion to limit time of summing up in criminal trial. *People v. Kelly*, 94, 526.

### III. Reception of evidence.

Evidence may be received, subject to objection, and finally rejected, unless that course is objected to. *McKnight v. Dunlop*, 5, 537.

Notice on trial to produce paper need not be in writing. *Kerr v. McGuire*, 28, 446.

Rejection of wholly incompetent evidence upon improper objection is valid. *People v. Brandreth*, 36, 191.

In trover for a written obligation parol evidence of its contents may be given without notice to produce. *Hotchkiss v. Mosher*, 48, 478.

By court, of action on note — when evidence shows bona fide holding, judge not bound to receive evidence of defense not available against bona fide holder. *Brookman v. Milbank*, 50, 378.

Reception of evidence pertinent to issue, without objection, no waiver of objection to consideration of other issues not presented by pleadings to which it is pertinent. *Williams v. Mechanics and Traders' Fire Ins. Co.*, 54, 577.

When not error to reject evidence drawn out on cross-examination — discretion of trial court as to when to be received. *Neil v. Thorn*, 88, 270.

Evidence erroneously received — cured by subsequent offer by same party and admission. *Id.*

### IV. Amendment.

Not competent on trial to substitute cause of action for mistake for one for fraud. *Dudley v. Scranton*, 57, 424.

Amendment where no surprise. *Parsons v. Sutton*, 66, 92.

Conforming complaint to proof — effect of, as to assignment of cause of action. *Washoe Tool Manufg. Co. v. Hibernia Fire Ins. Co.*, 66, 613.

### V. Nonsuit and dismissal of complaint.

Properly denied if even nominal damages recoverable. *Van Rensselaer v. Jewett*, 2, 135.

Complaint may be dismissed as to one of two defendants. *Montgomery County Bank v. Albany City Bank*, 7, 459.

In action against maker and indorser either may have a nonsuit. *Lomer v. Meeker*, 25, 361.

Motion to dismiss complaint should specify defect. *Webb v. Odell*, 49, 583.

Nonsuit not warranted, simply because the court might set aside verdict as against weight of evidence. *Cott v. Sixth Ave. R. Co.*, 49, 671.

Of equity issues — complaint may not be dismissed. *Moore v. Metropolitan Nat. Bk.*, 55, 41.

Request to direct verdict for defendant is equivalent to motion for nonsuit. *Appleby v. Astor Fire Ins. Co.*, 54, 253.

Dismissal of one count of complaint — evidence under other as showing fraud in first, incompetent. *Meyer v. Cullen*, 54, 392.

Court may nonsuit of its own motion after having refused motion. *Fitch v. Hassler*, 54, 677.

Motion to dismiss complaint — when sufficiently certain. *Weeks v. New York, etc., R. Co.*, 72, 50.

Motion to dismiss complaint for want of facts, proper — granting of, legal right. *Tooker v. Arnoux*, 76, 397.

Proper when complaint alleges sale and delivery, and it is shown that plaintiff has but an equitable interest, and there is no attempt to obviate by amendment. *Harris v. Kasson*, 79, 381.

What must appear to justify, in action for negligence. *Stackus v. N. Y. Cent. & H. R. R. Co.*, 79, 464.

Motion for nonsuit — no request to go to jury — motion denied — that questions should have been passed on by jury cannot be raised on appeal. *Ormes v. Dauchy*, 82, 443.

When plaintiff entitled to nonsuit instead of absolute judgment against him. *Briggs v. Waldron*, 83, 582.

Motion for nonsuit held ineffectual to raise question of privileged communication. *Brooks v. Harison*, 91, 83.

#### VI. Instructions to jury.

May be refused if not right in whole. *Doughty v. Hope*, 1, 79.

Exception to charge does not cover a refusal to charge. *Nichols v. Dusenbury*, 2, 283.

Judge may point out to jury the effect of discrediting either of two classes of contradictory witnesses. *People v. Larned*, 7, 445.

Judge may instruct jury as to effect of verdict on costs. *Waffle v. Dillenback*, 38, 53; 5 Trans. App. 241.

Request to charge embracing too much is ineffectual. *Hodges v. Cooper*, 43, 216.

When qualified retraction of erroneous charge does not cure. *Meyer v. Clark*, 45, 285.

When error in evidence not cured by charge. *Arthur v. Griswold*, 55, 400.

Refusal to charge on irrelevant point — refusal to repeat charge. *Kissenger v. New York & Harlem R. Co.*, 56, 538.

Error for judge to charge that impeachment has failed. *Allis v. Leonard*, 58, 288.

Charge as to ownership of carriage and horses, and employer of driver. *Sloane v. Elmer*, 64, 201.

When judge not bound to charge how jury shall find in certain views of facts. *Rexter v. Starin*, 73, 601.

Requisites of exception to charge. *McGinley v. United States Life Ins. Co.*, 77, 495.

Refusal to charge immaterial proposition is not error. *Priebe v. Kellogg Bridge Co.*, 77, 597.

Error to charge jury that absence of flagman sufficient to base finding of negligence. *Pakalinsky v. N. Y. Cent.*, 82, 424.

Refusal to hear request to charge after jury had risen to retire — abuse of discretion. *Chapman v. McCormick*, 86, 479.

Error in evidence not cured by instructions. *Tabor v. Van Tassel*, 86, 642.

Error in charge as to condition in fire insurance policy. *Ellsworth v. Aetna Ins. Co.*, 89, 186.

Order of proof in discretion of court. *Walsh v. People*, 88, 458.

Admission of illegal evidence in the least degree pertinent cannot be disregarded, although same fact subsequently proved by objecting party. *Worrall v. Parmelee*, 1, 519.

Instructions to jury as to consequences of verdict not error. *Keller v. Strasberger*, 90, 379.

Judge should not instruct as to effect of fact alleged but not proved. *Rouse v. Lewis*, 4 Abb. 121.

Remedy for erroneous comment by judge on facts — request to charge — should be clear. *Van Vechten v. Griffiths*, 4 Abb. 487.

When charge to find, proper. *Downs v. Sprague*, 2 Keyes, 57. See *Chapman v. Erie R. R. Co.*, 55, 579.

When error to charge that verdict must be for plaintiff if his evidence is credited. *Smith v. New York Cent. R. Co.*, 4 Keyes, 180.

#### VII. Objections and exceptions.

A general objection to admissibility of evidence is sufficient where objection could not have been obviated had specific grounds been pointed out. *Merritt v. Seaman*, 6, 168.



Exception to referee's conclusion of law must be specific. *Graham v. Chrystal*, 2 Keyes, 21.

Omission to object to evidence of counsel fees as damages, fatal. *Hynes v. Patterson*, 95, 1.

Question waived after objection and renewed—objection must be renewed. *Wagner v. Jones*, 77, 590.

General objection only applies to competency or materiality of point sought to be proved—not to competency of witness. *Stevens v. Brennan*, 79, 254.

Exception to charge need not repeat exact language—better practice to. *People v. Livingston*, 79, 279.

Exception to charge, when not abandoned. *Therasson v. People*, 82, 238.

General exception to charge of court—not sustained where portion of charge correct—exception should be specific—pointing out particular request. *Smedis v. Brooklyn and Rockaway*, 88, 13; *Jones v. Osgood*, 6, 233; *Howlands v. Willetts*, 9, 170.

General objection unavailing unless evidence in every respect incompetent. *Quinby v. Stratus*, 90, 664.

Objection to improper answer to proper question must be taken by motion to strike out. *Farmers' Bk. of Washington Co. v. Cowan*, 2 Abb. 88.

Grounds of objection to evidence must be stated. *Shaw v. Smith*, 1 Trans. App. 238; *Rosebrooks v. Dinsmore*, id. 265.

Bill of exceptions lies only to review decisions at trial. *Onondaga Co. Mut. Ins. Co. v. Minard*, 2, 98.

Question of double agency must be raised on trial—when exception to charge does not raise it. *Duryee v. Lester*, 75, 442.

#### VIII. Submission to jury.

Evidence of handwriting—what is sufficient to send case to jury. *Magee v. Osborn*, 32, 669.

In equity case judge may submit additional issues. *Farmers and Mechanics' Bk. v. Joslyn*, 37, 353.

If submission of fact to jury desired, it must be asked for. *O'Neil v. James*, 43,

84; *Seymour v. Cowing*, 1 Keyes, 532; 4 Abb. 200.

Improper submission of distinct ground of liability and general verdict—effect. *Baldwin v. Burrows*, 47, 199.

When plaintiff not required to ask submission of facts to jury. *Stone v. Flower*, 47, 566. See *Ormes v. Dauchy*, 82, 443.

Practice in trial by jury of issues in equity action—findings—exceptions. *Birdsall v. Patterson*, 51, 43

Effect of submission by consent of particular fact. *Carr v. Carr*, 52, 251.

Justice may reserve questions of law even after directing verdict. *Shellington v. Howland*, 53, 371.

Error to submit question on which there is no evidence. *Algur v. Gardner*, 54, 360.

Court not bound to submit abstract propositions of law. *Moody v. Osgood*, 54, 488.

Refusal to direct verdict not error where although evidence not contradictory, conflicting inferences may be drawn. *Smith v. Coe*, 55, 678.

In action for damages and injunction, plaintiff does not waive right to equitable relief by trying all issues before jury—court cannot make additional findings. *Parker v. Laney*, 58, 469.

Irresponsive answer of court to question of jury not construed as refusal to charge. *Bocklen v. Hardenbergh*, 60, 8.

When request to go to jury not essential. *Trustees of East Hampton v. Kirk*, 68, 459.

Question for jury, although only evidence was of a single and interested witness and uncontradicted. *Kavanagh v. Wilson*, 70, 177.

When judge cannot withdraw a theory from the jury if same is presented by pleadings and supported by the evidence. *Hazewell v. Coursen*, 81, 630.

Essential conflict of evidence is for jury. *Sloan v. Van Wyck*, 5 Trans. App. 98.

To get question submitted to jury, the judge assuming it proved, request is necessary—if conflicting evidence, judge

may not nonsuit nor direct verdict. *Malory v. Tioga R. Co.*, 1 Trans. App. 203.

If there is any evidence to support complaint, case must go to jury. *Howell v. Gould*, 3 Keyes, 422.

### IX. Verdict.

Special, must state facts and not mere evidence. *Hill v. Coveh*, 1, 522.

So in trover verdict of demand and refusal not equivalent to finding of possession. *Id.*

Special, or judge's finding, should find all the facts. *Sisson v. Barrett*, 2, 406; *Langley v. Warner*, 3, 327.

Right to poll — form of polling. *Labar v. Koplin*, 4, 547.

Where defenses of abatement and bar go to jury, there should be separate verdicts. *Gardner v. Clark*, 21, 399.

Where there are disputed facts it is error to direct a verdict against a party taking exceptions. *Purchase v. Matteson*, 25, 211.

For value of goods to be reduced by a factor's advances and charges not assessed is bad. *Wood v. Orser*, 25, 348.

General, on several counts, some good and some bad, is bad. *Fry v. Bennett*, 28, 324.

When judge may set aside on minutes. *Algeo v. Duncan*, 39, 313.

When judge may set aside for inadequacy. *McDonald v. Walter*, 40, 551.

Court may direct where evidence so conclusive that a different verdict would be set aside as against evidence. *Corning v. Troy Iron and Nail Factory*, 44, 577.

Trial judge may not entertain motion on minutes to set aside verdict because against instructions. *Tinson v. Welch*, 51, 244.

Jury may change sealed verdict at any time before they are discharged. *Warner v. New York Cent. R. Co.*, 52, 437.

Special verdict when general verdict should have been rendered — exception. *Jones v. Brooklyn Life Ins. Co.*, 61, 79.

May be corrected — affidavits of jurors competent to show mistake. *Dabrymple v. Williams*, 63, 361.

When verdict may be directed, subject to opinion of General Term — objection must be raised at trial to be available on appeal. *Howell v. Adams*, 68, 314.

In action to recover specific personal property — may be rendered certain by amendment of complaint. *Emerson v. Bleakley*, 2 Abb. 22.

### X. Trial by court or referee.

Trial by court — no finding of facts — intendment in favor of judgment. *Viele v. Troy & Boston R. Co.*, 20, 184.

After adjournment by referee to allow amendment trial does not commence de novo. *White v. Smith*, 46, 418.

Objections taken before referee. To take and report evidence must be renewed on trial. *Fox v. Moyer*, 54, 125.

Request to find immaterial fact — defect of defendants must be raised by answer. *Id.*

Refusal of referee to decide as to which defendant of several, evidence is applicable — reservation of decision on evidence, when not ground of reversal. *Lathrop v. Bramhall*, 64, 365.

By referee — report for dismissal of complaint at close of testimony is not nonsuit — exception — request. *Van Derlip v. Keyser*, 68, 443.

Separate statement of facts and law on trial by court. *Pollock v. Pollock*, 71, 137.

By court, finding of fact without evidence to support — if excepted to presents question of law subject to review in this court. *Sickles v. Flanagan*, 79, 234.

Refusal to find facts — exception — must show them established by uncontroverted evidence and that they affected result. *Stewart v. Morss*, 79, 629.

Finding contrary to admission in pleadings error. *Dunham v. Cudlipp*, 94, 129.

### XI. General matters.

Party cannot demand ruling of law as on uncontradicted facts where there is any question on the facts. *LeRoy v. Park Fire Ins. Co.*, 39, 56.

Settling issues of fact in partition — discretionary in trial court. *Hewlett v. Wood*, 62, 75.

Judge may take proof that no reply was in fact served. *Miller v. Barber*, 66, 558.

When court may give judgment for breach of contract and deny lien on land. *Herrington v. Robertson*, 71, 280.

Mode of, where counter-claim applies when separate action might be maintained on. *Cook v. Jenkins*, 79, 575.

Striking out testimony as to transactions with party dying before completion of examination. *Comins v. Hetfield*, 80, 261.

See APPEAL; EVIDENCE; CRIMINAL LAW.

### Trover.

See CONVERSION.

## TRUST AND TRUSTEE.

- I. *How created.*
- II. *Generally.*
- III. *Powers of trustees.*
- IV. *Rights and duties of trustees.*
- V. *Liability of trustee.*
- VI. *Actions by or against.*
- VII. *Who are trustees.*
- VIII. *Construction of trusts.*
- IX. *Valid and invalid trusts.*
- X. *Cestui que trust.*

### I. *How created.*

Results on purchase of land by one in his own name and with his own money by agreement for benefit of another. *Sandford v. Norris*, 4 Abb. 144.

Results in favor of infant in lands bought for his benefit with money given by parents, when taken in name of third persons with knowledge of parent. *Gilbert v. Gilbert*, 2 Abb. 256.

Under special statute, must be strictly followed, and cannot be delegated. *Powell v. Tuttle*, 3, 396.

Express, in lands, can only exist in pursuance of the statute. *Selden v. Vermilya*, 3, 525.

Authority to perform the required act must be delegated to the trustee. *Id.*

The statutes concerning trusts in real estate do not apply to securities by mortgage. *King v. Merchants' Exchange*, 5, 547.

Conveyance in trust for grantor's use with remainder — decree by collusion between trustee and tenant in possession to defeat remainderman set aside. *Wright v. Miller*, 8, 9.

In real estate may be established by parol. *Swinburne v. Swinburne*, 28, 568.

May result for benefit of third. *Siemon v. Schurck*, 29, 598.

Jurisdiction in Supreme Court — resulting trust in favor of creditors. *McCartney v. Bostwick*, 32, 53.

When arises on contract to sell lands. *Penman v. Slocum*, 41, 53.

By will — manner of execution. *Leitch v. Wells*, 48, 585.

When not implied on bill of sale without covenant of buyer. *Kelly v. Babcock*, 49, 318.

In deed, that trustee shall sell only with grantor's consent is valid — grantor's death extinguishes power. *Kissam v. Dierkes*, 49, 602.

What words essential to create, for support and maintenance. *Donovan v. Van De Mark*, 78, 244.

Valid express — what words necessary to create. *Morse v. Morse*, 85, 53.

Deposit by corporation to meet interest — when is an appropriation — attachment. *Rogers Locomotive, etc., Works v. Kelly*, 88, 234.

When implied by direction to executors to pay all income during life. *Marx v. McGlynn*, 88, 357.

Deposit in savings bank by parent in trust for daughter, held to create trust though control retained. *Willis v. Smyth*, 91, 297.

Where deposit in savings bank constitutes — limitation — interest. *Mabie v. Bailey*, 95, 206.

### II. *Generally.*

Removal of trustee — substitution — surety bound by. *People v. Norton*, 9, 176.

In personal property devolves on trustee's representative at his death. *Bunn v. Vaughan*, 3 Keyes, 345.

Resulting to married woman. *Lounsbury v. Purdy*, 18, 515.

Substituted trustee. *Leggett v. Hunter*, 19, 445.

Transfer of trust estate without consideration fraudulent as to transferee with knowledge. *Smith v. Bowen*, 35, 83.

In what securities fund for minors must be invested. *King v. Talbot*, 40, 76.

Of lands in 1827—how executed—infant trustees—power of court over. *Anderson v. Mather*, 44, 249.

In lands not established by admissions of holder of legal title that improvements were made with money and for benefit of another. *Duffy v. Masterson*, 44, 557.

When resulting—in favor of married woman. *Foot v. Bryant*, 47, 544.

Stipulation of discontinuance—when in violation of. *Fitzgerald v. Topping*, 48, 438.

Trustees are proper parties to protect fund against unlawful taxation. *Western Railroad Co. v. Nolan*, 48, 513.

For benefit of voluntary associates—repudiation—statute of limitation. *Barker v. White*, 58, 204.

For benefit of wife, under marriage settlement, when not affected by married women's acts of 1848 and 1849—court no power to destroy valid trust. *Douglas v. Cruger*, 80, 15.

Statute of resulting trusts, implies assent of the person paying the money—construction of findings—limitation. *Reitz v. Reitz*, 80, 538.

Purchaser of interests of parties, when may be made party to accounting of trustee—mode of proceeding—allowances to counsel. *Savage v. Sherman*, 87, 277.

### III. Powers of trustee.

Statute of, does not embrace personality. *Bunn v. Vaughan*, 1 Trans. App. 348.

Mortgage may be executed to trustee for a child where rights of creditors do not intervene. *Bucklin v. Bucklin*, 1 Abb. 242.

Trustee cannot plead statute of frauds

for his own benefit. *Sanford v. Morris*, 1 Trans. App. 350.

Trustee cannot purchase the trust property. *Colburn v. Morton*, 1 Abb. 378; *Fulton v. Whitney*, 66, 548; *Smith v. Frost*, 70, 65; *Dodge v. Stevens*, 94, 209.

One of several trustees, who is also beneficiary, cannot purchase trust estate. *Tiffany v. Clark*, 58, 632.

Trustees must all unite in action as plaintiffs. *Thatcher v. Candee*, 4 Abb. 387; 3 Keyes, 157.

To sell land for debts—ceases when debts are satisfied in any mode. *Selden v. Vermilya*, 3, 525.

Trust for payment of debts—debts subsequently maturing. *Rome Ex. Bk. v. Elmes*, 1 Keyes, 588.

Charitable, of personalty accumulated by religious society. *Williams v. Williams*, 8, 525.

To sell land and pay incumbrances—reconveyance. *Diefendorf v. Spraker*, 10, 246.

Receiver of insolvent bank may not purchase its property for himself—cestui que trust may adopt. *Jewett v. Miller*, 10, 402.

To receive and apply rents to separate use of wife, with power to sell the land and invest proceeds, is valid. *Belmont v. O'Brien*, 12, 394.

Disclaiming of trustee under will need not be in form to pass estate. *Burritt v. Silliman*, 13, 93.

When trustees may lease—when lease binds successors. *Greason v. Keteltas*, 17, 491.

Bank officer may buy property pledged to the bank, as a means of indemnifying himself and others as sureties for the bank. *Smith v. Lansing*, 22, 520.

Title passes to grantee although another pays consideration and receives deed without grantee's knowledge, and no trust results. *Everett v. Everett*, 48, 218.

When trustee may charge estate in favor of another for necessary expenditures, to exclusion of his own liability. *New v. Nicoll*, 73, 127; 29 Am. Rep. 111.

Having an equitable interest in trust estate may enforce performance in equity

— ejectionment not maintainable. *Bennett v. Garlock*, 79, 302; 35 Am. Rep. 517.

Power of appointment held executed by will disposing of more than estate, and not referring to power. *Hutton v. Benhard*, 92, 295.

#### IV. *Rights and duties of trustee.*

Trustee cannot be allowed a counsel fee for his own services as a lawyer in addition to commissions, etc. *Binsse v. Paige*, 1 Abb. 138; 1 Keyes, 87.

Trust can be executed by survivors, although the deed provided for substitution. *Belmont v. O'Brien*, 12, 394.

Subsequent grantee from creator of trust to sell land to pay debts gets no right of redemption. *Briggs v. Davis*, 21, 574.

Creditors of husband at time of fraudulent transfer to wife have equity superior to subsequent creditors secured by mortgage of the property by the wife. *Wood v. Robinson*, 22, 564.

Trust for charity — renunciation of trustee. *Beekman v. Bonsor*, 23, 298.

Directors of corporation, when made trustees, not entitled to compensation. *Ogden v. Murray*, 39, 202.

Trustee not confined to compensation allowed to executors. *Matter of Schell*, 53, 263.

When trustee not entitled to commissions as executor. *Hall v. Hall*, 78, 535.

To sell and convey lands — right of trustee as against grantee of creator of trust. *Heermans v. Robertson*, 64, 332; reversed, 7 Fed. Rep. 569.

Trustee may not purchase for his own benefit property connected with trust and affecting its value. *Fulton v. Whitney*, 66, 548; *Coburn v. Morton*, 1 Abb. 378; *Smith v. Frost*, 70, 65; *Dodge v. Stevens*, 94, 209.

When beneficiaries bound by acquiescence in form of investment. *Wiggins v. Howard*, 83, 613.

When devise not construed as precatory but as gift. *Foose v. Whitmore*, 82, 405; 37 Am. Rep. 572.

Duty of trustee to purchase for benefit of cestui que trust — discretion — subse-

quent sale without authority. *James v. Cowing*, 82, 449.

#### V. *Liability of trustee.*

Trustees not personally liable for costs unless so ordered. *Slocum v. Barry*, 38, 46; 5 Trans. App. 173.

Money received in trust from A. to pay to B. — cannot refuse on the ground that it was to be paid on an illegal executory contract. *Merritt v. Millard*, 3 Abb. 291.

Where one has received moneys for a special purpose, and applies it to the use of another in violation of the trust, the latter, suspecting the misapplication, is liable to the owner. *Ely v. Norton*, 3 Keyes, 397.

Creditors can only take surplus in trust created by a testator for support of son. *Bramhall v. Ferris*, 14, 41.

Where grant of land is made to one, another paying the consideration, the latter gets no interest liable to judgment and execution. *Garfield v. Hatmaker*, 15, 475.

Broker's clerk, buying customer's land intrusted to principal to sell, must convey or account. *Gardner v. Ogden*, 22, 327.

Trustee under assignment declared fraudulent, not accountable for rents received and applied before suit or lien. *Collumb v. Read*, 24, 505.

Property held in trust for a debtor's support cannot be reached by creditors except as to the surplus above what is necessary therefor. *Graff v. Bonnett*, 31, 9; *Williams v. Thorn*, 70, 270.

Surplus not liable to execution against beneficiary. *Campbell v. Foster*, 35, 361.

Subscription to stock — trustee using property for his own benefit — evidence of declarations. *Chapman v. Porter*, 69, 276.

When trustee liable for conversion — cannot purchase trust property. *Smith v. Frost*, 70, 65.

Purchase of trust property by trustee voidable. *Dodge v. Stevens*, 94, 209.

Liability for exceeding limits of power — bound to exercise due care — cannot claim he did not possess ordinary care and

judgment — undertakes by assuming position — not material that services are gratuitous. *Hun v. Cary*, 82, 65 ; 37 Am. Rep. 546.

Where invalid trust is fully executed beneficiary entitled to proceeds. *Robbins v. Robbins*, 89, 251.

#### VI. Actions by or against.

Where wrong claimant receives pay to exclusion of right claimant, latter can maintain no action against him therefor. *Patrick v. Metcalf*, 37, 332.

Supreme Court may remove trustee where he will not co-operate with co-trustee. *Quackenboss v. Southwick*, 41, 117.

Creditor at large cannot enforce resulting trust. *Estes v. Wilcox*, 67, 264.

When trust funds misappropriated by trustee may be traced to lands and reclaimed. *Ferris v. Van Vechten*, 73, 113.

Relief proper in action by beneficiary to set aside sale by trustee, etc. *Dodge v. Stevens*, 94, 209.

#### VII. Who are trustees.

Director of railroad company stands on footing of ordinary trustee as to acquiring title to its property. *Blake v. Buffalo Creek R. Co.*, 56, 485.

Directors liable if funds lost through negligence. *Brinckerhoff v. Borthwick*, 88, 52.

#### VIII. Construction of trusts.

For religious purposes — evidence. *Robertson v. Bullions*, 11, 243.

Valid, when trustee is a voluntary association. *Sherwood v. American Bible Society*, 1 Keyes. 561.

Of personalty, how constituted — evidence. *Day v. Roth*, 18, 448.

One purchasing on foreclosure sale for benefit of mortgagor must convey to him for purchase-money and interest. *Ryan v. Dox*, 34, 307.

To receive rents and profits. *Matter of Petition of Livingston*, 34, 555.

To receive rents and profits and apply. *Woodgate v. Fleet*, 64, 566.

When trustee deemed to have renounced — proceedings for new appointment. *Matter of Robinson*, 37, 261.

Acquiescence in theory that will create a trust — when binding on trustee and assignee of mortgage. *Reid v. Sprague*, 72, 457.

For support of husband and wife — how construed when parties live separate. *Ireland v. Ireland*, 84, 321.

#### IX. Valid and invalid trusts.

For payment of grantor's debts and return of surplus — when valid against subsequent creditors. *Rome Exchange Bk. v. Eames*, 4 Abb. 83.

To receive rents and profits of land and pay over to beneficiary is valid as a trust to "apply." *Leggett v. Perkins*, 2, 297.

When void for unlawful suspension of power of alienation and for unlawful accumulation. *Harris v. Clark*, 7, 242.

For maintenance and education of four minors, and for accumulation and division of surplus as they come of age, is void. *Jennings v. Jennings*, 7, 547.

To receive rents and profits — when valid. *Savage v. Burnham*, 17, 561 ; *Gilman v. Reddington*, 24, 9.

Charitable — for corporations — when void as to real estate — when power to sell valid. *Downing v. Marshall*, 23, 366.

When conveyances invalid as express trust — power in trust — remedy. *New York Dry Dock Co. v. Stillman*, 30, 174.

Partly illegal, sustainable if separable. *Post v. Hover*, 33, 593.

Partly valid and partly void, effectual as to valid part. *Woodgate v. Fleet*, 44, 1.

When to mortgage valid. *Marvin v. Smith*, 46, 571.

To several for benefit of one of them, valid. *Wetmore v. Truslow*, 51, 338.

Charitable, when void. *Holmes v. Mead*, 52, 332.

Instrument authorizing sale of lands, payment of proceeds to grantor for life, and distribution on his death — when is

not a valid trust. *Heermans v. Burt*, 78, 259. See 64, 332; reversed, 7 Fed. Rep. 569.

### X. *Cestui que trust*.

When lands are conveyed in trust, the trustee executing a mortgage, the cestui que trust takes the absolute title subject to the mortgage. *Rawson v. Lampman*, 5, 456.

An attorney, defending a suit respecting a trust, at the request of a married woman cestui que trust, without concurrence of trustee, cannot have costs out of the fund. *Noyes v. Blakeman*, 6, 567.

But the trustee may charge the fund therefor. *Id.*

For accumulation — presumption as to creation — effect of recital in deed — when estate vests in cestui que trust. *Wright v. Douglass*, 7, 564.

Trustee to take deed in his own name and hold for benefit, cannot be compelled to convey to purchaser from cestui que trust. *Ring v. McCoun*, 10, 268.

What amounts to affirmance by cestui que trust of purchase of trust property by trustee. *Boerum v. Schenck*, 41, 182.

When assignment of trust property unimpeachable by cestui que trust. *Dillaye v. Commercial Bank of Whitehall*, 51, 345.

When trustee may buy from cestui que trust — burden of proof on trustee to show fairness. *Graves v. Waterman*, 63, 657.

When trustee may appeal — when cestui que trust may use his name to appeal. *Bockes v. Hathorn*, 78, 222.

When trustee not entitled to notice of appeal. *Kilmer v. Hathorn*, 78, 228.

When trustee may be compelled to pay judgment in favor of creditor of cestui que trust. *Williams v. Thorn*, 81, 381.

Relation between trustees of savings bank and depositors similar to trustee and cestui que trust. *Hun v. Cary*, 82, 65; 37 Am. Rep. 546.

See ASSIGNMENT FOR CREDITORS; BANK; EXECUTORS AND ADMINISTRATORS; GIFT; GUARDIAN AND WARD; RECEIVER; WILLS.

### TURNPIKE COMPANY.

Powers of inspectors under act of 1848, chapter 45, and act of 1847, chapter 210, section 33 — under 1 R. S. 586, § 44, party not limited to one penalty. *Suydam v. Smith*, 52, 383.

When charter forfeited by misuser — failure to keep road in repair. *People v. Williamsburgh Turnpike and Bridge Co.*, 47, 586.

Action to vacate charter — evidence — negligence — “other material” — “along the line.” *People v. Waterford, etc., Turnpike Co.*, 2 Keyes, 327.

Liability for injury to traveler by stones on highway — notice — frightening horse — when notice to secretary is to company. *Eggleston v. Columbia Turnpike Co.*, 82, 278.

On dissolution title to land does not revert. *Tift v. City of Buffalo*, 82, 204.

See HIGHWAYS; PLANKROAD COMPANY.

## U.

**UNDERTAKING.**

- I. *On appeal.*  
 II. *Miscellaneous.*

I. *On appeal.*

Need not express consideration nor be sealed. *Thompson v. Blanchard*, 3, 335; *Dookittle v. Dininny*, 31, 350.

Action on — evidence — justification — recitals. *Hill v. Burke*, 62, 111.

From judgment against several — several liability sureties liable on affirmance as to one and reversal as to others. *Seacord v. Morgan*, 3 Keyes, 636; 4 Abb. 172; 4 Trans. App. 319.

Obligation construed according to law in force at time of enforcement. *Horner v. Lyman*, 2 Abb. 399.

Against waste on appeal in Supreme Court — sureties liable for waste on appeal here. *Church v. Simmons*, 83, 261.

From judgment absolute on demurrer — affirmance except that demurrant has leave to answer — sureties not liable. *Poppenhusen v. Seeley*, 3 Keyes, 150; 3 Abb. 615.

From justice's court — cause certified to Supreme Court and judgment reversed — sureties liable — not superseded by undertaking on appeal to General Term — no notice of judgment necessary before suit. *Humerton v. Hay*, 65, 380.

No action lies on, in favor of judgment creditor, when the judgment has been attached. *Wehle v. Spellman*, 75, 585.

Estate of deceased co-surety not liable. *Wood v. Fisk*, 63, 245; *Randall v. Sackett*, 77, 480.

By executor — want of assets no defense — reduction of costs on re-taxation does not necessitate new notice of judgment before suit on undertaking. *Yates v. Burch*, 87, 409.

On appeal to General Term — action does not lie without notice to opposite party of entry of order of judgment —

what is not notice — waiver — admission of appellant. *Rae v. Beach*, 76, 164.

II. *Miscellaneous.*

On arrest, in unauthorized form, void. *Cook v. Freudenthal*, 80, 202.

To avoid issue of attachment enforceable although it recites that attachment has issued. *Coleman v. Bean*, 3 Keyes, 94; 1 Abb. 394.

No action lies on, for damages by reason of injunction where action abates and does not survive. *Johnson v. Elwood*, 82, 362.

Liability of sureties upon an official bond not impaired by subsequent act of legislature. *Mayor of N. Y. v. Sibberns*, 3 Abb. 266; *People v. Vilas*, 36, 459.

Sureties of sheriff's bond are liable for his failure to meet his statutory liability. *People v. Dikeman*, 3 Abb. 520.

On claim and delivery of personal property delivery to sheriff may be waived. *Harrison v. Wilkin*, 69, 412.

See APPEAL; CLAIM AND DELIVERY; SURETY.

**UNITED STATES.**

Jurisdiction of State court when United States appears in suit. *Johnston v. Stimmel*, 89, 117.

Devise of realty to, void. *Matter of Fox*, 52, 530; 11 Am. Rep. 751; *Levy v. Levy*, 33, 97.

See CONSTITUTIONAL LAW.

**USES.**

Statute does not apply to personal property. *Robbins v. Robbins*, 89, 251.

Deed to, on consideration, failing in part, vests in grantee. *Vander Volgen v. Yates*, 9, 219.

Bequest to persons unknown to maintain school in another State void. *Bascom v. Albertson*, 34, 584.



Ownership, when void. *Levy v. Levy*, 33, 97.

Charitable, not recognized here. *Holmes v. Mead*, 52, 332; *Downing v. Marshall*, 23, 366. See *Williams v. Williams*, 8, 525.

Bequest to a voluntary unincorporated missionary society is invalid. *Owens v. Missionary Society*, 14, 380.

When lien under sections 51 and 52 of statute of uses, barred by discharge in bankruptcy. *Ocean Nat. Bank v. Olcott*, 46, 12.

See POWERS; TRUSTS; WILLS.

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### Usage.

See CUSTOM; EVIDENCE.

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### Use and Occupation.

See LANDLORD AND TENANT.

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## USURY.

- I. *Lex loci*.
- II. *What constitutes*.
- III. *What does not*.
- IV. *Agreement*.
- V. *Special cases*.
  1. *Indorsement*.
  2. *Agency*.
  3. *Discount*.
  4. *Banks*.
  5. *Corporation*.
- VI. *Warranty*.
- VII. *Inception*.
- VIII. *Defense of usury*.
  1. *By whom available*.
  2. *Practice*.
  3. *Evidence*.
  4. *Intent*.
  5. *Estoppel*.
  6. *Subrogation*.
  7. *Recovery of usurious interest*.

### I. *Lex loci*.

Place of contract of loan — conflict of laws. *Jacks v. Nichols*, 5, 178.

Note made in another State, and naming no place of payment, prima facie not usurious. *Davis v. Garr*, 6, 124.

Foreign corporation may loan money in this State, to be paid here, at greater rate of interest than in State of its residence. *Bard v. Poole*, 12, 495.

Our law applies to note made, dated, and payable here, but negotiated in another State. *Jewell v. Wright*, 30, 259.

Note made and payable here, void if negotiated in another State at rate of interest unlawful here. *Dickinson v. Edwards*, 77, 573; 33 Am. Rep. 671.

Drafts drawn and discounted in Canada, naming no place of payment, are Canada contracts. *Merchants' Bk. v. Griswold*, 72, 472; 28 Am. Rep. 159.

Loan negotiated in another State, and lawful there, but usurious here, not void because obligation executed here, and payable here. *Wayne County Savings Bank v. Low*, 81, 566; 37 Am. Rep. 533.

Statute has no extra-territorial force — when contract held to be that of another State. *Western Trans., etc., Co. v. Kilderhouse*, 87, 430.

Notes executed in Illinois valid there, valid here irrespective of consideration, though payable here. *Sheldon v. Haatum*, 91, 124.

### II. *What constitutes*.

Evasion of statute, by pretended sale or exchange. *Dry Dock Bank v. American Life and Trust Co.*, 3, 344.

Lender must know of and be benefited by arrangement. *Farmers' Loan and Trust Co. v. Clowes*, 3, 470.

Distinction between sale and loan. *Mumford v. American Life Ins. and Trust Co.*, 4, 463.

On loan of chattels. *Bull v. Rice*, 5, 315.

When certificates of deposit by New York Life Insurance and Trust Company are usurious. *New York Life Ins. and Trust Co. v. Beebe*, 7, 364.

Compelling borrower to borrow \$1,500 to secure \$1,000 is usurious. *East River Bank v. Hoyt*, 32, 119.

"Marine interest," when usurious. *Braynard v. Hoppock*, 32, 571.

Only predicable of loan or forbearance. *Stockwell v. Holmes*, 33, 53.

Exchange, where usurious. *Price v. Lyons Bank*, 33, 55.

When not. *Beals v. Benjamin*, 33, 61.

What is. *Newell v. Doty*, 33, 83.

Mortgage in consideration of a previous usurious mortgage is void. *Cope v. Wheeler*, 41, 308.

Stipulation for contingent unlawful interest renders whole contract void — offer to repay principal and lawful interest. *Browne v. Vredenburg*, 43, 195.

Forbearance for payment of prior mortgage and costs of foreclosure. *Birdsall v. Patterson*, 51, 43.

Selling property at exorbitant price, when cover for usury. *Quackenbos v. Sayer*, 62, 344.

Renewal of usurious note void in hands of innocent holder. *Treadwell v. Archer*, 76, 196.

Devisee of mortgaged land not a "borrower" under statute entitled to have mortgage canceled. *Buckingham v. Cornin*, 91, 525.

### III. What does not.

Bond and mortgage requiring payment of interest on whole principal, and also a monthly reduction of principal. *City Building and Loan Co. v. Fatty*, 1 Abb. 347.

Loan in depreciated bank bills. *Robbins v. Dillaye*, 4 Abb. 71.

A mortgagee of land subject to a prior usurious judgment is not a "borrower," and cannot maintain an action to set aside the judgment without offering to pay the amount due. *Rexford v. Wigger*, 2, 131.

On purchase of land executing mortgage for \$12,000 to enable vendor to realize \$10,000. *Brooks v. Avery*, 4, 225.

On a sale of foreign exchange in good faith — more than lawful interest. *Leavitt v. De Laruny*, 4, 364.

Note of lender may be received as money within usury act. *Schermerhorn v. Talman*, 14, 93.

Note for larger amount than advance, when not — variance. *Schoop v. Clarke*, 1 Keyes, 181.

Lender retaining amount of previous debt. *Van Duzer v. Howe*, 21, 531.

Payment for indorsing and procuring discount. *Chatham Bank v. Betts*, 37, 356.

When commissions on advances are not — acquiescence. *Smith v. Marvin*, 27, 137.

Sale of credit not, per se. *Elwell v. Chamberlain*, 31, 611.

Transfer of chose in action on loan is not necessarily usurious although the security prove uncollectible — onus on party alleging. *Thomas v. Murray*, 32, 605.

Securing genuine debt as condition of loan. *Valentine v. Conner*, 40, 248.

Compensation for services, in good faith. *Thurston v. Cornell*, 38, 281.

When mortgage transferred as security not affected by. *Kay v. Whittaker*, 44, 565.

Cannot arise where there is no loan or forbearance. *Crocker v. Colwell*, 46, 212.

Mere collateral benefits. *Clarke v. Sheehan*, 47, 188.

Interest upon arrears of interest. *Stewart v. Petree*, 55, 621; 14 Am. Rep. 352. See 67, 162; 23 Am. Rep. 99.

Valid obligation not impaired because included in usurious one. *Patterson v. Birdsall*, 64, 294; 21 Am. Rep. 609; *Cook v. Barnes*, 86, 520.

One who takes conveyance of land at an excessive price is not a "borrower." *Bissell v. Kellogg*, 65, 432.

When none in law. *Brown v. Champney*, 66, 214.

Assignment of surplus of property pledged to secure usurious loan does not entitle assignee to avoid lien. *Dalton v. Smith*, 86, 176.

Receipt of loans by guardian loaning ward's funds. *Fellows v. Longyor*, 91, 324.

Premium on loan on shares by building association. *Concordia Sav. Assn. v. Read*, 93, 474.

An agreement between partners to pay ten per cent interest on over-drafts upon firm accounts is not usurious. *Payne v. Freer*, 91, 43; 43 Am. Rep. 640.

IV. *Agreement.*

Where by agreement one partner received a mortgage from a debtor to the firm, and sold it to the other partner at usurious discount, and paid the debt, the debt is discharged, although the mortgage may be declared void. *Green v. Elmer*, 8. 422.

Usurious agreement for extension of bond and mortgage—mortgagor cannot claim extension and also credit for the usurious consideration. *Church v. Malloy*, 70, 63.

V. *Special cases.*1. *Indorsement.*

Charging for indorsing a note does not constitute usury. *Kitchel v. Schenck*, 29, 515.

Accommodation indorser not “borrower”—annulling contract. *Allerton v. Belden*, 49, 373.

Indorser not discharged by non-presentment of renewal usurious note. *Leary v. Miller*, 61, 488.

2. *Agency.*

A commission taken by an agent in excess of lawful interest, unknown to his principal, not usury. *Lee v. Chadsey*, 3 Abb. 43; 2 Keyes, 543; *Condit v. Baldwin*, 21, 219; *Estevez v. Purdy*, 66, 446; *Mut. Life Ins. Co. v. Kashaw*, 66, 544; *Van Wyck v. Watters*, 81, 352; *Phillips v. Mackellar*, 92, 34.

Principal not chargeable with agent's unauthorized usurious agreement—dissenting opinions of Davis and Brown, JJ. *Bell v. Day*, 32, 165.

If principal knowingly appropriates excess of interest exacted by agent it is usury. *Algur v. Gardner*, 54, 360.

Charge for trouble and expense, not. *Eaton v. Alger*, 2 Abb. 5; 2 Keyes, 41.

Erroneous submission to jury of question of agency. *White v. Stillman*, 25, 541.

When agreement for commissions on sales not usurious. *Matthews v. Coe*, 70, 239; 26 Am. Rep. 583.

Charge for obtaining loan, when not usurious. *Guggenheimer v. Geisler*, 81, 293.

When transaction is loan and not purchase—bonus to agent. *Wyeth v. Braniff*, 84, 627.

False charge for expense of procuring loan, when not—request to find. *Morton v. Thurber*, 85, 550.

Use of money by agent, and excessive interest—when not. *Bevier v. Covell*, 87, 50.

3. *Discount.*

Discount of note given in exchange for another at more than legal interest, not usurious. *Cobb v. Titus*, 10, 198.

Discount, error in computation, or premium for exchange, by bank, is not. *Marvine v. Hymers*, 12, 223.

Difference in exchange does not constitute. *Oliver Lee & Co.'s Bank v. Walbridge*, 19, 134.

Purchase of demand against debtor, at his request, although at a discount, and upon his promise to secure, is not a loan. *Crane v. Price*, 35, 494.

Lawful discount not rendered void by subsequent usury—conflict of laws. *Farmers and Mechanics' Bk. v. Barker*, 37, 148.

Limitation of rate of discount by bank. *Nash v. White's Bank of Buffalo*, 68, 396.

Drafts drawn and discounted in Canada, naming no place of payment, are Canada contract. *Merchants' Bank v. Griswold*, 72, 472; 28 Am. Rep. 159.

Lender directed borrower to make mortgage to some one else, and promised to buy it and loan the money—no terms of loan were stated, and no property described—lender bought at discount—not usury. *Sickles v. Flanagan*, 79, 224.

When purchaser of note at discount may enforce. *Mans v. Chatfield*, 90, 303.

Purchase of debt at discount is not usurious. *Siewert v. Hamel*, 91, 199.

4. *Banks.*

Payment in depreciated foreign bank bills, when not usurious—defense must be pleaded. *Codd v. Rathbone*, 19, 37.

When not predicable of application of draft by bank. *International Bank v. Bradley*, 19, 245.

When bank reserves interest illegal by its charter, the loan is void. *Bank of Salina v. Alvord*, 31, 473.

National banks subject to State laws of. *First Nat. Bank of Whitehall v. Lamb*, 50, 95; 10 Am. Rep. 438.

State banks not relieved from penalties of, by act of 1870. *Farmers' Bank v. Hale*, 59, 53.

Penalty against National bank for taking, is twice the amount of the excess over legal interest. *Hintermister v. First Nat. Bk. of Chittenango*, 64, 212.

National bank liable to penalties of act for taking excessive interest on business paper — conflict with State law. *Johnson v. Nat. Bk. of Gloversville*, 74, 329; 30 Am. Rep. 302.

#### 5. Corporations.

Act prohibiting plea of, by corporations, is retrospective, and applies to foreign corporations. *Southern Life Ins. and Trust Co. v. Packer*, 17, 51.

Corporation may not set up. *Belmont Branch Bank v. Hoge*, 35, 65.

Corporation cannot recover usurious interest paid by it. *Butterworth v. O'Brien*, 23, 275.

Agreement to pay interest in gold at premium — power of corporation to charge commissions. *Tyng v. Commercial Warehouse Co.*, 58, 308.

Surety of corporation cannot plead under Laws of 1850, chapter 172. *Rosa v. Butterfield*, 33, 665.

When complaint alleges — corporation succeeding to rights of pledgor may recover property usuriously pledged. *Merchants' Ex. Nat. Bk. v. Commercial Warehouse Co.*, 49, 635.

#### VI. Warranty.

Noimplied warranty against, on transfer of note without indorsement, when transferor is ignorant of the usury. *Littauer v. Goldman*, 72, 506; 28 Am. Rep. 171.

#### VII. Inception.

In renewal note does not taint original. *Farmers and Mechanics' Bank v. Joslyn*, 37, 353; *Winsted Bank v. Webb*, 39, 325.

Valid mortgage not vitiated by usurious contract to make further advances on. *Kellogg v. Adams*, 39, 28.

Avoidance of usurious security revives the valid debt in hands of assignee. *Gerwig v. Sitterly*, 56, 214.

When inception of note takes place. *Eastman v. Shaw*, 65, 522.

Valid obligation not invalidated by usurious agreement for extension of payment — sum paid for forbearance applied in payment. *Real Estate Trust Co. v. Keech*, 69, 248; 25 Am. Rep. 181.

Recovery may be had on loan not usurious although a usurious note was subsequently given for it — limitations — payments of interest on note applied to original loan — case of executor's note to testator. *Matter of Accounting of Consalus*, 95, 340.

Security valid at inception not invalidated by subsequent transactions. *Dunham v. Cudlipp*, 94, 129.

A note delivered for accommodation has no inception until transferred for value — when usury question for jury. *Cutlin v. Gunter*, 11, 368.

#### VIII. Defense of usury.

##### 1. By whom available.

When assignment of lease may be avoided in hands of purchaser — ejectment. *Mason v. Lord*, 40, 476.

Cannot be set up by accommodation indorser of note of manufacturing company. *Stewart v. Bramhall*, 74, 85.

Case of device to avoid usury law — when defense not affected by conveyance of premises subject to usurious mortgage. *Knick. Life Ins. Co. v. Nelson*, 78, 137.

Tenant may avoid lease for. *People v. Howlett*, 76, 574.

Defense not available to grantee assuming usurious mortgage. *Hartley v. Harrison*, 24, 170.

One having lien on chattel may set up against a prior mortgage. *Thompson v. Van Vechten*, 27, 568.

## 2. Practice.

In trover for goods, etc., received usuriously, the declaration must conform to the statute. *Schroeppe v. Corning*, 2, 182.

Bill in equity does not lie to restrain prosecution of action of law on ground of usury or ultra vires. *Minturn v. Farmers' Loan and Trust Co.*, 3, 498.

Assignment of securities on a usurious loan is void, and trover may be immediately maintained. *Schroeppe v. Corning*, 6, 107.

Purchasers on foreclosure of a junior mortgage cannot set up usury in a senior mortgage. *Sands v. Church*, 6, 347.

Usurer may not set it up, to avoid effect of satisfaction of prior demand. *La Farge v. Herter*, 9, 241.

Immaterial variance disregarded in defense of usury. *Cutlin v. Gunter*, 11, 368.

Variance — when fatal — amendment. *Griggs v. Howe*, 3 Keyes, 166.

When question of law — uncurrent money. *Robbins v. Dillaye*, 2 Keyes, 506.

Must be precisely pleaded. *Manning v. Tyler*, 21, 567.

When plea of, sufficient. *Dagal v. Simmons*, 23, 491.

Must be pleaded — defense as between indorser and indorsee and between indorsers. *Morford v. Davis*, 28, 481.

Is personal defense. *Bullard v. Raynor*, 30, 197; *Billington v. Wagoner*, 33, 31; *Williams v. Tilt*, 36, 319; *Ohio & Miss. R. Co. v. Kasson*, 37, 218.

A security for notes, some valid and some usurious, is void, but will not be canceled until valid notes are paid. *Williams v. Fitzhugh*, 37, 444.

Question for jury. *Southworth v. Bennett*, 58, 659.

Cannot be first adjudged on appeal. *Haughout v. Garrison*, 69, 339.

Finding of, sustained. *Pratt v. Elkins*, 80, 198.

## 3. Evidence.

Apparent, may be rebutted by proof — variance. *Shoop v. Clark*, 4 Abb. 235

Cannot be implied without proof of an agreement to reserve unlawful interest. *Booth v. Swezey*, 8, 276.

On plea of usury, no presumption that a foreign law agrees with our own. *Cutler v. Wright*, 22, 472.

Where uncontradicted evidence shows usury there should be a nonsuit. *Lower v. Meeker*, 25, 361.

Cannot be proved by entries reciting facts from which it may be inferred. *Churchman v. Lewis*, 34, 444.

Evidence of former usurious transactions inadmissible. *Ross v. Ackerman*, 46, 210.

When finding that note was for accommodation will not be implied — different rates of discount on several notes, when usury not implied — evidence. *Bayliss v. Cockcroft*, 81, 363.

Foreclosure — mortgage securing notes — ten per cent interest demanded — paid and acquiesced in is acknowledgment that agreement usurious — refusal to so find error. *Smith v. Hathorn*, 88, 211.

## 4. Intent.

Intent immaterial where no usurious agreement. *Smith v. Paton*, 31, 66

What is loan and not purchase — intent immaterial if unlawful interest is knowingly taken. *Fiedler v. Darrin*, 50, 437.

Party may testify as to whether intended usury. *Thurston v. Cornell*, 38, 281.

## 5. Estoppel.

Estoppel in pais applies. *Mason v. Anthony*, 3 Trans App. 255.

Indorser may be estopped from setting up. *Mason v. Anthony*, 3 Keyes, 609.

When grantee not estopped from setting up, against mortgage. *Berdan v. Sedgwick*, 44, 626

Promise to make affidavit that mortgage was wholly and fairly due does not estop mortgagor from pleading usury. *Payne v. Burnham*, 62, 69.

When principal estopped by agent's representations. *Ahern v. Goodspeed*, 72, 108.

Mortgagor estopped from alleging against assignee, when he has certified that mortgage was valid. *Weyh v. Boylan*, 85, 394 : 39 Am. Rep. 669, note.

Representation by debtor to purchaser that securities are valid bars defense of usury. *Union Dime Sav. Inst. v. Wilmot*, 94, 221 : 46 Am. Rep. 137.

Assignee for creditors may direct payment of usurious loan, in assignment. *Chapin v. Thompson*, 89, 270.

#### 6. Subrogation.

Where existing as to loan applied to payment of mortgage, creditor not entitled to subrogation. *Baldwin v. Moffett*, 94, 82.

Does not exist in favor of usurious lender. *Id.*

#### 7. Recovery of usurious interest.

Where one sells accommodation notes at a discount, as business paper, the buyer may recover the purchase money. *Webb v. Odell*, 49, 583.

Borrower's right to recover usurious interest expires in one year. *Palen v. Johnson*, 50, 49.

See BANKS ; INTEREST ; MORTGAGE ; NEGOTIABLE INSTRUMENT ; SURETY.

## V.

### VARIANCE.

What may not be disregarded. *Walter v. Bennett*, 16, 250.

What is amendable. *Russell v. Coon*, 20, 81.

Objection must be made at trial. *Belknap v. Sealey*, 14, 143.

When waived by omission to object. *Rosebrook v. Dinsmore*, 4 Abb. 118.

When not failure of proof — authorities on subject of variance collated. *Place v. Munster*, 65, 89.

What is not, in regard to usury. *Shoop v. Clark*, 4 Abb. 235.

As to usury — when material — when right to require proof that objector has been misled is waived. *Griggs v. Howe*, 2 Abb. 291.

What sufficient variance between indictment and proof to justify acquittal. *Canter v. People*, 1 Abb. 305.

Bill of exceptions does not lie to review exercise of discretion disregarding variance. *Conover v. Ins Co.*, 1, 290.

See CRIMINAL LAW ; PLEADING ; TRIAL ; USURY.

### VENDOR AND PURCHASER.

#### I. Vendor.

#### II. Purchaser.

#### III. Contracts between.

#### IV. Actions on contract.

#### V. Payment.

#### VI. Tender.

#### VII. Sale of real estate.

#### I. Vendor.

Entitled to benefit of mortgage executed by purchaser to indemnify accommodation maker of note given for the purchase-money even as against judgment creditor of mortgagee. *Vail v. Foster*, 4, 312.

When bound to give warranty deed. *Barlow v. Scott*, 24, 40.

Being in default and his time having been extended vendee may insist on strict performance at the very hour. *Friess v. Rider*, 24, 367.

In action by vendor for removal of building by purchaser in possession under contract of sale, purchaser may show that vendor had no title. *Smith v. Babcock*, 36, 167.

When liable to pay tax. *Rundell v. Lakey*, 40, 513.

Oral promise by vendor to pay assessment is binding—authority of agent. *Remington v. Palmer*, 62, 81.

Where he retains possession as security, title to pass to buyer. *Tutill v. Bogart*, 79, 215.

Fraud—concealment of vendor's marriage, supposed invalid—vendee's acquiescence—subsequent tender of deed with wife's release. *Schiffer v. Dietz*, 83, 300.

## II. Purchaser.

Failing to fulfill, vendor elects to avoid by bringing ejectment. *Goodwin v. Nelin*, 4 Trans. App. 369.

Bound by mortgage executed and left with vendor's agent for delivery on delivery of deed, although he does not call for deed. *Farmers' Loan and Trust Co. v. Curtis*, 7, 466.

Where purchaser covenants to pay consideration in installments, and makes total default, the vendor cannot recover any of the price without proving offer to convey. *Beecher v. Conradt*, 13, 108.

When vendor's lien does not subsist against bona fide purchaser. *Fisk v. Potter*, 2 Keyes, 64.

Existence of liens for taxes and assessments excuses performance by purchaser. *Morange v. Morris*, 3 Keyes, 48.

Taking possession cannot rescind without surrendering—delay to deliver deed waiver of default—infancy—vendee's knowledge of defect of title. *Tompkins v. Hyatt*, 28, 346.

In possession under contract, may lawfully cut timber under license, although he breaks the contract. *Pratt v. Ogden*, 34, 20.

Surrender of contract satisfies mortgage given under it. *Eveland v. Wheeler*, 37, 244.

When may mortgage. *Stoddard v. Whiting*, 46, 627.

In possession, when entitled to crops. *Harris v. Frink*, 49, 24.

Not bound where mortgage incumbrances are not released although mortgagees

orally agree to take new mortgages. *Hinckley v. Smith*, 51, 21.

Where presumed to agree to accept title subject to lease. *Page v. McDonnell*, 55, 299.

When he accepts deed of an unfinished house, supposing that contractors of former owner will finish it, but the contract being silent, he cannot set off amount paid by him for finishing. *Canaday v. Stiger*, 55, 452.

Right of vendee or his assignee in possession to set off in ejectment by vendor. *Cwalli v. Allen*, 57, 508.

Presumed to take municipal tax lease at his own risk—specific performance. *Boyd v. Schlesinger*, 59, 301.

Induced by material misrepresentations may refuse to perform although they were not fraudulent. *Phillips v. Conklin*, 58, 682.

When money payable "on or before" a specified day, purchaser may tender before, and vendor's refusal is a breach. *Freer v. Denton*, 61, 492.

For value protected, unless he had actual notice of vendor's intent to defraud. *Stearns v. Gage*, 79, 102.

Not relieved against mortgage for defect of title, where no fraud or eviction. *Ryerson v. Willis*, 81, 277.

## III. Contracts between.

When contract not void for want of mutuality or consideration, although containing no agreement to do any thing on one part—if contract void for want of mutuality the consideration paid may still be recovered back. *Eno v. Woodworth*, 4, 249.

When reconveyance requisite before consideration can be recovered back. *Id.*

Where contract is to be performed on a certain day, and neither party performs or offers then, neither can sue at law, but either may claim specific performance. *Stevenson v. Maxwell*, 2, 408.

Where deeding and payment are to be simultaneous omission to deliver deed before demand or offer to pay is not default. *Id.*

Contract for sale of land need not be sealed. *Worrall v. Munn*, 5, 229.

May be enforced against vendor although not executed by vendee. *Id.*

On contract payable in two installments at specified dates, the deed to be delivered at an intermediate date, delivery of the deed is a condition precedent to payment of the second installment. *Grant v. Johnson*, 5, 247.

Assignee of contract takes subject to equities — estoppel. *Reeves v. Kimball*, 40, 299

When contract forfeited as against heir of vendee — no right to recover payments by vendee. *Havens v. Patterson*, 43, 218.

Assignment of contract does not imply title to land in vendor — when assignee must perform. *Thomas v. Bartow*, 48, 193.

Purchaser of land in possession under executory contract — rescission by vendor and conveyance to heir — land cannot be sold for debts of purchaser. *Goodwin v. Nehin*, 2 Abb 258.

Agreement to convey lot 120 feet deep, including stable at rear, carries stable, although it would make lot 131 feet deep. *White v. Williams*, 48, 344.

When contract restricts use of premises vendor may so provide in deed by condition or covenant, and vendee must elect as to form before he can rescind. *Congregation Shaaner Hush Moin v. Halladay*, 50, 664.

Construction of stipulation as to liquidated damages. *Leggett v. Mutual Life Ins. Co.*, 53, 394.

#### IV. Actions on contract.

Representation as to buildings not actionable in absence of fraud or warranty. *Harsha v. Reid*, 45, 415.

Action to recover payment made on contract — evidence — purchaser not bound to accept title founded on adverse possession. *Hartley v. James*, 50, 38.

Suppression of material fact, when releases purchaser at auction. *King v. Knapp*, 59, 462.

In action to enforce vendor's lien proof of tender of deed not requisite. *Freeson v. Bissell*, 63, 168.

Vendee cannot maintain action to rescind agreement. *Bruner v. Meigs*, 64, 506.

#### V. Payment.

When payment is condition precedent, offer to convey unnecessary. *Paine v. Brown*, 37, 228.

When purchaser entitled as against subsequent mortgage to secure overdue notes not surrendered not extended — relation of payment. *Young v. Guy*, 87, 457.

#### VI. Tender.

By vendor excused by purchaser's declaration that he will not perform. *Lawrence v. Miller*, 86, 131.

When vendee excused from. *Sellick v. Tallman*, 87, 106.

Unnecessary when vendor cannot give good title. *Delavan v. Duncan*, 49, 485.

To one of joint purchasers, sufficient. *Curman v. Pultz*, 21, 547.

#### VII. Sales of real estate.

Equitable lien waived by taking security of third person. *Vail v. Foster*, 4, 312.

"Good and sufficient" deed implies legal title, and an equitable title, together with possession and use, constitutes no defense to action for principal and interest of consideration paid. *Fletcher v. Hutton*, 4, 396.

Sale as so many acres, "be the same more or less," at a fixed price, is a sale in bulk, and purchaser cannot be relieved in case of deficiency. *Faure v. Martin*, 7, 210.

Contract for "good and sufficient deed" implies a good title. *Burwell v. Jackson*, 9, 535.

"Good and sufficient deed" means good title — vendor bound, although induced to give such deed by unjust means. *Story v. Conger*, 36, 673

In absence of fraud, vendor not liable to make compensation for failure of land to



equal quantity represented. *Johnson v. Taber*, 10, 319.

When deed does not extinguish provision in contract for rebate of price for deficiency in quantity. *Witbeck v. Waine*, 16, 532.

Effect of possession by husband of wife's real estate as notice to purchaser. *Fassett v. Smith*, 23, 252.

Land "to be measured within ten days" — not material — excess of quantity, when party to be allowed for. *Clute v. Jones*, 28, 280.

When outstanding leases not breach of covenant for good title. *Pease v. Christ*, 31, 141.

What is a restrictive condition preventing clear title — lien of vendees in possession for improvements — failure of title in part. *Gilbert v. Peteler*, 38, 165.

Materiality of defect in title — when question of law and when of fact. *Stokes v. Johnson*, 57, 673.

Action to foreclose vendor's lien cannot be maintained by representatives of deceased vendor without showing tender or readiness to give deed. *Thomson v. Smith*, 63, 301.

Implied agreement for possession. *Miller v. Hall*, 64, 286.

When vendee accepts deed knowing it does not conform to the agreement, he is without remedy. *Whittemore v. Farrington*, 76, 452.

Substantial compliance with covenant to convey — waiver — right to oyster beds. *Bigler v. Morgan*, 77, 312.

See CONTRACT; SPECIFIC PERFORMANCE, STATUTE OF FRAUDS.

### Villages.

See CONTRACT; MUNICIPAL CORPORATION; TAXATION.

## W.

### WAIVER.

A constitutional objection is waived by failure to raise it by answer or on trial. *Vose v. Cockcroft*, 44, 415.

See APPEAL; CRIMINAL LAW; INSURANCE.

### WAR.

Of rebellion begun August 16, 1861, as to commercial intercourse. *Burnside v. Matthews*, 54, 78.

See CONFISCATION; CONTRACT; INSURANCE; REBELS.

### WAREHOUSEMAN.

When carrier liable as, on arrival of goods. *Collins v. Burns*, 63, 1; *Fairfax*

*v. New York Cent., etc., R. Co.*, 73, 167; 29 Am. Rep. 119.

One storing furniture for hire bound to exercise ordinary care. *Jones v. Morgan*, 90, 4; 43 Am. Rep. 131.

Loss of goods by burglary — burden on plaintiff to show negligence. *Clafflin v. Meyer*, 75, 260; 31 Am. Rep. 467.

Warehouseman is liable to owner of goods misdelivered by mistake. *Bank of Oswego v. Doyle*, 91, 32; 43 Am. Rep. 634.

Receipt by, from himself as owner, is mere chattel mortgage. *Farmers' Nat. Bank v. Lang*, 87, 209.

When receipt for flour does not pass title without separation from mass. *Gardiner v. Suydam*, 7, 357.

Receipt for whisky by keeper of distillery bonded warehouse — rights of holder. *Van Schoonhoven v. Curley*, 86, 187.

Where one accepts negotiable warehouse receipt from seller of grain instead

of delivery of goods, it is prima facie release of seller's liability. *Whitlock v. Hay*, 58, 484.

Lease of warehouse — when contract not implied for increase of price of storage by lessee. *Hazeltine v. Weld*, 73, 156.

Has an insurable interest in goods in his hands. *Richmond v. Niagara Fire*, 79, 230.

What is not warehouse receipt under Laws of 1858, chapter 326. *Yenni v. McNamee*, 45, 614.

United States statute as to risks of goods in bonded warehouses does not bar action for negligence against keeper — evidence of negligence essential. *Schwerin v. McKie*, 51, 180; 10 Am. Rep. 581.

Delivery of warehouse receipt cannot prejudice rights of true owner. *First Nat. Bank of Toledo v. Shaw*, 61, 283.

See BAILMENT; CARRIER; RAILROAD.

### Warrant.

See CRIMINAL LAW.

### Warranty.

See CONTRACT; INSURANCE; NEGOTIABLE INSTRUMENT; SALE.

### WASTE.

When remainderman may sue for. *Van Deusen v. Young*, 29, 9.

Reversioner may recover for, against tenant, although he has unconditionally alienated the estate. *Robinson v. Wheeler*, 25, 252.

Action may be maintained by one redeeming from execution against one committing between sale and deed. *Thomas v. Crofut*, 14, 474.

Cutting trees by tenant for years is, and evidence of landlord's parol consent on condition is inadmissible. *McGregor v. Brown*, 10, 114.

Life tenant may not fell trees for sale — treble damages proper. *Robinson v. Kime*, 70, 147.

Judgment creditor cannot maintain action for. *Lansing v. Carpenter*, 48, 408.

Action for, lies in favor of mortgagee against mortgagor or purchaser with knowledge of the injurious effect. *Van Pelt v. McGraw*, 4, 110.

Mortgagor restrained on petition of purchaser on foreclosure, pending action of court. *Mut. Life Ins. Co. v. Bigler*, 79, 568.

See INJUNCTION.

### WATER AND WATER-COURSE.

#### I. Generally.

#### II. Surface water.

#### III. Use and detention of water.

#### IV. Navigable water.

#### V. Rights of lower proprietors.

#### VI. Conveyance of water rights.

#### VII. Liability for escaping water.

#### VIII. Actions regarding water rights.

#### I. Generally.

Obstruction of, by municipal corporation. *Rochester White Lead Co. v. City of Rochester*, 3, 463.

Reservation of water privilege — construction — easement in, by prescription. *Olmstead v. Loomis*, 9, 423.

Right to use of artificial channel — adverse user — non-user. *Townsend v. McDonald*, 12, 381.

When by agreement an artificial race is substituted for natural channel, no right to have waste-weir in race in place of one in channel. *Packer v. Rochester & Syracuse R. Co.*, 17, 283.

Effect of severance of ownership upon easement of water-course charged by common owner on one part of his land for benefit of another. *Lampman v. Milks*, 21, 505.

Prescription to use flush boards. *Marcy v. Shults*, 29, 346; *Hall v. Augsburg*, 46, 622.

Underground waters not governed by same principles as streams of water. *Goodale v. Tuttle*, 29, 459.

Courts of this State have no jurisdiction to enjoin or remove structures extending

into bay of New York from New Jersey shore. *People v. Cent. R. Co. of N. J.*, 42, 283.

Rule as to ownership in natural pond—adverse possession. *Wheeler v. Spinola*, 54, 377.

One may remove an embankment on his own land purposely to lower water in his neighbor's well to its natural height. *Phelps v. Nowlen*, 72, 39.

State succeeded to rights of crown in navigable waters, and may grant land thereunder. *Langdon v. Mayor of New York*, 93, 129.

Agreement to furnish surplus water through pipes, a license only. *Cronkhite v. Cronkhite*, 94, 323.

## II. Surface water.

Led into ditches — when cannot be diverted. *Curtiss v. Ayrault*, 47, 73.

Railroad may drain into a natural stream although it is thereby raised. *Waffle v. N. Y. C. R. Co.*, 53, 11; 13 Am. Rep. 467.

One lot owner is not compelled to drain his lot for protection of another. *Vanderwiele v. Taylor*, 65, 341.

Accumulation of, and turning it on neighbor, not justifiable. *Jutte v. Hughes*, 67, 267.

Municipal corporation has no right to collect and discharge on lands of another. *Noonan v. Albany*, 79, 470; 35 Am. Rep. 540.

When removal of dam across stream, obstructing discharge of surface water, may be compelled. *McCormick v. Horan*, 81, 86; 37 Am. Rep. 479.

Prevention of escape of, by filling up lot, not actionable. *Barkley v. Wilcox*, 86, 140; 40 Am. Rep. 519.

## III. Use and detention of water.

Upper proprietor has no right to accumulate in reservoir for use in future—lower proprietor may object although not injured. *Clinton v. Myers*, 46, 511; 7 Am. Rep. 373.

Case of reasonable use and detention of stream by upper mill proprietor. *Bulard v. Saratoga Victory Manfg. Co.*, 77, 525.

## IV. Navigable waters.

Low-water mark on the Brooklyn side forms boundary line of the city of Brooklyn. *Atlantic Dock Co. v. City of Brooklyn*, 1 Abb. 24; 3 Keyes, 444.

Owner of lands on navigable tidal river has no private right or property in water on shore between high and low-water mark. *Gould v. Hudson River R. Co.*, 6, 522.

Title by alluvion or dereliction only where accretion is natural and by imperceptible degrees. *Halsey v. McCormick*, 18, 147.

State has title to all navigable waters, and rights of riparian proprietors are subordinate. *People v. Tibbetts*, 19, 523.

Title to bed of Mohawk river is in State—riparian owners not entitled to damages for diversion by State. *People v. Canai Appraisers*, 33, 461.

What is navigable river—rights of riparian owner. *Morgan v. King*, 35, 454.

When telegraph cable in navigable river is nuisance. *Blanchard v. Western Union Tel. Co.*, 60, 510.

One riparian proprietor cannot recover, when because of his own acts adjoining proprietor compelled to protect himself by erecting an embankment to turn water off his own land. *Avery v. Empire Woolen Co.*, 82, 582.

Town having title to lands under tide navigable water held entitled to lease exclusive right to oysters thereon. *Hand v. Newton*, 92, 88.

Inland non-tidal waters subject only to public right of navigation and cannot be taken for other purposes except upon compensation. *Smith v. City of Rochester*, 92, 463; 44 Am. Rep. 393.

Owner erecting dam does not create obstruction against one not navigating stream. *Groat v. Moak*, 94, 115.

## V. Rights of lower proprietors.

Right of upper proprietor of saw-mill to throw sawdust in stream—prescription. *Prentice v. Geiger*, 74, 341.

Railroad may not divert water of stream for its engines to injury of lower proprietor. *Garwood v. N. Y. Cent., etc., R. Co.*, 88, 400; 38 Am. Rep. 452.

#### VI. Conveyance of water rights.

Grant by metes and bounds, when does not convey right to flood. *Tabor v. Bradley*, 18, 109.

Grant of land with water privilege for particular purpose is not limitation to that purpose but only of quantity. *Wakely v. Davidson*, 26, 387.

Grant of use of water may be availed of up to its limits. *Caslar v. Shipman*, 35, 533.

When water-power passes as appurtenance. *Simmons v. Cloonan*, 81, 557.

Grant of right of wharfage carries as appurtenant right of access to wharf. *Langdon v. Mayor of New York*, 93, 129.

Construction of reservation of water-power in deed. *Groat v. Moak*, 94, 115.

#### VII. Liability for escaping water.

Action for overflowing lands—evidence. *Phillips v. Terry*, 3 Keyes, 313.

Action lies for injury by percolation through embankments raised by defendant on natural stream. *Pixley v. Clark*, 35, 520.

No action lies for cutting off percolating water by digging on one's own land. *Village of Delhi v. Youmans*, 45, 362; 6 Am. Rep. 100.

Privilege to construct a dam on grantor's lands when necessary—new dam—rights of another grantee whose lands were flowed. *Barber v. Nye*, 65, 211.

Injury by percolation in derogation of grant. *Johnstown Cheese Manufg. Co. v. Veghte*, 69, 16; 25 Am. Rep. 125.

Railroad elevated road-bed on own land by erecting embankment—not liable for damages caused by overflow of stream. *Moyer v. N. Y. Cent. & H. R. Co.*, 88, 351.

One collecting water, which escapes, injuring adjoining lands, is liable for

injury. *Mairs v. Manhattan, etc., Assoc.*, 89, 498.

If thrown on land by negligence of contractor with city, the latter liable, if having power to prevent. *Vogel v. Mayor of N. Y.*, 92, 10; 44 Am. Rep. 349, note.

#### VIII. Actions regarding water rights.

In action for diversion, plaintiff not chargeable with contribution to injury by dam on his own land, which would have been harmless but for the diversion. *Haight v. Price*, 21, 241.

Railroad bridging stream by legislative authority, is liable for injury to adjoining proprietors only in case of omission of due care, skill and foresight. *Bellinger v. New York Central R. Co.*, 23, 42.

Action by mill-owner for setting back water—damages—reversioner—estoppel. *Brown v. Bowen*, 30, 519.

Railroad diverting stream, bound to restore it as fully as practicable. *Cott v. Lewiston R. Co.*, 36, 214.

Injunction lies to compel restoration of diverted stream—adverse use—estoppel—improvements—appurtenant right to flow. *Corning v. Troy Iron and Nail Factory*, 40, 191.

Judgment directing lowering of dam proper in action to restrain setting back water. *Rothery v. New York Rubber Co.*, 90, 30.

See DEED, EASEMENT; INJUNCTION; MUNICIPAL CORPORATION; NUISANCE.

#### WAY.

When license implied from use. *Driscoll v. Newark, etc., Company*, 37, 637.

By prescription, over former highway—construction of reservation for use by lot-owners and public. *Wheeler v. Clark*, 58, 267.

By necessity under equitable grant with right of possession. *Simmons v. Sines*, 4 Abb. 246.

By necessity—when presumed. *Simmons v. Sines*, 4 Keyes, 153.

Right of, by deed, extinguished by partly executed parol agreement. *Pope v. O'Hara*, 48, 446.

Where the owner of lands, across which others have a right of way, closes the way, and substitutes another, which is used less than twenty years, he may not close the latter without restoring the former. *Hamilton v. White*, 5, 9.

A covenant to repair a gate across a way binds covenantor to replace it when removed by third persons. *Beach v. Crain*, 2, 86.

Right of, includes right to remove obstructions and make repairs. *McMillan v. Cronin*, 75, 474.

Right of, when acquired by deed bounding on alley laid down on map. *Cox v. James*, 45, 557.

When easement of, passes on grants from common grantor — map — non-user — adverse possession. *Smyles v. Hastings*, 22, 217.

One who takes deed bounding upon a proposed road over grantor's land has right of way, but no right to have road opened unless there has been public acceptance. *Fonda v. Birst*, 2 Abb. 155.

Agreement by one of two adjoining owners, that a third may have a way over land of each, binds him although the other closes the way on his own land. *Dempsey v. Kipp*, 61, 462.

Reserved on partition must be made reasonably convenient. *Bakeman v. Talbot*, 31, 366.

Action for obstructing a private way by prescription — evidence to establish use — substitution — construction of another road. *Crounse v. Wemple*, 29, 540.

See DEDICATION; DEED; EASEMENT; HIGHWAYS; MUNICIPAL CORPORATION; NEGLIGENCE; RAILROAD.

## WHARF.

When lessor liable to a laborer for defective condition of. *Swords v. Edgar*, 59, 28; 17 Am. Rep. 295.

Lessee in New York city liable to third person for injury from neglect to keep in repair. *Radway v. Briggs*, 37, 256.

Lessee of, in New York city, may not demand pay for use of, as highway. *Taylor v. Atlantic Mut. Ins. Co.*, 37, 275.

Public may not use wharf erected within permanent water line of East river in Brooklyn, although extending beyond low water and without consent of State. *Wetmore v. Brooklyn Gas-light Co.*, 42, 384.

See BROOKLYN; NEW YORK CITY.

## WIDOW.

Widow, as dowress and guardian in socage, may not purchase hostile title against heirs — presumption as to her payment of mortgage. *Knolls v. Barnhart*, 71, 474.

When not precluded from claiming property to be set apart to her husband's estate, by ante-nuptial agreement and will. *Sheldon v. Bliss*, 8, 31.

Surrogate may decree her sum of money in lieu of property omitted to be set apart for her. *Id.*

See MARRIAGE; SURROGATE; WILLS.

## WILLS.

- I. *Execution.*
- II. *Testamentary capacity.*
- III. *Undue influence.*
- IV. *Revocation.*
- V. *Probate.*
- VI. *Nuncupative wills.*
- VII. *Construction.*
  1. *Generally.*
  2. *Particular phrases.*
  3. *Codicil.*
  4. *Words of limitation.*
  5. *Repugnancy.*
  6. *Suspension.*
  7. *In lieu of dower.*
- VIII. *Powers under will.*
  1. *Generally.*
  2. *Of executors.*
  3. *Equitable conversion.*
  4. *What passes and who may take.*

IX. *Estates.*

1. *Vested estates.*
2. *Life estates.*
3. *In fee.*
4. *Residuary and contingent interests.*
5. *Perpetuity.*
6. *Personal estate.*

X. *Charges.*

1. *Bequests.*
2. *Devises.*
3. *Legacies.*
4. *Trusts.*
5. *Gifts.*

I. *Execution.*

A will signed and attested at the end is properly executed although it refers to a map annexed and following the signatures. *Tonnele v. Hall*, 4, 140.

Attestation — when draftsman may take under. *Nexson v. Nexson*, 2 Keyes, 229.

Will executed before Revised Statutes of 1830 does not pass lands acquired subsequently to its execution. *Parker v. Bogardus*, 5, 309.

Execution — acknowledgment of subscription and declaration that it is his will, both requisite. *Lewis v. Lewis*, 11, 220.

"My will and deed" not sufficient declaration. *Id.*

Words not essential to publication — sounds and signs sufficient. *Lane v. Lane*, 95, 494.

Witnesses need not subscribe in each other's presence, acknowledgment to one equivalent to signing in his presence. *Hoysradt v. Kingman*, 22, 372.

Declaration by testator in presence of only one witness and signing in presence of two is not sufficient. *Seymour v. Van Wyck*, 6, 120.

Witnesses need not sign in presence of each other. *Willis v. Mott*, 36, 486.

Sufficiency of publication — draftsman as legatee. *Coffin v. Coffin*, 23, 9.

Will of a confirmed drunkard, when held valid — attestation — proof of execution. *Peck v. Cary*, 27, 9.

Sufficient acknowledgment of subscription. *Baskin v. Baskin*, 36, 416.

Attestation — signing by witnesses — testator's mark — undue influence. *Jackson v. Jackson*, 39, 153.

Execution — declaration and request — may proceed from a third. *Gilbert v. Knox*, 52, 125.

Irregular subscription. *Sisters of Charity v. Kelly*, 67, 409.

Witnesses to, strangers to testator — evidence sufficient to show due execution. *Marx v. McGlynn*, 88, 357.

Where witnesses do not sign at end not admissible. *Matter of Hewitt*, 91, 261; *Matter of O'Neil*, 91, 516. *91 576*

Subscription by testator after attestation clause valid — complaint in action to establish held sufficient. *Younger v. Duffie*, 94, 535; 46 Am. Rep. 156.

II. *Testamentary capacity.*

Question of mental capacity — implied revocation — burden of proof — opinions of experts. *Delafield v. Parish*, 25, 9.

Insanity — test of, in respect to testamentary capacity. *Seamans' Friend Society v. Hopper*, 33, 619.

Opinions of non-experts as to capacity — attesting witnesses — delusion. *Clapp v. Fullerton*, 34, 190; *Nexsen v. Nexsen*, 2 Keyes, 229.

What is testamentary capacity. *Van Guysling v. Van Kuren*, 35, 70.

Mental capacity — hypochondria — undue influence. *Brick v. Brick*, 66, 144.

Question of mental capacity and undue influence — evidence of declaration. *Horn v. Pullman*, 72, 269.

Case of failure to show insane delusions rendering testatrix incompetent. *Coit v. Patchen*, 77, 533.

Testamentary capacity — diaries and letters as evidence of. *Marx v. McGlynn*, 88, 357.

That beneficiary was decedent's attorney does not raise presumption of fraud or undue influence. *Matter of Will of Smith*, 95, 516.

When testator's subsequent declarations competent to prove want of mental capacity. *Waterman v. Whitney*, 11, 157.

III. *Undue influence.*

Undue influence means coercion—not inferred. *Seguine v. Seguine*, 4 Abb. 191; 3 Keyes, 663; *Marx v. McGlynn*, 88, 357.

What is undue influence. *Gardiner v. Gardiner*, 34, 155; *Children's Aid Society v. Loveridge*, 70, 387.

Burden of proof as to undue influence. *Marvin v. Marvin*, 4 Keyes, 9.

Cases of undue influence. *Tyler v. Gardiner*, 35, 559; *Rollwagen v. Rollwagen*, 63, 504.

Will destroyed by testator under undue influence may be established. *Voorhees v. Voorhees*, 39, 463.

When will held vitiated by fraud and undue influence. *McLaughlin v. McDevitt*, 63, 213.

Declarations of testator. *Cudney v. Cudney*, 68, 148.

Undue influence must be such as to overpower will of testator—not generally presumed—made in favor of religious adviser will be presumed under—presumption of fact—evidence may show gift of affection without influence—facts stated in diary or letters not to prove fraud or undue influence. *Marx v. McGlynn*, 88, 357.

IV. *Revocation.*

Declarations as to. *Waterman v. Whitney*, 11, 157.

Will cannot be partially revoked by obliteration of a clause—testator must destroy whole will. *Lovell v. Quitman*, 88, 377; 42 Am. Rep. 254.

Birth of child unprovided for after making, defeats, and grantee from executor takes no title against child. *Smith v. Robertson*, 89, 555.

In proceedings for revocation of, of personal property, contestant may try case as if no adjudication had been had—citation need not issue within a year if petition filed within that time. *Matter of Will of Gouraud*, 95, 256.

V. *Probate.*

Proof of, in 1724. *Hunt v. Johnson*, 19, 279.

Direction to surrender note—when valid—parol evidence of testator's declarations as to *Tillotson v. Race*, 22, 122.

Disposition partly invalid—suspension of alienation—uncertainty. *Beekman v. Bonsor*, 23, 298.

Will may be established by one subscribing witness in opposition to the other. *Trustees of Auburn Seminary v. Calhoun*, 25, 422.

In duplicate—proof—jurisdiction—interlineation. *Crossman v. Crossman*, 95, 145.

—may be proved by one witness. *Harris v. Harris*, 26, 433.

Lost, may be proved by parol. *Schultz v. Schultz*, 35, 653.

Next of kin may contest within a year from probate, although the will conveys real estate—notice to devisees unnecessary. *Matter of Will of Kellum*, 50, 298.

Citation on proof may be served by executor of legatee—will cannot be collaterally assailed therefor. *Wetmore v. Parker*, 52, 450.

Will apparently regularly executed may be admitted to probate although witnesses have forgotten—proponents must establish due execution. *Matter of Will of Kellum*, 52, 517.

Will may be proved although subscribing witnesses forget—executor competent witness to prove. *Rugg v. Rugg*, 83, 592.

Evidence of testator's declarations to show that a legacy was intended as payment of a debt is incompetent. *Phillips v. McCombs*, 53, 494.

Action for construction authorized in behalf of executor, trustee or cestui que trust only. *Bailey v. Briggs*, 56, 407.

Will being admitted to probate, competency presumed—devise to alien trustees. *Howard v. Moot*, 64, 262.

Will properly attested may be proved although witnesses forgot—when execution of codicil is republication of will—woman's will revoked by subsequent marriage. *Brown v. Clark*, 77, 369.

Debts and legacies are primarily paid out of personalty, and presumption is that they have been. *Prentice v. Janssen*, 79, 479.

Sufficiency of proof of, where attestation clause full. *Matter of Pepoon*, 91, 255.

Equity cannot set aside for fraud a will of personalty admitted to probate nor charge executors. *Post v. Mason*, 91, 539; 43 Am. Rep. 689.

Will established by testimony of subscribing witnesses though contradicted by other persons present. *Matter of Higgins*, 94, 554.

Effect of attestation by deceased witness as against testimony of other witness. *Orser v. Orser*, 24, 51.

Attestation in due form does not prevail against unanimous positive testimony showing insufficient execution. *Woolley v. Woolley*, 95, 231.

But prevails if corroborated by other testimony or by circumstances. *Matter of Will of Cottrell*, 95, 329.

## VI. Nuncupative wills.

Nuncupative will may be made by captain of a coasting vessel on a voyage, at anchor in an arm of the sea. *Hubbard v. Hubbard*, 8, 196.

No particular form, nor request to witness, is necessary. *Id.*

## VII. Construction of wills.

### 1. Generally.

When present legal estate passes by will. *Brewster v. Striker*, 2, 19.

Construction of will and codicils—general residuary clause—republication. *Howland v. Union Theol. Seminary*, 5, 193.

Construction as to future estates. *Kane v. Astor's Exrs.*, 9, 113.

Provision that a life estate shall close on recovery of judgment against beneficiary is valid. *Bramhall v. Ferris*, 14, 41.

Construction of devise in 1810—to what time death of devisee referable. *Gibson v. Walker*, 20, 476.

Foreign testator deemed intestate as to personal property here unless will executed according to our requirements. *Moultrie v. Hunt*, 23, 394.

When "may leave" may be read "may have" lineal descendants. *DuBois v. Ray*, 35, 162.

Valid part of will may be effectuated if separable from void part. *Oxley v. Lane*, 35, 340.

Construction of power to sell for support. *Bundy v. Bundy*, 38, 410.

Division—trusts—suspension of alienation—accumulation—contingent remainders. *Manice v. Manice*, 43, 303.

When proceeds of sale of land deemed personalty and pass by, and when not—partition. *Horton v. McCoy*, 47, 21.

Construction favorable to children of deceased child. *Scott v. Guernsey*, 48, 106.

What is will—seal not necessary—mutual wills by husband and wife valid—proof of foreign will—when order denying, not bar. *Matter of Probate of Will of Diez*, 50, 88.

Construction of "should any of my children die." *Livingston v. Greene*, 52, 118.

Bequest of income not an annuity. *Whitson v. Whitson*, 53, 479.

"Heirs"—limitation over, when valid. *Kiah v. Grenier*, 56, 220.

Meaning of "heirs"—vesting of legacy. *Cushman v. Horton*, 59, 149.

"Legitimate heirs" held words of purchase—one taking quit-claim deed from devisee not estopped from asserting title adverse to testator. *Lytle v. Beveridge*, 58, 592.

Construction of will as to time of death. *Kelly v. Kelly*, 61, 47.

Action for construction—heir cannot maintain—when claiming in hostility—when action for accounting maintainable by remainderman—estoppel. *Chipman v. Montgomery*, 63, 221.

Provision that child shall have a "home free of expense" in the testator's house includes support. *Lyon v. Lyon*, 65, 339.

Mistake in number of children—when legacies deemed charged. *Kalbfeisch*, 67, 354.

Widow not "next of kin." *Murdock v. Ward*, 67, 387; *Luce v. Dunham*, 69, 36; *Keteltas v. Keteltas*, 72, 312; 28 Am. Rep. 155.



Widow not "heir." *Tillman v. Davis*, 95, 17.

When "my books" includes firm books — advancements. *Lawrence v. Lindsay*, 68, 108.

"Death of child," when construed to mean in life-time of testator — vested remainder — intermediate rents and income — "undisposed of." *Embury v. Sheldon*, 68, 227.

Interests," when not construed in the plural — "heirs." *Luce v. Dunham*, 69, 36.

When "living children" does not include grandchildren — trust for support. *Low v. Harmony*, 72, 408.

"Children," when construed to mean illegitimate, to exclusion of legitimate. *Gelston v. Shields*, 78, 275.

When "children" does not include grandchildren. *Palmer v. Horn*, 84, 516.

When it does. *Prowitt v. Rodman*, 87, 42.

Great grandchildren, when "grandchildren." *Hone v. Van Schaick*, 3, 538.

Legacy to "such Roman Catholic charities as majority of executors should decide" not void for uncertainty. *Power v. Cassidy*, 79, 602; 35 Am. Rep. 550, note.

Taking per stirpes and not per capita. *Ferrer v. Pyne*, 81, 281.

Construction as to advancement by executors — declarations of testator. *Williams v. Freeman*, 8, 561.

Who may apply to court for construction of will. *Wager v. Wager*, 89, 161.

Construction of — conversion of estate into personalty. *Lent v. Howard*, 89, 169.

Construction and validity of will. *Robert v. Corning*, 89, 225.

Legacy held chargeable on residuary real estate. *Scott v. Stebbins*, 91, 605.

Construction of and validity of will under statute against perpetuities. *Purdy v. Hayt*, 92, 446.

Will construed to imply a power of sale in executors when necessary to carry out provisions. *Phillips v. Davies*, 92, 199.

Construction of will as to power of appointment and of sale by executor. *Mott v. Ackerman*, 92, 539.

Construction of will as to meaning of word "money" — authorities collated. *Smith v. Burch*, 92, 228.

Construction of will which will not divert estate from kin of testator preferred. *Wood v. Mitcham*, 92, 175.

A construction permitting the issue of a deceased child to participate will be preferred to one forbidding them. *Matter of Brown*, 93, 295.

Action for construction of a devise where no trust exists not maintainable. *Weed v. Weed*, 94, 243.

Will held not to dispose of benefit fund in mutual benefit society. *Hellenberg v. Order of B'nai Berith*, 94, 580.

Advancements — ademption. *Langdon v. Astor's Ex'rs*, 16, 9.

Will by married woman not affected by subsequent birth of children. *Cotheal v. Cotheal*, 40, 405.

What creates tenancy in common. *Fisher v. Hall*, 41, 416.

Marshaling assets — conflict of laws — decree of another State. *Rice v. Harbeson*, 63, 494.

Provision for loan — when security cannot be exacted. *Denike v. Harris*, 84, 89.

Acceptance of provision, when satisfies claim against estate. *Caulfield v. Sullivan*, 85, 153.

Direction to sell real estate — construction of — plate glass as item of repairs — allowance to auditor and referee — when question concerning not raised on appeal. *Hancox v. Meeker*, 95, 528.

## 2. Particular words and phrases used.

When "portion" and "share" embrace a specific legacy. *Genet v. Beekman*, 26, 35.

"From any charge I have made," to what time and of what it speaks. *Van Alstyne v. Van Alstyne*, 28, 375.

When "children" includes grandchildren. *Prowitt v. Rodman*, 87, 42.

When it does not. *Palmer v. Horn*, 84, 516.

Intention of testator if clearly manifested not defeated by use of inappropriate language "— wish" used in sense of "will" or direct. *Bliven v. Seymour*, 88, 469.

"Grandchildren." *Hone v. Van Schaick*, 3, 538.

"Heirs." *Cushman v. Horton*, 59, 149; *Luce v. Dunham*, 69, 36; *Tillman v. Davis*, 95, 17.

"Legitimate heirs." *Lytle v. Beveridge*, 58, 592.

"Home free of expense." *Lyon v. Lyon*, 65, 339.

"Next of kin." *Murdock v. Ward*, 67, 387; *Luce v. Dunham*, 69, 36; *Keteltas v. Keteltas*, 72, 312.

"My books." *Lawrence v. Lindsay*, 68, 108.

"Children." *Gelston v. Shields*, 78, 275.

"Living children." *Low v. Harmony*, 72, 408.

"Money." *Smith v. Burch*, 92, 228.

"Bequest." *Thurber v. Chambers*, 66, 42.

"Dower and thirds." *O'Hara v. Dever*, 2 Keyes, 588.

"Legacy." *Orton v. Orton*, 3 Keyes, 486.

"Future editions." *Hone v. Kent*, 6, 390.

"And," "or." *Roome v. Phillips*, 24, 463; *O'Hara v. Dever*, 2 Keyes, 558.

"Remainder of land." *Christie v. Hawley*, 67, 133.

"Property." *Brown v. Brown*, 41, 507.

"All household property." *Matter of Frazer*, 92, 239.

"Descendant." *Van Beuren v. Dash*, 30, 393.

### 3. Codicil.

A power of sale in a will not revoked by a codicil unless their provisions are inconsistent. *Conover v. Hoffman*, 1 Abb. 429.

Where a codicil revokes a disposition, the former purpose will not be attributed to the substituted provision. *Pierpont v. Patrick*, 53, 591.

### 4. Words of limitation.

Unlawful suspension—when avoids limitation over. *Rose v. Rose*, 4 Abb. 108.

Devise prior to Revised Statutes, in general terms, without words of limitation or inheritance, carries only life estate. *Harvey v. Olmstead*, 1, 483.

But a charge on person of devisee in respect to the lands devised operates as a purchase. *Id.*

Words of purchase or limitation. *Chrystie v. Phyfe*, 19, 344.

When void ulterior limitation can be dropped and primary disposition upheld. *Harrison v. Harrison*, 36, 543.

Alternative limitation on two events, one valid and the other void, effectuated on happening of valid one. *Schettler v. Smith*, 41, 328.

When "heirs" word of limitation—"bequest." *Thurber v. Chambers*, 66, 42.

Gift of use with limitation over of what remains confers absolute title. *Campbell v. Beaumont*, 91, 464.

Limitation over forbidden by 1 R. S. 723, § 17, refers to vested, not contingent remainders. *Purdy v. Hayt*, 92, 446.

### 5. Repugnancy.

One clause giving legacy absolutely to wife, to be paid out of avails of sale of estate, and subsequent clause directing the sale after death of wife, not repugnant, and legacy is vested. *Sweet v. Chase*, 2, 73.

Legacy before R. S.—repugnancy to power—capacity of trustees to take for pious uses. *Trustees, etc. v. Kellogg*, 16, 83.

When no repugnancy between general bequest and diversion in event of death of legatee without issue. *Tyson v. Blake*, 22, 558.

Restriction upon right to sell vested interest void. *Lovett v. Gillender*, 35, 617.

Power to sell, when not repugnant to precedent devise. *Skinner v. Quin*, 43, 99.

Later provision controls, although invalid. *Van Nostrand v. Moore*, 52, 12.

One provision qualified by another. *Hoppock v. Tucker*, 59, 202.

Construction of apparently conflicting provisions—devise subject to power of sale. *Van Vechten v. Keator*, 63, 52.

Estate given in one part, not taken away by subsequent provision unless equally clear. *Roseboom v. Roseboom*, 81, 356.

### 6. Suspension.

Unlawful suspension of power of alienation. *Amory v. Lord*, 9, 403.

Illegal suspension of power of alienation — trust to accumulate rents — power of sale. *Garvey v. McDevitt*, 72, 556.

When no suspension of power of alienation — express trust for support — when valid. *Moore v. Hegeman*, 72, 376.

Equitable conversion — conflict of laws — unlawful suspension of alienation. *Hobson v. Hale*, 95, 588.

### 7. In lieu of dower.

Bequest in lieu of dower is legacy. *Orton v. Orton*, 3 Trans. App. 18.

"Dower and thirds" means dower only. *O'Hara v. Dever*, 2 Keyes, 558.

Bequest in lieu of dower is a "legacy." *Orton v. Orton*, 3 Keyes, 486.

Provision in lieu of dower — construction. *Lewis v. Smith*, 9, 502.

Doctrine of election under will. *Havens v. Sackett*, 15, 365.

Rules of election under will. *Id.*

When claim of dower inconsistent with will. *Tobias v. Ketchum*, 32, 319.

Equitable conversion, where will directs real estate converted — parties entitled to, may elect to take lands — what sufficient to show election. *Prentice v. Janssen*, 79, 478.

Doctrine of, applies, equitable conversion when apparent sale intended, though power of sale not imperative. *Power v. Cassidy*, 79, 602; 35 Am. Rep. 550, note.

Provision in will inconsistent with dower held to be in lieu of dower. *Matter of Zahrt*, 94, 605.

## VIII. Powers under will.

### 1. Generally.

Power to sell — accumulation — anticipating payment of legacies — bequest of

note void — illegal suspension of ownership. *Phelps' Exr. v. Pond*, 23, 69.

Sale by testator of land devised by him revokes devise and devisee gets no interest in purchase-money mortgage. *McNaughton v. McNaughton*, 34, 201.

Power in trust to sell lands absolutely devised is valid. *Crittenden v. Fairchild*, 41, 289.

When power of sale does not charge real estate with payment of debts and legacies. *Kinnier v. Rogers*, 42, 531.

Testator may delegate power of naming executor. *Hartnett v. Wandell*, 60, 346; 19 Am. Rep. 194.

Power to sell land — how defeated. *Hetzel v. Barber*, 69, 1.

### 2. Of executors.

When executors take a mere power, and not a trust term. *Tucker v. Tucker*, 5, 408.

Power to sell lands, naming no person to sell, may be executed by executors, and by one, the others not having qualified. *Meakings v. Cromwell*, 5, 136.

Power to two executors to sell land cannot be executed by one alone. *Wilder v. Ranney*, 95, 7.

Power to sell real estate as the executor shall deem expedient and for best interests, does not justify conveyance in discharge of a debt. *Russell v. Russell*, 36, 581.

Executor may appoint attorney to ask for probate — bringing in minor acquiring interest subsequently — proof of will in possession of court of a foreign country. *Russell v. Hartt*, 87, 19.

When cestui que trust necessary party to action to remove executor. *Onondaga Trust and Deposit Co. v. Price*, 87, 542.

Permitting executors having power of sale to exercise discretion as to time does not create perpetuity — restricting corporation to use of income does not create. *Robert v. Corning*, 89, 225.

Executor and trustee — commissions — carrying on testator's business — discharge as executor — when not proper. *Johnson v. Lawrence*, 95, 154.

Commissions, both as executors and trustees, when allowed. *Laytin v. Davidson*, 95, 263.

### 3. *Equitable conversion.*

Power to sell — execution of — equitable conversion. *Allen v. De Witt*, 3, 276; *Moncrieff v. Ross*, 50, 431.

Equitable conversion of estate into personality — remainder — acceptance of annuity by widow, effect on dower. *Hatch v. Bassett*, 52, 359.

When intent to convert real estate into money is not disclosed. *Gourley v. Campbell*, 66, 169.

Equitable conversion — when legatee not bound by decree settling executor's account. *Fisher v. Banta*, 66, 468.

Will executed in 1663 — equitable conversion. *Van Giessen v. Bridgford*, 83, 348.

Equitable conversion — taking per stirpes. *Vincent v. Newhouse*, 83, 505.

Corpus and income — suspension of alienation — equitable conversion. *Wells v. Wells*, 88, 323.

Equitable conversion — conflict of laws. *Hobson v. Hale*, 95, 588.

Gift to charity — whether more than half estate. *Hollis v. Drew Theol. Sem.*, 95, 166.

Equitable conversion. *Tillman v. Davis*, 95, 17.

### 4. *What passes and who may take.*

When corporation may take in trust for an unincorporated association — devise of more than half estate to charity — objection may be raised by any one interested. *Harris v. American Bible Society*, 2 Abb. 316.

Subscribing witness may take legacy under will when not examined to prove it — record evidence to show fact. *Caw v. Robertson*, 5, 125.

A book in press passes under bequest of "future editions," and not under residuary clause as "unsold commentaries on hand." *Hone v. Kent*, 6, 390.

When will passes after-acquired lands. *Lynes v. Townsend*, 33, 558.

Will to Dutch church in 1684. *Attorney-General v. Minister, etc.*, 36, 452.

Foreign corporation may take personality by will — conflict of laws — charitable devises — limit on — ascertainment of half of estate. *Chamberlain v. Chamberlain*, 43, 424.

Gift to foreign scientific and educational corporation by will executed within two months of testator's death, valid — whole estate deemed converted into money to determine whether more than half given to charity. *Hollis v. Drew Theol. Sem.*, 95, 166.

When subsequently-acquired lands do not pass. *Quinn v. Hardenbrook*, 54, 83.

When after acquired lands pass — implied power of sale. *Byrnes v. Baer*, 86, 210.

What passes by devise of "farm on which I now live and wood-land attached." *Underhill v. Vandervoort*, 56, 242.

When will directs real estate converted donor may elect to take lands — what sufficient to show intent. *Prentice v. Jansen*, 79, 478.

Benefit in mutual benefit society not disposable by will. *Hellenberg v. Order of B'nai Berith*, 94, 580.

## IX. *Estates.*

### 1. *Vested estates.*

What constitutes a vested interest in real estate. *Carmichael v. Carmichael*, 1 Aub. 309.

Vested remainder in tail expectant — conversion into fee-simple. *Barlow v. Barlow*, 2, 386.

Vested remainder, subject to divesting — "and" and "or." *Roome v. Phillips*, 24, 463.

Successive estates and remainders, contingent or vested. *Striker v. Mott*, 28, 82.

Construction of will as to vesting land. *Terpening v. Skinner*, 29, 505.

When estate not vested in trustees. *Bruner v. Meigs*, 64, 506.

"Remainder of land" — construction of will. *Christie v. Hawley*, 67, 133.

When legacy in trust is vested. *Warner v. Durant*, 76, 133.

Vested remainder in fee liable to defeat—contingent remainder enlarged to fee. *Kelso v. Lorillard*, 85, 177.

## 2. Life estates.

Life estate with power to devise. *Freeborn v. Wagner*, 4 Keyes, 27.

Life estate—vesting of remainder. *Carmichael v. Carmichael*, 4 Keyes, 346.

When mortgages charged on estate in remainder in exoneration of life estate. *Moseley v. Marshall*, 22, 200.

What constitutes life estate in land. *Tobias v. Cohn*, 36, 363.

Life estate during widowhood—remainder on paying debts—dower on remarriage—"property." *Brown v. Brown*, 41, 507.

Life estate or fee with power of sale in executor—power of executor to receive rents and profits—postponement of legacies—lien of dower—lapsed legacy. *Vernon v. Vernon*, 53, 351.

Remainder on successive life estates—validity of first two not impaired by invalidity of others. *Woodruff v. Cook*, 61, 638.

Remainder on bequest of money—legatee for life as trustee. *Smith v. Van Ostrand*, 64, 278.

Life estate charged with support of children till majority—death of life tenant before—charge terminates then. *Brandow v. Brandow*, 66, 401.

Life estate terminable by majority of all testator's children. *Provost v. Provost*, 70, 141.

When life tenant is liable for taxes. *Deraismes v. Deraismes*, 72, 154.

Successive life estates—suspension—vesting of remainder. *Monarque v. Monarque*, 80, 320.

Life estates—remainders in fee—survivorship. *Wylie v. Lockwood*, 86, 291.

## 3. In fee.

Perpetual annual rent reserved on conveyance in fee passes under devise of tene-

ments and hereditaments. *Van Rensselaer v. Read*, 26, 558.

What not implied fee. *Van Dyke v. Emmons*, 34, 186.

When intent to devise fee may be inferred. *Vanderzee v. Vanderzee*, 36, 231.

Devise—when not in fee. *Terry v. Wiggins*, 47, 512.

Devise before Revised Statutes—intent to convey fee—absence of words of inheritance. *Provoost v. Calyer*, 62, 545.

## 4. Residuary and contingent interests.

Future interest in lands, capable of taking effect as a contingent remainder, never construed an executory devise. *Wolfe v. Van Nostrand*, 2, 436.

Life estate, with remainder in fee, and executory limitation over—power of appointment. *Baker v. Lorillard*, 4, 257.

Future contingent interest, when not mere naked possibility. *Miller v. Emans*, 19, 384.

Lapse—contingent limitation—takers by classes—alienage. *Downing v. Marshall*, 23, 366.

Residuary devise—after-acquired lands—charge of debts. *Youngs v. Youngs*, 45, 254.

Qualification of devise by residuary clause. *Taggart v. Murray*, 53, 233.

Vested remainder subject to power of sale. *Ackerman v. Gorton*, 67, 63.

Future contingent interest void in perpetuity. *Colton v. Fox*, 67, 348.

Successive limited estates—vested remainders—"heirs"—substituted devise. *Smith v. Scholtz*, 68, 41.

Contingent fee subject to reduction to life estate—devise over—suspension of alienation—sale for assessment against devisee. *Buel v. Southwick*, 70, 581.

Will of personality—residuary clause carries whatever not therein disposed of—when limited in terms does not apply—then is another residuum. *Kerr v. Dougherty*, 79, 327.

In interpreting residuary clause, intention to be gathered from surrounding circumstances. *Id.*

Estate in expectancy—vested contingent remainder. *Hennessy v. Patterson*, 85, 91.

General residuary clause includes every real interest of testator—intention to exclude must appear. *Floyd v. Carow*, 88, 560.

Contingent interests under will descendible. *Kenyon v. See*, 94, 563.

### 5. Perpetuity.

Provision in will for three persons during life, if severable, is valid. *Matter of Verplanck*, 91, 439.

Accumulation for minor, with life estate, after reaching age therein, not permitted. *Pray v. Hegeman*, 92, 508.

### 6. Personal estate.

Personal estate, not expressly exonerated or bequeathed, is primary fund for payment of legacies, although charged on real estate. *Hoes v. Van Hoesen*, 1, 120.

Leasehold estate for years in land here is personalty. *Despard v. Churchill*, 53, 192.

### X. Charges.

#### 1. Bequest.

Bequest for support in discretion of executors—discretion must be exercised reasonably. *Forman v. Whitney*, 2 Keyes, 165; 2 Abb. 163.

When bequest is collective and not several. *De Nottebeck v. Astor*, 13, 98.

Bequest to mortgagor of testator—when does not extinguish debt. *Hancock v. Hancock*, 22, 568.

Bequest to charitable corporation, when valid—perpetuity—ascertainment of value of corporation's property—residuary clause—codicil—revocation—when will speaks. *Wetmore v. Parker*, 52, 451.

Charitable bequest void for uncertainty as to beneficiary. *Prichard v. Thompson*, 95, 76.

Words of survivorship in bequests are referred to time of division and enjoyment. *Teed v. Morton*, 60, 502.

Bequest of stock does not carry interest certificates issued by corporation. *Brundage v. Brundage*, 60, 544.

Bequest to several in equal shares—intention to keep corpus of each share entire—power of legatees to dispose of, by will—paying over share on security. *Livingston v. Murray*, 68, 485.

Bequest in lieu of dower, not satisfaction of other claims. *Boughton v. Flint*, 74, 476.

When bequest invalid because power of alienation suspended—as to bequest testator dies intestate—when bequests valid as not suspending alienation. *Smith v. Edwards*, 88, 92.

Shot-gun and fuel in house held included in bequest to widow of “all household property,” and bequest held not to preclude exemption right of \$150—discretion as to tombstone. *Matter of Frazer*, 92, 239.

#### 2. Devise.

Devise to two or survivor—joint conveyance by devisees passes all title, vested or contingent. *Freeborn v. Wagner*, 2 Abb. 175.

Devise to sons and heirs of their bodies with contingent cross-remainders—construction. *Lott v. Wykoff*, 2, 355.

Reimbursement of devisees charged with debts out of subsequently-discovered assets. *Couch v. Delaplaine*, 2, 397.

When that right inures to devisee's assignee. *Id.*

Devise before Revised Statutes, without words of inheritance, conveys only life estate, and the charge of a legacy does not enlarge to a fee unless the devisee's person is also charged. *Olmstead v. Olmstead*, 4, 56; *Edwards v. Bishop*, 4, 61.

Devise in will, taking effect before the Revised Statutes, of lands for life, then to descend to heirs of the body and their heirs and assigns forever, carries a fee. *Brown v. Lyon*, 6, 419.

A devise taking effect in 1802, without words of inheritance, and legacies to be paid “out of the real estate,” passes only a life estate. *Mesick v. New*, 7, 163.

Devise determinable on happening of collateral event. *Leonard v. Burr*, 18, 96.

Devise to certain persons "and their heirs for use for life," with remainder—construction. *Campbell v. Rawdon*, 18, 412.

Lapsed devise—"descendant"—effect of lapse as to part of estate. *Van Beuren v. Dash*, 30, 393.

Devise by implication. *Post v. Hover*, 33, 593.

Devise carries crops—crops go first to pay debts. *Bradner v. Faulkner*, 34, 347.

Devise to three in fee, survivors to take if either should die without issue—issue of either takes parent's share. *Guernsey v. Guernsey*, 36, 267.

Lapsed devise—rule of distribution. *Gill v. Browner*, 37, 549.

Made in Connecticut—power to sell lands here—charitable devise—contingent remainder—power of foreign corporation to take devise. *White v. Howard*, 46, 144.

Devise to corporation—two claimants with similar names—evidence of intent. *St. Luke's Home v. Association for Indigent Females*, 52, 191; 11 Am. Rep. 697.

Devise to United States void. *Matter of Will of Fox*, 52, 530; 11 Am. Rep. 751.

Devise in trust to sell lands and apply—when beneficiaries not entitled to interest before sale. *Fincke v. Fincke*, 53, 528.

Determinable fee—limitation over—executory devise—remoteness—presumption. *Hatfield v. Sneden*, 54, 280.

Devise to A. and his wife, and to B.—wife takes one-third. *Hilton v. Bender*, 69, 75.

Ulterior devise to take effect on defeasance of former devise. *McLean v. Freeman*, 70, 81.

Devise in fee with power of sale in devisee—power is merged and inoperative. *Jennings v. Conboy*, 73, 230.

Devise to corporation, will to be made two months before death—when testator dies within a month devise void. *Kerr v. Dougherty*, 79, 327.

Devise construed as gift and not as precatory trust. *Foose v. Whitmore*, 82, 405; 37 Am. Rep. 572.

If society unincorporated cannot take devise—will executed within two months of death void under statute. *Marx v. McGlynn*, 88, 357.

Devise to benevolent corporation within two months of testator's death invalid though he leaves no wife, child or parent. *Stevenson v. Short*, 92, 433.

Devise to two with limitation to survivor and heirs, etc., is not perpetuity. *Mott v. Ackerman*, 92, 539.

Liability of devisee for debt of testator. *Dodge v. Stevens*, 94, 209.

### 3. Legacies.

Legacy to subscribing witness to a will, when not void. *Cornwell v. Wooley*, 1 Abb. 441.

Legacy, when payment postponed till expiration of life estate. *Dodge v. Manning*, 1, 298.

When devisee becomes personally liable for legacies. *Id.*

Legatees liable for testator's debts only in proportion to their legacies. *Wilkes v. Harper*, 1, 586.

Legatees whose estate has been wasted by executor have no right of resort to real estate devised to him. *Id.*

Charge of legacy—bound to pay—remedy where land sold. *Kelsey v. Western*, 2, 500.

Legacy to church, on condition that a certain person continues its pastor for a certain time, is valid. *Caw v. Robertson*, 5, 125.

Legacy of stock, when general and not specific. *Tift v. Porter*, 8, 516.

Legacy to a corporation by name or by description is valid. *New York Institution for the Blind v. How's Executors*, 10, 84.

Legacy "to the trustees" is valid although the officers are called "managers" in the charter. *Id.*

Not payable until a year from granting of letters unless contrary intention clearly appears. *Bradner v. Faulkner*, 12, 472.

Legacy to non-resident subscribing witness valid. *Cornell v. Woolley*, 3 Keyes, 378.

Abatement of legacy. *Reynolds v. Reynolds' Executors*, 16, 257.

Demonstrative legacy not subject to ademption. *Giddings v. Seward*, 16, 365.

When legacy passes to personal representatives rather than children of legatee. *Traver v. Schell*, 20, 89.

Sole legatee under will directing him to pay annuity is personally liable without promise. *Gridley v. Gridley*, 24, 130.

Demonstrative legacy—annuity—when and how payable. *Pierrepont v. Edwards*, 25, 128.

Legacies, when general and not specific—executor may foreclose mortgage securing them. *Newton v. Stanley*, 28, 61.

Legatees when taking distributively and not jointly—perpetuity—vesting—survivorship. *Everitt v. Everitt*, 29, 39.

When legatees liable for money had and received. *Green v. Givan*, 33, 343.

Interest on legacy for support runs from testator's death. *Cooke v. Meeker*, 36, 15.

When sale of legacy will not be set aside. *Parmelee v. Cameron*, 41, 392.

Designation of legatee—charitable trust, when void. *Holmes v. Mead*, 52, 332.

When real estate held to aid in paying legacies. *Taylor v. Dodd*, 58, 335.

Misnomer of legatee—devise to corporation within two months of testator's death—when provision for wife not in lieu of statutory rights. *Lefevre v. Lefevre*, 59, 434.

When legacies charged and vested. *Loder v. Hatfield*, 71, 92.

When legacies not charged on residuary estate. *Bevan v. Cooper*, 72, 317.

When legacies begin to draw interest. *Wheeler v. Ruthven*, 74, 428; 30 Am Rep. 315.

Devisee of real estate charged with payment of legacy personally liable, although estate worth less than its amount. *Brown v. Knapp*, 79, 136.

When legacy to infant until twenty-one—when carries interest from death of testator. *Id.*

Void legacies distributed as in case of intestacy. *Kerr v. Dougherty*, 79, 327.

Services rendered testator to be paid by legacy—declarations of testator intended as payment not admissible—legacy implies bounty not payment. *Reynolds v. Robinson*, 82, 103; 37 Am. Rep. 555.

When legacy charged—when in lieu of dower. *LeFevre v. Toole*, 84, 95.

When legacy deemed charged on real estate. *Hoyt v. Hoyt*, 85, 142.

Legacy to hospital for support of inmate—expulsion of inmate before testator's death—subsequent offer to receive back. *Livingston v. Gordon*, 84, 136.

Legacy on condition not to marry without consent, valid—general doctrine discussed. *Hogan v. Curtin*, 88, 162; 42 Am. Rep. 244.

When subsequent words in will limit or cut down absolute gift. *Clarke v. Leupp*, 88, 228.

When one general legacy takes preference over other general legacies. *Bliven v. Seymour*, 88, 469.

When annuity not limited to interest merely. *Id.*

Legacy to draughtsman does not raise presumption of undue influence—probate conclusive as to fraud, etc. *Post v. Mason*, 91, 539; 43 Am. Rep. 689.

Legacy payable to grandchild at twenty-five years of age held vested at testator's death. *Bushnell v. Carpenter*, 92, 270.

Legacy payable at specified time, with limitation over in case of death of legatee before payment—legatee dying after time specified but before payment, limitation does not take effect—equitable assignment. *Finley v. Bent*, 95, 364.

Obligation of legatee to apply legacy to benefit of others according to his implied promise to testator. *Matter of Will of O'Hara*, 95, 403.

#### 4. Trusts.

Trust for accumulation of interest, when void. *Kilpatrick v. Johnson*, 15, 322.

When does not invalidate bequest of principal. *Id.*

Trust to apply income—vested interest—suspension of alienation. *Tucker v. Bishop*, 16, 402.



Trust to receive rents and profits. *Savage v. Burnham*, 17, 561.

Construction of trust of personality — annuity — discretion — accumulation. *Hull v. Hull*, 24, 647.

Trust for corporation — when not invalid within statute of perpetuities — uncertainty. *Burrill v. Boardman*, 43, 254 ; 3 Am. Rep. 694.

Trust — when vests immediately in cestui que trust — active trust — devise and bequest to academy — perpetuity. *Adams v. Perry*, 43, 487.

Trust as to lands in another State — trust of land and personality — separability — vested interest. *Knox v. Jones*, 47, 389.

Bequest to persons unknown to main-tain school in another State void. *Bascom v. Albertson*, 34, 584.

Trust to pay interest and divide principal — manner of execution, how varied. *Leitch v. Wells*, 48, 585.

Devise in trust — quit-claim by cestui — action by executor for succession tax. *Duval v. English Evangelical Lutheran Church*, 53, 500.

Will containing trusts, some valid and others void, upheld as to former *Van Schuyver v. Mulford*, 59, 426.

Trust to sell lands — arrears of interest. *Rodman v. Fincke*, 68, 239.

Trust not illegally suspending power of alienation — whether taking per capita or per stirpes — children born after testa-tor's death — vesting of trust estate. *Stevenson v. Lesley*, 70, 512.

Passive trusts invalid. *Verdin v. Slocum*, 71, 345.

Construction of trust — equitable conversion — when remainder a conditional limitation and not a condition precedent — burden of proof. *Newell v. Nichols*, 75, 78 ; 31 Am. Rep. 424.

When will creates valid trust for sup-port and maintenance. *Donovan v. Van de Mark*, 78, 244.

Estate in expectancy in trust fund — when alienable. *Ham v. Van Orden*, 84, 257.

Express trust — to pay interest of land, with power to lease or sell. *Morse v. Morse*, 85, 53.

Trust of rents and profits for life with power in beneficiary of appointment by will — estate not chargeable after beneficiary's death with judgment against him. *Cutting v. Cutting*, 86, 522.

Trust fund for insane daughter — prin-cipal to go to, if she recovers — falls into residuum when she dies. *Smith v. Edwards*, 88, 92.

General power in trust imperative, and on death of trustees court may appoint new trustee — real estate to be sold — gift of proceeds — next of kin — nephew. *Delaney v. McCormack*, 88, 174.

Severable provisions for three persons during life not invalid — distribution to nieces construed to be per capita. *Mutter of Verplanck*, 91, 439.

Accumulation for minor cannot be sub-ject of life estate. *Pray v. Hegeman*, 92, 508.

Accumulation — void direction for — de-vastavit — interest — commissions. *Cook v. Lowry*, 95, 103 ; *Barbour v. De Forest*, 95, 13.

### 5. Gifts.

Gift of money valid though beneficiaries are aliens. *Meakings v. Cromwell*, 5, 136.

Absolute gift and subsequent limitation — when not repugnant. *Morris v. Beyea*, 13, 273.

When gift payable only out of annual profits and not out of body of estate — authorities collated. *Delaney v. Van Aulen*, 84, 16.

Construction of gift to two or survivor — death of one over and one under age. *Watts v. Ronald*, 95, 226.

See SURROGATE ; TRUSTS.

## WITNESSES.

- I. *Expert witnesses.*
- II. *When competent.*
- III. *When not competent.*
- IV. *Impeachment.*
- V. *Privilege.*
- VI. *Presumption.*

VII. *Intent.*VIII. *Prisoner witness for himself.*IX. *Generally.*I. *Expert witnesses.*

Book-keeper in breweries may be expert on market price of ale. *Kerr v. McGuire*, 28, 446.

Physician may be competent expert although not in practice. *Roberts v. Johnson*, 58, 613.

Farmer, etc., competent to show value of land. *Robertson v. Knapp*, 35, 91.

II. *When competent.*

Competency determined by law at time of trial. *Fielden v. Lahens*, 2 Abb. 111.

In crim. con. divorced wife of plaintiff competent. *Wottrick v. Freeman*, 71, 601.

Married woman as party—competency. *Wehrkamp v. Willet*, 4 Abb. 548; 1 Keyes, 250.

On indictment of husband for perjury, when wife competent. *Chamberlain v. People*, 23, 85.

In action by husband and wife, husband competent. *Maverick v. Eighth Ave. R. Co.*, 36, 378.

In action by husband and wife, husband was competent for wife under section 399, Code of Procedure, as amended in 1860. *Birdsall v. Patterson*, 51, 43.

Surety in undertaking for provisional remedy not incompetent. *Jessop v. Miller*, 2 Abb. 449.

In action against city, aldermen are competent witnesses, at common law and under Code of Civil Procedure. *Pack v. Mayor*, 3, 489.

Widow of mortgagee, releasing dower, is competent, for the heirs in an action for redemption. *Dobson v. Racey*, 8, 216.

Stockholder is competent for corporation where not named as a party. *Montgomery County Bank v. Marsh*, 7, 481.

In tort against two, each is competent for his co-defendant. *Beal v. Finch*, 11, 128.

Residuary legatee competent in suit for executor on assigning interest. *Freeman v. Spalding*, 12, 373.

Renouncing executor competent to prove will. *Burritt v. Silliman*, 13, 93.

In trespass against two, neither is competent for the other. *Dean v. Thornton*, 13, 266.

Child or next of kin of intestate is competent for administrator in action to recover demand claimed to be due the estate. *Butler v. Patterson*, 13, 292.

In action against one joint debtor the other is competent for him under Code of 1852. *Sweet v. Tuttle*, 14, 465.

Mother of infant killed by negligence, when sole heir, is competent witness in action for the death. *Quin v. Moore*, 15, 432.

When assignor competent for assignee. *Bridges v. Hyatt*, 16, 546.

Adverse party may testify against assignor. *Coving v. Geib*, 16, 600.

When party competent, although he offered himself generally. *Brown v. Richardson*, 20, 472.

Not rendered infamous by first conviction of petit larceny. *Shay v. People*, 22, 317.

Widow, when competent, for contestant of husband's will. *Talbot v. Talbot*, 23, 17.

Competency of co-defendant in 1854—construction of proffer. *Wilson v. Elwood*, 28, 117.

Mortgagor when competent for his grantee. *Beach v. Cooke*, 28, 508.

In action against heirs at law and administrator for specific performance plaintiff competent. *Card v. Card*, 39, 317.

Widow competent to show circumstances of her assignment of insurance on her husband's life for her benefit. *Barry v. Equitable Life Ass. Society*, 59, 587.

In action by heir to set aside grantor's deed, other heirs not parties may testify to personal transactions with deceased—sufficiency of exception. *Hobart v. Hobart*, 62, 80.

Party not prohibited from testifying to transaction between himself and deceased agent of opposite party. *Hildebrandt v. Crawford*, 65, 107.

Not incompetent for infamy, until sentence. *Blaufus v. People*, 69, 107; 25 Am. Rep. 148.

In action by executor against maker and indorser of note neither defendant can testify for other as to personal transactions with deceased. *Alexander v. Dutcher*, 70, 385.

Conviction in another State does not render infamous—record may be rebutted. *Sims v. Sims*, 75, 466.

Conviction of felony in another State does not render incompetent here. *National Trust Co. v. Gleason*, 77, 400; 33 Am. Rep. 632, note.

General objection and exception does not present competency of witness under section 399 of Code. *Stevens v. Brennan*, 79, 254.

Competency of claimant against decedent's estate. *Matter of Frazer*, 92, 239.

### III. When not competent.

Wife not competent in crim. con. *Hicks v. Bradner*, 5 Trans. App. 239; 2 Abb. 362.

Usurious borrower, when incompetent. *Morse v. Crofoot*, 4, 114.

Indemnitor of sheriff on execution not competent for sheriff in suit for taking. *Howland v. Willetts*, 9, 170.

One or two joint defendants in felony is not competent for his co-defendant on his separate trial. *McIntyre v. People*, 9, 38.

Husband not competent in suit between wife's trustee and a third person in relation to trust estate. *Hasbrouck v. Vandervoort*, 9, 153.

Surety, in undertaking for claim and delivery, not incompetent. *Jessop v. Miller*, 1 Keyes, 321.

Joint defendants not competent for one another under Code of 1852. *Blodget v. Morris*, 14, 482.

When co-defendant may be rejected. *City Bank of Columbus v. Bruce*, 17, 507.

Party in criminal prosecutions not competent. *Williams v. People*, 33, 688.

Conviction of felony and sentence to house of refuge renders incompetent. *People v. Park*, 41, 21.

Husband and wife incompetent only where there is legal marriage. *Dennis v. Crittenden*, 42, 542

When incompetent as to conversation between himself and a deceased person and a third. *Kraushaar v. Meyer*, 72, 602.

Surety of non-resident executor incompetent to testify for executor as to personal transactions with deceased—waiver of objection—motion to strike out. *Miller v. Montgomery*, 78, 282.

Admission of, out of court—incompetent to prove interest. *Nisland v. Boynton*, 79, 630.

Defendant may not testify to personal transactions between himself and plaintiff's deceased assignor. *Raubitschek v. Blank*, 80, 478.

When married woman incompetent to testify concerning transaction with deceased person, husband also incompetent. *Whitehead v. Smith*, 81, 151.

When widow incompetent as to personal transactions with husband—objection. *Sanford v. Ellithorp*, 95, 48.

Wife of testator incompetent to testify to what she said to him or what he said to her or others in reply, on execution of will. *Lane v. Lane*, 95, 494.

Claimant under former will, seeking to set aside last will, is interested under section 829, Code of Civil Procedure, although a stranger in blood to testator. *Matter of Will of Smith*, 95, 516.

In action of administrator of assignor of bond and mortgage, next of kin are "interested" within section 829, Code of Civil Procedure. *Holcomb v. Holcomb*, 95, 316.

### IV. Impeachment of.

Cannot be impeached by party calling, but may be contradicted. *Thompson v. Blanchard*, 4, 303.

### V. Privilege of.

May refuse to answer when answer would tend to disgrace him, and would be immaterial except as to his credibility. *Lohman v. People*, 1, 379.

When not privileged in criminal proceeding. *People v. Kelly*, 24, 74.

Prisoner, not raising privilege, must answer as to former arrests. *Brandon v. People*, 42, 265.

Party cannot be compelled to become except generally in the cause. *King v. Leighton*, 58, 383.

Resident of another State, attending here, as a witness, may not be served with civil process. *Person v. Grier*, 66, 124; 23 Am. Rep. 35.

Director of defendant corporation cannot be compelled to submit to examination before trial. *People v. Mutual Gas-light Co.*, 74, 434.

#### VI. *Presumption.*

Objected to as party in interest may himself repel the presumption. *Requa v. Requa*, 22, 254.

Summoned and called to testify presumed to be present until conclusion of trial. *Neil v. Thorn*, 88, 270.

#### VII. *Intent.*

May testify as to whether intended to defraud. *Starin v. Kelly*, 88, 418.

#### VIII. *Prisoner witness for himself.*

Prisoner becoming witness for himself, subject to ordinary rules and tests. *Connors v. People*, 50, 240.

#### IX. *Generally.*

Plaintiff of record or in interest cannot be compelled, under usury act of 1837, to disclose facts showing violation of 1 R. S. 575, § 28. *Henry v. Bank of Salina*, 1, 83.

Testimony taken de bene esse cannot be impeached by proof of subsequent inconsistent statements. *Stacy v. Graham*, 14, 492.

To rebut impeaching cross-examination letters of adverse party showing credibility are competent. *Id.*

Transferor of note is not assignor of thing in action. *Bartlett v. Turbox*, 1 Keyes, 495; *Porter v. Potter*, 18, 52.

Opposite party may be, against corporation. *La Farge v. Exchange F. Ins. Co.*, 22, 352.

Assignor against legatee. *Hight v. Sackett*, 34, 447.

When judgment debtor liable for contempt in refusing to testify in supplementary proceedings. *Lathrop v. Clapp*, 40, 328.

Surviving partner not "assignee" under Code of Procedure, section 399. *Tremper v. Conklin*, 44, 58.

"Assignee" includes grantee under Code of Procedure, section 399. *Mattoon v. Young*, 45, 696.

Indorsee not assignee within section 399 of Code of Procedure. *Comstock v. Hier*, 73, 269; 29 Am. Rep. 142.

Not necessarily discredited by material misstatements in some particulars. *Wilkins v. Earle*, 44, 172.

Cross-examination on collateral matters conclusive. *Kirkpatrick v. N. Y. C. & H. R.*, 79, 240.

Answer of, not responsive, properly struck out. *Ryan v. People*, 79, 593.

Cross-examination — collateral evidence conclusive. *Misland v. Boynton*, 79, 630.

See CRIMINAL LAW; EVIDENCE.

#### WRIT OF ERROR.

This court cannot reverse criminal conviction as against weight of evidence. *Donohue v. People*, 56, 208.

Power of this court on, to Superior Court of Buffalo. *Gaffney v. People*, 50, 416.

See APPEAL; CRIMINAL LAW.

# TABLE OF CASES.

	Page.		Page.
Abb ads. Rome Exchange Bank.....	262	Adams ads. Howell.....	33, 353, 412, 442
Abbe v. Eaton .....	74	Adams ads. Joyce .....	107
Abbey v. Deyo.....	273	Adams ads. Kellogg.....	452
Abbott v. Johnstown, etc., R. Co....	379	Adams v. Leland.....	318
Abbott v. People....	63, 135, 140, 141, 142	Adams ads. Miller.....	49, 203
Abbott ads. Shapley .....	415	Adams v. Mills .....	268
Abbott ads. Squires .....	399	Adams v. Outhouse.....	110
Abeel v. Van Gelder.....	343	Adams v. People .....	132
Abendroth ads. Durant.....	31, 352	Adams v. Perry .....	87, 473
Abrahams v. Benson.....	357	Adams ads. Petrie .....	29
Abrahams ads. Hier.....	436	Adams ads. Pfeiffer .....	408
Abrahams ads. Watkins .....	271	Adams v. Popham.....	338
Acer v. Westcott.....	156	Adams v. Sage.....	209
Acker v. Acker.....	249, 414	Adams v. Saratoga & Wash'gton R. Co.	253
Acker v. Ledyard.....	194, 397	Adams v. Van Alstyne.....	203
Ackerley ads. Robins .....	204, 354	Adee v. Bigler.....	130
Ackerman v. Gorton.....	469	Adee v. Campbell.....	161
Ackerman v. Hunsicker.....	289, 383	Adee v. Cornell.....	47, 350
Ackerman ads. Mott....	198, 369, 465, 471	Adee ads. Toles.....	42, 43, 398, 420
Ackerman ads. Ross.....	453	Adirondack Co. ads. Catlin.....	24, 384
Ackert v. Lansing.....	308	Adler ads. Koehler....	190
Ackley v. Tarbox .....	345	Adolph v. Central Park, etc., R. Co..	313, 380
Ackley ads. Westervelt....	206, 273, 274	Adrian v. Lagrave.....	201
Ackroyd ads. Birkbeck .....	272	Adrian ads Pothier.....	317
Acosta ads. Geisler .....	257	Adriatic Fire Ins. Co. ads. Herman...	227
Adair v. Brimmer.....	198, 426	Adsit v. Butler.....	130, 262
Adams v. Adams .....	275, 278	Adsit ads. Lee.....	12
Adams ads. Brisbane .....	8	Ætna Fire Ins. Co. ads. Hoffman ....	230
Adams v. Bush.....	327	Ætna Ins. Co. v. Aldrich.....	399
Adams v. Conover.....	157	Ætna Ins. Co. ads. Andrews..	10, 171, 241
Adams v. Davidson.....	47	Ætna Ins. Co. ads. Ellsworth....	440
Adams ads. Dinsmore .....	21	Ætna Ins. Co. ads. Ripley ..	229, 231, 232
Adams v. Fort Plain Bank.....	243, 411	Ætna Ins. Co. v. Wheeler .....	76
Adams v. Fox.....	21, 30, 343	Ætna Life Ins. Co. ads. Andrews....	170
Adams v. Greenwich Ins. Co....	185, 192	Ætna Life Ins. Co. ads. Edington.	177, 241
Adams ads. Holyoke.....	365		

	Page.		Page.
Ætna Life Ins. Co. ads. Foot.....	37, 239	Albany & West Stockbridge R. Co.	
Ætna Life Ins. Co. ads. Smith.....	17, 238	ads. Van Rensselaer.....	162
Ætna Nat. Bank v. Fourth Nat. Bank	58	Alberger ads. Steuben County Bank.	
Agate v. Lowenbein .....	261		17, 51
Agate v. Sands.....	118	Albertson ads. Bascom.....	448, 473
Agawam Bank v. Strever ...	215, 322, 324	Albertson ads. People .....	98
Agricultural Ins. Co. ads. Benninghoff		Albion Plankroad Co. ads. McAllister.	19
	8, 183, 232	Albro ads. Huttemeier .....	155
Agricultural Ins. Co. ads. Boman....	231	Alden v. New York Cent. R. Co.....	79
Agricultural Ins. Co. ads. Cummins..	231	Aldrich ads. Ætna Ins. Co.....	399
Agricultural Ins. Co. ads. Merrill ...	230	Aldrich ads. Bradley.....	4
Agricultural Ins. Co. ads. Sherwood.	234	Alexander v. Bennett .....	99
Aguirre ads. Allen .....	109, 408	Alexander v. Cauldwell.....	120
Ahern v. Goodspeed.....	11, 454	Alexander v. Dutcher .....	475
Ahearne ads. Austin.....	259, 348	Alexander v. Germania Fire Ins. Co..	230
Aiken ads. Van Rensselaer .....	113	Alexander v. Hard .....	272, 438
Aikin ads. Mathews.....	289, 416	Alexander Presbyterian Church v.	
Aikin ads. Pugsley.....	255	Presbyterian Church .....	386
Aikin v. Wasson.....	405	Alexandre v. Sun Mut. Ins. Co... ..	236
Aikin v. Western R. Co .....	203	Alfaro ads. Davidson.....	29, 395
Albany ads. Albany, etc., Bank .....	306	Algeo v. Duncan.....	442
Albany, City of, ads. Menges.....	95, 166	Alger ads. Eaton. 33, 55, 178, 192, 345,	451
Albany, City of, ads. Noonan....	304, 459	Alger ads. Hudson Iron Co.. 108, 162,	391
Albany, City of, ads. Smith.....	303	Alger v. Scott.....	44
Albany, etc., Bank v. City of Albany,	306	Algur v. Gardner.....	441, 451
Albany City Bank ads. Montgomery		Allaire ads. Whitney.....	151, 208, 255
County Bank.....	12, 58, 126, 439	Allard v. Greasert.....	409
Albany City Fire Ins. Co. ads. Ellis..	226	Allcott ads. Wadsworth .....	55
Albany City Nat. Bank ads. Munger.		Allen v. Aguirre.....	109, 408
	57, 64, 395	Allen ads. Barnes.....	174, 272
Albany City Sav. Inst. v. Burdick.		Allen v. Brown.....	12, 346
	279, 385	Allen v. City of Buffalo.....	89, 346, 365
Albany Exchange Co. ads. Gracy....	255	Allen ads. Cady.....	37, 93
Albany Fire Ins. Co. v. Bay.....	273	Allen ads. Cavalli.....	455
Albany Gas-light Co. ads. Lannen... ..	279	Allen v. Comm'rs of Land Office.....	262
Albany Ins. Co. ads. People ....	119, 429	Allen v. Cowan .....	214
Albany Mut. Ins. Co. ads. Harper ...	230	Allen ads. Davis .....	169, 350, 352
Albany Northern R. Co. v. Brownell.		Allen v. DeWitt .....	468
	102, 166, 218	Allen v. Fourth Nat. Bank.....	325
Albany Railway ads. Bulger.....	377	Allen v. Fox.....	150
Albany Ry. Co. ads. Gallup.....	257	Allen ads. Gaylord Manfg. Co... ..	391
Albany & Susquehanna R. Co. ads.		Allen v. Glenville Woolen Co.....	145
Johnson .....	206, 413	Allen v. Godfrey.....	418
Albany & Susquehanna R. Co. ads.		Allen ads. Hoxie .....	189
People .....	100	Allen ads. Hyatt .....	119
Albany & Susquehanna R. Co. ads.		Allen ads. Irving Nat. Bank.....	323
Van Woert.....	409	Allen v. Judson.....	88
Albany & Susquehanna R. Co. ads.		Allen v. Leonard.....	363
Wademan. ....	376	Allen ads. Malcolm.....	288
Albany & Vermont R. Co. ads. People.		Allen ads. Mattice.....	408
	122, 347, 373	Allen ads. McCombs. ....	50, 65

	Page.		Page.
Allen ads. McMahon.....	48	American Home Miss. Soc. ads. Wad-	
Allen ads. Meech.....	352	hams.....	273
Allen v. Mercantile Mut. Ins. Co....	237	American Institute ads. Denneth....	108
Allen v. Meyer.....	23, 50	American, etc., Ins. Co. ads. St. John.	226
Allen v. Patterson.....	359	American, etc., Ins. Co. ads. Thomp-	
Allen ads. People.....	98, 134, 436	son... ..	239
Allen ads. Pope.....	193, 237	American Linen Thread Co. ads. De	
Allen ads. Russell... ..	433	Groff.....	269
Allen v. Sackrider.....	73	American Life, etc., Co. ads. Dry Dock	
Allen ads. Savage.....	222	Bank.....	449
Allen v. Smith.....	344	American Life, etc., Co. ads. Mumford	449
Allen ads. Springfield F. & M. Ins. Co..		American Linen Thread Co. v. Wor-	
	234, 292	tendyke.....	352
Allen v. St. Louis Ins. Co.....	236	American Merch. Mu. Ex. Co. ads.	
Allen ads. Van Wyck.....	147, 392	Coulter.....	192, 254, 311
Allen ads. Wheeler.....	5	American Mut. Life Ins. Co. ads.	
Allen v. Williamsburgh Sav. Bk..	61, 310	Gibson.....	185, 238
Allen ads. Witherhead.....	245	American Mut. Life Ins. Co. ads.	
Allen ads. York.....	154, 265	People... ..	17
Allemannia Fire Ins. Co. ads. Black-		American Mut. Life Ins. Co. ads.	
stone.....	226	Rawls.....	176, 238
Allerton v. Allerton.....	212	American In. Life Ins. Co. ads. St.	
Allerton v. Belden.....	451	John....	240
Allis v. Leonard.....	440	American Nat. B'k ads. Lawrence.....	285, 310
Allis v. Read.....	409	American Nat. Bank. ads. Van Allen,	12
Allis v. Wheeler.....	425	American Nat. Bank. ads. Walker... ..	53
Allison ads. Beck.....	402	American Nat. Bank v. Wheelock... ..	58
Allison v. Corn Ex. Ins. Co.....	237	American Popular Life Ins. Co. ads.	
Allison ads. Rundle.....	414	Fitch.....	238, 240
Almar ads. Pell.....	265	American Popular Life Ins. Co. ads.	
Almgren v. Dutilh.....	399	Hayner.....	239, 434
Alston ads. Mason's Executors.....	246	American Popular Life Ins. Co. ads.	
Altorp v. Wolfe.....	149, 279	Van Valkenburgh.....	238
Altman ads. Cowing... ..	26, 39, 173, 320, 325	American Soc. for Prevention of	
Altmyer ads. Tracey.....	17	Cruelty to Animals ads. Davis....	15
Alvord ads. Bank of Salina.....	59, 452	American Spiral Spring, etc., Co. ads.	
Alvord ads. Newman.....	457	Bommer... ..	117, 407, 413
Amazon ads. Standard, etc....	16, 185, 327	American Spiral Spring Butt Co. ads.	
Ambler ads. White.....	181, 324	Burr.....	108
Ambler ads. Wood.....	187	American Tract Society ads. Riggs.	
Ames v. N. Y. Ins. Co.....	232, 233		114, 214, 223
American Art Union ads. Governors		American Union Telegraph Co. v.	
of Alms-house.....	265	Middleton... ..	42, 437
American Art Union ads. People....	265	Ames ads. Comstock.....	212
American Bible Society ads. Harris..	468	Ames ads. Green.....	414
American Bible Society ads. Sher-		Ames ads. Herricks.....	285
wood.....	121, 446	Ames ads. Kellogg.....	284, 292
American Exchange Bank ads. Coggill.	325	Ames ads. People... ..	196, 396
American Exchange Bank ads. Graves.	321	Ames ads. Wright.....	115, 351
American Exchange Fire Ins. Co. ads.		Amidon ads. Meyer.....	208
Kunzze.....	227	Amory v. Lord.....	467

	Page.		Page.
Amsbry v. Hinds .....	217	Anthony ads. White .....	126
Anable v. Conklin .....	361	Anthony ads. Wyckoff. .57, 323, 368,	434
Anderson, Matter of Petition of.....	332	Apgar ads. Esmond .....	64
Anderson ads. Blumenthal.....	54, 65	Apgar ads. Kenney .....	281
Anderson ads. Dillon.....	68, 114	Appleby v. Astor Fire Ins. Co....	227, 439
Anderson ads. Jones .....	34	Appleby v. Brown .... .	3
Anderson ads. Knapp.....	36, 65	Appleby ads. Coles.....	293
Anderson v. Lemon .....	350	Appleby v. Erie County Sav. Bank..	61
Anderson v. Mather .....	221, 444	Applegate ads. Van Brunt .....	349
Anderson ads. Maynard.....	170	Appleton ads. Gandolfo.....	187
Anderson v. Nicholas .....	393	Archer ads. Low.....	145
Anderson v. Reilly.....	99, 129	Archer ads. Treadwell.....	276, 450
Anderson v. Rome, etc., R. Co....	31, 179	Archibald ads. Kincaid.....	415
Anderson ads. Union Dime Sav. Ins.	396	Architectural Iron Works v. City of	
Andes, Town of, ads. Craig.....	436	Brooklyn .....	36
Andes Ins. Co. ads. Mix.....	387	Arctic Fire Ins. Co. v. Austin...73,	108
Andrews v. Artisans' Bank.....	57, 209		400, 434
Andrews v. Ætna Life Ins. Co....	10, 170	Arctic Fire Ins. Co. ads. Parker ....	227
	171, 241	Argall v. Jacobs.....	65, 365
Andrews ads. Boynton .....	269	Argall v. Pitts .....	158, 292
Andrews ads. Crooke.....	89	Argotsinger v. Vines.....	151, 265, 438
Andrews v. Durant .....	44, 107	Argus Co. v. Mayor, etc ....	301, 408
Andrews ads. Ellis .....	209	Arkell v. Commerce Ins. Co .....	227
Andrews ads. Gates .....	44	Armitage v. Pulver.....	384, 422
Andrews v. Gillespie .....	295	Armour v. Michigan Cent. R. Co..11,	247
Andrews v. Glenville Wool. Co..149,	222	Armour v. Transatlantic Ins. Co....	231
Andrews ads. Hagerty.....	358	Armstrong ads. Brooklyn Park Co..	
Andrews ads. Jackson.....	37		102, 167
Andrews ads. Jackson.....	385	Armstrong v. DuBois...39, 54, 156,	157
Andrews v. Long .....	35		195, 438
Andrew v. Newcomb .....	389	Armstrong ads. Hoffman.....	371
Andrews ads. People .....	71, 85	Armstrong v. People .....	142
Andrews ads. Pratt .....	191	Armstrong ads. Stevens.....	278
Andrews ads. Schenck.....	120, 268	Armstrong v. Weed.....	19
Andrews ads. Sheridan....164, 250,	337	Arnold, Matter of....	332
Andrews v. Tyng .....	53, 128, 151	Arnold v. Angell.....	364
Angell ads. Arnold .....	364	Arnold v. Arnold.....	344, 352
Angell ads. Bradley.....	395	Arnold ads. Chauncey .....	289
Angell v. Hartford Fire Ins. Co'....	228	Arnold ads. Cheney .....	271
Angel v. Hollister .....	206	Arnold v. Nichols.....	353
Angell v. Lawton .....	345	Arnold v. Pacific Mut. Ins. Co .....	237
Angevine ads. Guckenheimer .....	209	Arnold ads. People.....	135, 414
Angle ads. Shibley.....	417	Arnold v. Rees.....	99
Annett v. Terry .....	421	Arnold v. Robertson.....	39
Anonymous .....	22, 42, 263	Arnot ads. Baker.....	368
Ansley v. Patterson .....	63	Arnot ads. Colson .....	325
Ansonia Brass and Copper Co. v.		Arnot v. Erie Ry. Co.....	215
New Lamp Chimney Co .....	65	Arnot v. Pittstown & Elmira Coal Co..	110
Ansonia Brass and Copper Co. v.		Arnoux ads. Livingston.....	196
Babbitt.....	397	Arnoux ads. Tooker.....	360, 440
Anthony ads. Mason.....	171, 453	Arteaga v. Conner.....	42, 203



	Page.		Page.
Arthur ads. Baltimore, etc., R. Co...	244	Atlantic F. and M. Ins. Co. ads. Tall-	
Arthur v. Griswold..22, 120, 208, 327,	440	man.....	225
Arthur v. Homestead Fire Ins. Co..		Atlantic Mail Steamship Co. v. Sven-	
52, 231,	362	son.....	278
Artisans' Bank ads. Andrews.....	57, 209	Atlantic Mut. Ins. Co. ads. Daniels..	398
Artisans' Bank v. Backus .....	319	Atlantic Mut. Ins. Co. ads. Leitch....	237
Artisans' Bank ads. Hotchkiss ....	57, 78	Atlantic Mutual Ins. Co. ads. Luling.	235
Artisans' Bank ads. Lake ....32, 317,	355	Atlantic Mut. Ins. Co. ads. Robertson,	237
Ashburner v. Balchen.....	148, 399	Atlantic Mut. Ins. Co. ads. Sturm...	236
Ashley v. Dixon .....	5, 113	Atlas Mut. Ins. Co. ads. Mussey.....	236
Ashley v. Marshall .....	39, 363	Atlantic Mut. Ins. Co. ads. Snyder...	237
Ashton ads. White.....	78	Atlantic Mut. Ins. Co. ads. Taylor...	461
Aspinwall ads. Crafts.....	288	Atlantic Mut. Life. Ins. Co. ads. At-	
Aspinwall ads. Eaton.....	117	torney-General .....	24, 241
Aspinwall ads. Oakley...37, 91, 100,	244	Atlantic Mut. Life Ins. Co. ads. Peo-	
	245	ple .....	241
Aspinwall v. Saccha.....	118	Atlantic Nat. Bank v. Franklin..	320, 415
Aspinwall ads. Van Wyck .....	264	Atlantic Nat. Bank ads. Pierson. ...	172
Asseler ads. Goulet.....	300	Atlantic State B'k v. Savery..	60, 323, 350
Assessors ads. People.....	86	Atlantic & Great Western Ry. Co. ads.	
Associates of Jersey Co. ads. Davison.	403	Gurney .....	105, 380, 382
Association for Indigent Females ads.		Atlantic & Pac. Tel. Co. v. Barnes...	420
St. Luke's Home.....	471	Atlantic & Pac. R. Co. ads. Boorman.	184
Astor, Petition of. ....	101, 332, 334	Atlantic & Pac. Tel. Co. ads. Ward..	432
Astor ads. De Nottebeck .....	470	Atlantic, etc., Tel. Co. v. Baltimore.	
Astor v. L'Amoureux .....	36	etc., R. Co.....	20
Astor v. Mayor, etc.....	94, 102, 332	Atlas Steamship Co. ads. Spinetti....	67
Astor's Ex'rs ads. Kane .....	464	Atrill ads. Littlejohn.....	438
Astor's Ex'rs ads. Langdon.....	465	Attica ads. Metzger .....	436
Astor Fire Ins. Co. ads. Appleby..	227, 439	Attorney, Matter of an.....	52, 191
Astor Fire Ins. Co. ads. Rinn.....	121	Attorney-General v. Atlantic Mut. L.	
Astor Mut. Ins. Co. ads. Bidwell...5,	114	Ins. Co.....	24, 241
145, 252,	385	Attorney-General v. Continental Life	
Astor Mutual Ins. Co. ads. Patchin...	191	Ins. Co.....	25, 26, 123, 241, 242, 325
Atcherson v. Troy & Boston R. Co..		Attorney-General v. Guardian Mutual	
121,	376	Life Ins. Co.....	122, 242
Atcheson v. Mallon.....	109	Attorney-General v. Minister, etc..	87, 468
Atkins ads. Bostwick .....	216, 426	Attorney-General v. N. America Life	
Atkins v. Elwell.....	179, 190	Ins. Co.....	15, 16, 53, 54, 94, 100, 241
Atkins v. Saxton .....	351	242, 381	
Atkinson ads. Farmers and Mechanics'		Attorney-Gen. v. Ref. Dutch Church.	386
Nat. Bk.....	67	Auburn, City of, ads. Clemence.....	303
Atkinson v. Great Western Ins. Co..	236	Auburn City Nat. Bank v. Hunsiker.	324
Atlantic Dock Co. v. City of Brooklyn.		Auburn & Cato Plankroad Co. v.	
70, 329,	459	Douglass .....	357
Atlantic Dock Co. v. Leavitt.....	154, 394	Auburn & Roch. R. Co. ads. Wood ..	374
Atlantic Dock Co. v. Libby.....	125, 236	Auburn Sem., Trustees of, v. Calhoun.	463
Atlantic Dock Co. v. Mayor, etc.....	247	Auchmuty, Matter of.....	24
Atlantic Fire Ins. Co. ads. Grosvenor,	234	Audenreid v. Mercantile Mut. Ins.	
Atlantic F. and M. Ins. Co. ads. Shel-		Co .....	237
don .....	228	Audubon v. Excelsior Ins. Co.,	205, 226

	Page.		Page.
Auerbach v. New York Cent. R. Co..	80	Babcock ads. Gager .....	398
Augsbury ads. Hall .....	458	Babcock ads. Jackson.....	101, 432
Auld ads. Freeman.....	291	Babcock v. Lake Shore Ry. Co.....	75
Austin v. Ahearne.....	259, 348	Babcock v. Libby ..	174, 209
Austin ads. Arctic Fire Ins. Co....	73, 108	Babcock ads. McKinster .....	177, 298
	400, 434	Babcock ads. McQueen.....	14, 367
Austin ads. Bennett.....	287	Babcock v. Montgomery Co. Mutual	
Austin ads. Christopher.....	262	Ins. Co.....	226
Austin v. Dye .....	391	Babcock ads. Smith .....	454
Austin ads. Giles.....	165, 257	Babcock v. Utter.....	155, 157, 265, 287
Austin v. Goodrich.....	361	Babcock ads. Wells.....	443
Austin v. Holland.....	353	Baccio v. People.....	143
Austin v. Hudson River Co.....	259	Bach ads. Day .....	51, 438
Austin ads. Low .....	401	Bache v. Doscher .....	295
Austin ads. Mack .....	130, 290	Bachman ads. Lawson .....	174
Austin v. Munro .....	197	Bachman ads. Niagara, etc., Bridge	
Austin v. New Jersey Steamboat Co.	400	Co .....	152
Austin v. Rawdon.....	250, 360	Backer ads. Dorn .....	428
Austin v. Searing.....	109	Backus ads. Artisans' Bank .....	319
Averell ads. Moss.....	120	Backus v. Fobes .....	41
Averill v. Patterson.....	160	Bacon v. Burnham .....	321
Averill v. Taylor.....	255, 280	Bacon v. Cropsey.....	251, 397
Aver ads. Brandon .....	98	Bacon ads. Fire Department of Bacon.	429
Avery ads. Brooks ...	450	Bacon ads. Fire Department of Troy.	228, 235
Avery ads. Dunlop .....	234, 289		
Avery ads. Eaton, Cole & Burnham		Bacon v. Frisbie .....	54
Co.....	209	Bacon ads. Tooley .....	192
Avery v. Empire Woolen Co. 69, 437,	459	Bacon v. Van Schoonhoven .....	383
Avery ads. Marsh.....	425	Badeau ads. Hackett .....	283
Avery v. Wilson.....	389	Badger v. Badger .....	186
Ayer v. Kobbe.....	258	Badger ads. Magee.....	320
Ayers ads. Carl .....	266	Badger v. Phoenix Warehousing Co..	118
Ayers v. Dixon .....	292	Baer ads. Byrnes.....	468
Ayers v. Lawrence.....	303	Bagg ads. Palmer.....	420
Ayrault ads. Curtiss.....	459	Bagley v. Peddie.....	149
Ayrault v. Murphy.....	290	Bagley ads. Rider .....	295
Ayrault v. Pacific Bank .....	59	Bagley v. Smith..	149, 352
Ayrault ads. Spencer ....	210, 283	Bailey, Matter of Assignment of.....	31
Ayres v. Lawrence.....	436	Bailey v. Bergen .....	47
Ayres ads. Waring.....	110	Bailey v. Briggs.....	361, 371, 463
Ayres v. West. R. Co. 34, 37, 126, 364,	387	Bailey ads. Fiske .....	272, 363
		Bailey v. Hollister.....	118
Babbett v. Young .....	10, 114, 162, 405	Bailey v. Hudson River R. Co.....	77
Babbitt ads. Ansonia Brass and Cop-		Bailey ads. Mabie .....	443
per Co .....	397	Bailey v. Ryder .....	252, 360
Babbitt ads. Crispin.....	281	Bailey ads. Walls.....	184
Babcock v. Beman .....	317	Bailey ads. Webb.....	51
Babcock v. Bonnell.....	90, 391	Bain v. Brown.....	10
Babcock v. Buffalo, City of .....	306	Bain v. Matteson.....	193
Babcock ads. Corn Ex. Ins. Co....	275	Bainbridge ads. Livermore ....	1, 22
Babcock v. Eckler .....	210	Baird ads. Clark.....	6, 155, 176, 208

	Page.		Page.
Baird v. Daly . . . . .	187, 252, 310, 398, 434	Baldwin v. Mayor, etc . . . . .	20, 331
Baird v. Gillett . . . . .	188	Baldwin v. Moffett . . . . .	454
Baird v. Mayor, etc. . . . .	27, 335, 384	Baldwin v. New York City . . . . .	90
Baird ads. McGiffin . . . . .	393	Baldwin v. Oswego, City of . . . . .	43, 302, 306
Bakeman v. Talbot . . . . .	348, 461	Baldwin v. Palmer . . . . .	407
Baker v. Arnot . . . . .	368	Baldwin v. U. S. Teleg. Co. . . . .	433
Baker ads. Blewitt . . . . .	112	Baldwin v. Van Deusen . . . . .	38, 220
Baker v. Bliss . . . . .	211, 337	Baldwin ads. Wright . . . . .	74
Baker ads. Courtney . . . . .	28	Balen ads. Hope . . . . .	177
Baker v. Drake . . . . .	150, 416	Baley v. Homestead Fire Ins. Co. . . . .	227
Baker ads. Dubois . . . . .	176	Ball ads. Clafin . . . . .	106
Baker ads. Haire . . . . .	285, 366	Ball ads. Hayes . . . . .	23
Baker ads. Hankins . . . . .	407	Ball ads. Lawrence . . . . .	411
Baker v. Higgins . . . . .	177, 390	Ball v. Liney . . . . .	56
Baker v. Hoag . . . . .	399	Ball v. Loomis . . . . .	38, 47
Baker v. Johnson . . . . .	111	Ball ads. Miller . . . . .	410
Baker v. Kenworthy . . . . .	195	Ball ads. Van Hensselaer . . . . .	45, 93, 255, 262
Baker v. Lever . . . . .	212, 332	Ballard v. Ballard . . . . .	36
Baker v. Lorillard . . . . .	469	Ballard v. Burgett . . . . .	390, 391
Baker ads. Magie . . . . .	34	Ballard ads. Hosford . . . . .	163
Baker ads. Metcalf . . . . .	150	Ballin v. Dillaye . . . . .	273
Baker ads. People . . . . .	139, 216, 277	Ballou v. Ballou . . . . .	12, 167, 192
Baker v. Remington . . . . .	37	Ballou ads. First Nat. Bk. of Utica . . . . .	414
Baker ads. Rindge . . . . .	353	Ballou ads. Hand . . . . .	90, 101
Baker v. Spencer . . . . .	30, 191, 212	Ballou v. Parsons . . . . .	123, 384
Baker ads. Selchow . . . . .	16, 437	Ballou ads. Spencer . . . . .	317, 322
Baker ads. Tebo . . . . .	347	Ballston Spa, Village of, ads. Weed . . . . .	304
Baker ads. Turner . . . . .	69	Baltes v. Kipp . . . . .	116, 171, 195, 298, 300
Baker v. Union Mut. Life Ins. Co. . . . .	239	Baltimore, etc., R. Co. v. Arthur . . . . .	244
Baker v. Utica, City of . . . . .	339	Baltimore, etc., R. Co. ads. Atlantic, etc., Tel. Co. . . . .	20
Baker ads. Van Amburgh . . . . .	270	Baltimore & Ohio R. Co. ads. Bost- wick . . . . .	74
Baker ads. Veeder . . . . .	31, 357	Baltimore & Ohio R. Co. ads. Can- field . . . . .	75, 76
Baker ads. Victory . . . . .	309	Baltimore & Ohio R. Co. ads. Good- win . . . . .	77
Balbo v. People . . . . .	134, 137	Baltz ads. Emery . . . . .	423
Balch v. New York & Oswego Mid- land R. Co. . . . .	376	Baltzen v. Nicolay . . . . .	10, 55
Balchen ads. Ashburner . . . . .	148, 399	Bancker ads. People . . . . .	224
Balcom ads. Bissell . . . . .	408	Bandonine ads. Crane . . . . .	27, 104
Baldwin v. Brown . . . . .	69	Bango v. Duckinfield . . . . .	381
Baldwin ads. Bryan . . . . .	115, 368	Bangs v. Gray . . . . .	235
Baldwin v. Buffalo, City of . . . . .	219	Bangs v. Skidmore . . . . .	235
Baldwin v. Burrows . . . . .	349, 441	Bangs v. Strong . . . . .	286
Baldwin ads. Condit . . . . .	11, 451	Bank Commissioners v. St. Lawrence Bank . . . . .	58
Baldwin ads. Fulton Fire Ins. Co. . . . .	72, 365	Bank of Albion v. Burns . . . . .	272
Baldwin v. Humphrey . . . . .	347	Bank of Albion ads. Pope . . . . .	61, 316
Baldwin ads. Ingraham . . . . .	223, 259, 412	Bank of Attica v. Manufacturers and Traders' Bank . . . . .	61
Baldwin ads. Knox . . . . .	270		
Baldwin ads. Loeschick . . . . .	19		
Baldwin v. Liverpool, etc., Steamship Co . . . . .	74, 162		

	Page.		Page.
Bank of Attica v. Metropolitan Nat. Bank.....	32	Bank of Syracuse v. Hollister.....	313
Bank of Attica ads. Robinson.....	60	Bank of Toledo v. International Bank	116
Bank of Auburn v. Putnam.....	121, 322	Bank of Utica ads. Cahoon.....	5, 124
Bank of Auburn v. Roberts.....	288, 405	Banker v. Banker.....	223
Bank of Beloit v. Beale.....	392	Banker ads. Cook.....	265
Bank of Brit. N. Amer. v. Merchants' Nat. Bank.....	58, 204, 325, 412	Banning ads. Jewett.....	188
Bank of California v. Webb.....	356	Banks ads. Griffin.....	214
Bank of Chenango v. Brown.....	94, 431	Banks ads. Little.....	109, 387
Bank of Commerce v. Union Bank.	285, 324	Banks ads. People.....	96, 306
Bank of Cooperstown ads. White-house.....	181	Banta, Matter of.....	71
Bank of Cooperstown v. Woods.....	189, 319	Banta ads. Fisher.....	426, 468
Bank of Commonwealth v. Mayor, etc.....	305, 430	Baptist Church v. Brooklyn Fire Ins. Co.....	175, 226, 234
Bank of Commonwealth v. Mudgett.	319, 353	Barber v. Cary.....	369
Bank, Empire City.....	60	Barber ads. Easterly.....	268, 324
Bank of Fort Edward ads. Streever..	321	Barber ads. Hetzel.....	369, 382, 467
Bank of Fox Lake ads. Turner.....	323, 355	Barber ads. Miller.....	209, 360, 443
Bank of Genesee v. Patchin Bank.	58, 317, 363	Barber v. Nye.....	460
Bank of Genesee v. Spencer.....	21	Barber v. Sterling.....	64
Bank of the State of Indiana v. Bugbee.....	8, 70	Barber ads. Sudam.....	92, 246
Bank of Kentucky v. Varnum.....	337	Barber ads. Western Trans. Co.	56, 78, 202, 406
Bank of Kingston ads. Chester.....	178, 420	Barbour v. DeForest.....	473
Bank of New Orleans v. Matthews.	168, 353	Barbour v. Litchfield.....	10
Bank of New York ads. Clews. . . .	59	Barclay, Matter of.....	336
Bank of New York v. Vanderhorst.	9, 320	Bard ads. Fort.....	25
Bank of State of New York ads. Morgan.....	58	Bard v. Poole.....	91, 293, 344, 449
Bank of State of New York v. Muskingum Branch of Bank of State of Ohio.....	326	Barden ads. Gardner.....	291
Bank of State of N. Y. ads. Walker.	8	Barden ads. Weaver.....	316, 366
Bank of North America ads. People.	115, 324, 403	Bardin v. Stevenson.....	176
Bank of North America ads. Thomson.	27, 323, 355, 412	Bargy ads. Townsend.....	152
Bank of Oswego v. Doyle.....	457	Barnhart ads. Knolls.....	461
Bank of Republic ads. Lawrence.....	130, 344	Barhydt v. Ellis.....	257
Bank of Rochester v. Jones.....	202	Barhyte v. Shepherd.....	341
Bank of Rome v. Village of Rome.	95, 96, 316	Barkalow ads. Cummins.....	110
Bank of Salina v. Alvord.....	59, 452	Barker v. Baxter.....	390
Bank of Salina ads. Henry.....	33, 476	Barker v. Binninger.....	168, 179, 195, 397
Bank of Sing Sing ads. Leggett.....	61	Barker v. Bradley.....	178, 410
		Barker v. Cocks.....	19, 177, 250
		Barker ads. Farmers & Mechanics' Bk.	451
		Barker ads. Metcalf.....	22
		Barker ads. Methodist Churches.....	369
		Barker v. N. Y. Cent. R. Co.....	182, 314
		Barker ads. People.....	427
		Barker ads. Roe.....	410
		Barker v. Savage.....	314
		Barker v. White.....	26, 39, 124, 351, 384, 444
		Barkhoof ads. Hover.....	218
		Barkley v. Rens. & Sar. R. Co.....	9, 409
		Barkley v. Wilcox.....	459
		Barley ads. De Witt.....	176

## TABLE OF CASES.

485

	Page.		Page.
Barlow v. Barlow .....	468, 469	Barron v. People .....	133
Barlow ads. Jones .....	270	Barrons ads. Starbird .....	127, 146
Barlow v. Myers .....	395	Barrow ads. Barns .....	215
Barlow v. Scott .....	370, 454	Barry v. Breesse .....	240
Barlow v. St. Nicholas' Nat. Bank ..	154	Barry v. Equitable Life Ass. Society.	
Barlow ads. Whitney Arms. Co. ....	268, 270		91, 240, 371, 474
Barly ads. De Witt .....	176	Barry v. Mut. Life Ins. Co. ....	22
Barmon v. Lithauer .....	146, 355	Barry v. N. Y. Cent., etc., R. Co. ....	312, 378
Barmore ads. Heath .....	358	Barry v. Ransom .....	169, 177, 410
Barnard v. Campbell .....	170, 208	Barry ads. Slocum .....	125, 445
Barnard v. Kobbe .....	10, 202	Barry ads. Tousley .....	180
Barnard v. Monnot .....	70	Bartean v. Phenix Mut. Life Ins. Co. ....	239
Barnard ads. Pierrepont .....	264	Bartholick ads. Merriitt .....	290
Barnes v. Allen .....	174, 272	Bartle v. Gilman .....	126
Barnes ads. Atlantic & Pac. Tel. Co. ....	420	Bartlett ads. Blair .....	206
Barnes v. Brown .....	110, 120, 208	Bartlett v. Drew .....	118
Barnes ads. Clark .....	95, 99, 258	Bartlett v. Hoppock .....	392
Barnes ads. Cook .....	450	Bartlett v. Judd .....	157, 177, 411
Barnes v. Harris .....	253	Bartlett v. McNiel .....	22
Barnes v. Mott .....	248, 291, 421	Bartlett v. Mitchell .....	153
Barnes v. Newcomb .....	53, 381	Bartlett v. Musliner .....	32
Barnes v. Ontario Bank .....	57	Bartlett v. Robinson .....	317
Barney v. Oyster Bay, etc., Steamboat		Bartlett v. Spicer .....	6, 252
Co. ....	82	Bartlett v. Tarbox .....	180, 476
Barnes v. Perine .....	106, 417	Bartley v. Richtmeyer .....	342, 394
Barnes v. Quigley .....	360	Barto v. Himrod .....	95
Barnes ads. Taylor .....	189, 412	Barton ads. Edmunds .....	396
Barnes v. Underwood .....	272	Barton v. Fisk .....	149
Barney v. Worthington .....	152	Barton ads. Gray .....	213, 394
Barnett v. Selling .....	42, 88	Barton ads. Hinds .....	370, 379
Barnett ads. Southworth .....	192	Barton v. Speis .....	123
Barnett ads. Spencer .....	283	Barton v. Syracuse, City of .....	304
Barney ads. Brackett .....	153	Barton ads. Thomas .....	286
Barney ads. Cardot .....	63, 379	Bartow v. People .....	140
Barney ads. Cornell .....	282	Bartow ads. Thomas .....	456
Barney v. Griffin .....	46, 48	Bascom v. Albertson .....	448, 473
Barney ads. Kelsey .....	400	Bascom v. Smith .....	37, 50, 283, 292
Barney ads. Sweet .....	77	Baskin v. Baskin .....	463
Barney ads. Weed .....	77	Baskins v. Shannon .....	299
Barney ads. Whiting .....	54	Bass v. Comstock .....	365
Barnhart ads. Knolls .....	154	Bassell v. Elmore .....	264
Barns v. Barrow .....	215	Bassett v. Fish .....	14, 309, 311, 341, 394, 418
Barr ads. Cook .....	178, 179	Bassett ads. Hatch .....	468
Barrett ads. Blossom .....	277, 365	Bassett v. Spofford .....	77
Barrett ads. Brush .....	412	Bassett v. Wheeler .....	25
Barrett ads. Sisson .....	321, 442	Bassford, Matter of Petition of .....	332
Barrett v. Third Ave. R. Co. ....	21, 52, 379	Batchellor ads. People .....	96, 267, 305, 306
Barrie ads. Metropolitan Board of Ex-		Bate ads. Gillett .....	354
cise .....	97	Bate v. Graham .....	201
Barringer v. People .....	86, 189	Bates ads. Bennett .....	171, 243, 293
Barringer ads. Van Rensselaer .....	256	Bates ads. Finkelmeier .....	204, 257

	Page.		Page.
Bates v. First Nat. Bank.....	9, 57	Bean v. Edge.....	260
Bates ads. Gibbs.....	350	Bean v. Tonnele.....	355
Bates ads. Green.....	318	Beard ads. Cross.....	398
Bates ads. Hyatt.....	222	Beard ads. Mansfield.....	127
Bates v. Rosecrans.....	355, 362	Beards v. Wheeler.....	24
Bates ads. Supervisors of Rensselaer.	442	Beardsley v. Duntley.....	209, 274, 410
Bates v. Voorhees.....	16	Beardsley Scythe Co. v. Foster.....	130
Battell v. Burrill.....	221	Bearns v. Gould.....	424
Battell v. Torrey.....	221	Bearss v. Copley.....	175, 179, 191
Batterman v. Finn.....	20	Beattie ads. Smith.....	45, 298
Battle v. Coit.....	4, 45	Beaumont ads. Campbell.....	466
Bathgate v. Haskin.....	127, 296, 411	Beaver ads. Dubois.....	262, 437
Baulec v. N. Y. & Harlem R. Co....	379	Bechar v. Flues.....	256
Baucus ads. Mattison.....	298, 300	Beckstein ads. Davis.....	290, 291, 346
Baucus ads. Sipperly.....	424, 425	Beck v. Allison.....	402
Baucus v. Stover.....	200	Beck ads. Bowen.....	130, 292
Baum ads. Brackett.....	297	Beck v. Carter.....	309
Baum v. Mullen.....	275, 345	Beck v. Sheldon.....	18, 108
Baxter ads. Barker.....	390	Becker v. Boon.....	433
Baxter v. Bell.....	90, 178	Becker v. Hallgarten.....	391
Baxter ads. Belton.....	187, 314	Becker ads. Haverly.....	248
Baxter v. Drake.....	42	Becker v. Howard.....	432
Baxter ads. Parker.....	39	Becker ads. Myers.....	48, 250
Baxter v. Troy & Boston R. Co....	313	Becker ads. Payne.....	277, 381
Baxter ads. White.....	110, 162	Becker ads. People.....	196
Bay ads. Albany Fire Ins. Co.....	273	Becker v. Torrance.....	196
Bayliss v. Cockcroft.....	190, 453	Beckert ads. Wohlfahrt.....	161, 191, 310
Bayne ads. Western R. Co.....	12, 362	Beckwith, Matter of.....	1, 25, 36, 170
Bay State Shoe & Leather Co. ads.		Beckwith ads. Carter.....	34
Cunningham.....	116, 309	Beckwith ads. Newman.....	396
Beach ads. Carman.....	13	Beckwith v. Union Bank.....	48
Beach v. Colles.....	106	Beckwith v. Whalen.....	69, 218
Beach v. Cooke.....	297, 474	Bedell v. Carll.....	213, 324
Beach v. Cram.....	130, 147, 246, 461	Bedell v. Case.....	210
Beach ads. Gilbert.....	34	Bedell v. Chase.....	28, 186
Beach ads. Matthews.....	365	Bedell v. Long Island R. Co.....	379
Beach v. Nixon.....	261	Bedell v. Shaw.....	6
Beach ads. People.....	135	Bedford v. Terhune.....	256
Beach ads. Presbyterian Soc.....	417	Beebe ads. Brisbane.....	106
Beach ads. Rae.....	448	Beebe v. Estabrook.....	6, 161, 406
Beach v. Raritan, etc., R. Co.....	115, 183, 432	Beebe v. Griffing.....	20, 160
Beach v. Reynolds.....	2, 255	Beebe v. Griffing.....	348
Beach v. Smith.....	373	Beebe ads. Hill.....	298, 365
Beach ads. Weyer.....	16, 283	Beebe v. Mead.....	18, 202
Beal v. Finch.....	474	Beebe ads. New York Life Insurance	
Beale ads. Bank of Beloit.....	392	and Trust Co.....	7, 449
Beale v. Parrish.....	319	Beebe ads. Platt.....	62, 320
Beals v. Benjamin.....	450	Beebe v. Pyle.....	64
Beals ads. Foster.....	187, 293	Beebe ads. Thomas.....	180, 360
Beals v. Home Ins. Co.....	229	Beecher v. Conradt.....	455
Bean ads. Coleman.....	210, 448	Beecher ads. Foote.....	31, 180

	Page.		Page.
Beecher ads. Gates .....	191, 318	Beman ads. Babcock.....	317
Beecher ads. Tilton.....	17, 67	Bement ads. Smart .....	295, 296
Beekman v. Bigham.....	432	Bench v. Cooke .....	370
Beekman v. Bonsor.....	445, 463	Bender ads. Belknap. ....	410
Beekman ads. Genet.....	465	Bender ads. Hilton .....	95, 306, 471
Beekman ads. Miner.....	414	Bendetson v. French.....	223
Beekman ads. Remsen.....	423	Benedict v. Benedict .....	222, 262
Beers ads. Burr .....	290	Benedict ads. Bigelow.....	66, 111
Beers v. Caussidiere.....	66	Benedict ads. Bradt.....	122
Beers ads. Goodale .....	246	Benedict v. Cowden.....	325
Beers v. Hendrickson.....	52, 245, 251	Benedict v. De Groot.....	183
Beers v. Reynolds.....	351	Benedict v. Field.....	391
Beers v. Shannon .....	68, 359, 424	Benedict v. Huntington.....	46
Beggs, Matter of.....	23	Benedict ads. Jones.....	356
Behan v. People.....	140	Benedict ads. Lange .....	245, 366
Beier ads. Feldman.....	293, 355	Benedict v. Ocean Ins. Co... ..	231
Beirne v. Dord.....	389	Benedict ads. People .....	22
Beisiegel v. New York Cent. R. Co..	184, 313, 377	Benedict ads. Powers.....	393
Bell ads. Baxter .....	90, 178	Benedict ads. Shoemaker .....	414
Bell v. Dagg.....	321	Benham ads. Steele.....	301
Bell v. Day.....	451	Benjamin ads. Beals.....	450
Bell v. Dix .....	387	Benjamin v. Benjamin.....	253, 261
Bell v. Leggett.....	65	Benjamin v. Saratoga Co. M. F. Ins.	233
Bell ads. Luddington.....	353	Co .....	233
Bell ads. People.....	72	Benkard v. Hutton .....	445
Bell v. Pierce.....	428	Benner ads. Southard.....	63, 298
Belden ads. Allerton.....	451	Bennett ads. Alexander.....	99
Belden ads. Hackett.....	22	Bennett v. Austin.....	287
Belden ads. Johnson.....	400	Bennett v. Bates.....	171, 243, 293
Belden v. Meeker.....	188, 405	Bennett v. Brown.....	68, 254
Belfast and Angelica Plankroad Co.		Bennett v. Buchan.....	11, 130, 353, 392
v. Chamberlain.....	358	Bennett v. Buffalo, City of.....	431
Belger v. Dinsmore.....	73, 74	Bennett ads. Collins.....	247
Belknap v. Bender .....	410	Bennett v. Cook.....	247, 412, 413
Belknap v. Sealey .....	285, 454	Bennett ads. Crowfoot.....	389
Belknap v. Waters.....	16	Bennett ads. Fleischmann.....	26, 263, 359
Beller ads. Chamberlain .....	398		360
Bellinger v. Gray .....	431	Bennett ads. Fry.....	263, 361, 438, 442
Bellinger v. New York Cent. R. Co..	460	Bennett v. Garlock.....	6, 164, 445
Belloni v. Freeborn.....	68, 421	Bennett ads. Gould.....	357
Belloni ads. Milburn.....	147	Bennett ads. Hathaway.....	103, 214
Belmont v. Coleman .....	183	Bennett ads. Huff .....	187, 193
Belmont v. Comen.....	219, 417	Bennett ads. Hunt.....	264, 361
Belmont ads. Ford.....	371	Bennett v. Judson.....	11
Belmont ads. Nelson.....	236	Bennett v. Lake.....	14
Belmont ads. O'Mahoney.....	186, 381	Bennett v. Lycoming Co. Mut. Ins.	
Belmont v. O'Brien.....	369, 412, 444, 445	Co.....	232
Belmont v. Pouvert .....	108	Bennett ads. More.....	263
Belmont Branch Bank v. Hoge.....	322, 452	Bennett v. New York Cent. R. Co. .	80
Belton v. Baxter.....	187, 314	Bennett v. North British, etc., Ins. Co.	231
		Bennett ads. People .....	16, 132, 134

	Page.		Page.
Bennett ads. Sandford.....	264	Best v. Thiel.....	62, 170, 294
Bennett ads. Southworth.....	19, 439, 453	Best ads. Sistare.....	62
Bennett v. Stevenson.....	295	Best v. Staple.....	399
Bennett ads. Thompson.....	32	Bettee ads. Smith.....	391
Bennett v. Van Syckel.....	39	Beth Hamedrash Society ads. Isaacs..	37
Bennett ads. Walter.....	454	Bethlehem Iron Co. ads. Dibbald....	10
Bennett v. Whitney ...	304, 306, 341, 359	Betsinger v. Chapman. ....	271
Bennett ads. Woodworth.....	113	Bettinger ads. Buffalo, City of.....	302
Benninghoff v. Agricultural Ins. Co..		Betts ads. Chatham Bank....	450
	8, 183, 232	Betts v. Garr .....	194
Bensel v. Gray.....	402	Betts v. June .....	258, 352
Bensel v. Lynch.....	396	Betts ads. People .....	86
Benson ads. Abrahams.....	357	Bevan v. Cooper....	424, 472
Benson ads. Marsh.....	252	Beveridge ads. Lytle.....	198, 464, 466
Bent ads. Finley .....	472	Bevier v. Covell .....	451
Bentley v. Columbia Ins. Co.....	228	Beyea ads. Morris .....	473
Bentley ads. Foot .....	174, 392	Beyer v. People.....	139
Bentley v. Smith .....	114, 385	Bicknell v. Lancaster City and County	
Bentley ads. Thrasher.....	48, 63	Fire Ins. Co .....	225
Bentley v. Vanderheyden.....	289	Biddlecom ads. Fredenburgh....	18, 189
Bentley v. Waterman .....	24	Biddlecum ads. Stewart.....	52, 224
Benton v. Martin .....	315, 326	Bidenlac v. Smith.....	8, 400
Benton ads. People .....	72	Bidwell v. Astor Mut. Ins. Co. 5, 114, 145	
Benton v. Wickwire.....	283		252, 385
Berdan ads. Graves.....	259	Bidwell v. North-western Ins. Co	
Berdan v. Sedgwick.....	453		236, 237
Berdell v. Berdell ..	18, 191	Bierce ads. Booth .....	9
Berdell ads. Parkhurst.....	384	Bierling ads. Moses .....	10
Berdell ads. Roberts.....	412	Bigelow v. Benedict.....	66, 111
Bergen ads. Bailey.....	47	Bigelow v. Hall.....	182
Bergen ads. Briggs.....	21	Bigelow v. Orr .....	106, 146
Bergen v. Carman.....	17, 211	Bigelow ads. Plimpton .....	18, 49, 119
Bergen ads. People.....	103	Bigham ads. Beekman.....	432
Bergen v. Powell..	102, 326, 341	Bigler ads. Adee.....	130
Bergen ads. Powers.....	96	Bigler v. Hall .....	112
Bergen v. Urbahn.....	295	Bigler v. Morgan .....	147, 457
Bergen v. Wyckoff.....	35	Bigler ads. Mut. Life Ins. Co ...	295, 458
Bergen v. Carman.....	297	Bigler ads. Nat. Bank of Newburgh.	
Berger ads. Tenney .....	37, 53		289, 352, 355, 423
Bergin v. Wemple.....	369	Bigler v. New York Cent. Ins. Co.	
Bergmann v. Jones.....	151, 263, 264		230, 233
Berkshire Woolen Co. v. Juillard....	68	Bigsby v. Warden.....	126
Berlin ads. Duncan.....	57, 311	Billings ads. Catlin.....	19
Bernard ads. Stedeker.....	20, 415	Billings v. Mayor, etc .....	94, 331
Bernhard v. R. & S. R. R. Co....	187, 311	Billings v. Robinson.....	119, 270
Bernhardt v. Lymburner.....	296	Billings ads. Wheeler .....	178
Berry ads. Hill.....	87	Billington v. Wagoner.....	453
Bertholf v. O'Reilly .....	87, 97, 418	Bills v. National Park Bk.....	49
Bertles v. Nunan .....	271	Bills v. New York Cent. R. Co.....	77
Besel v. New York Cent., etc., R. Co..	281	Bingham ads. Blydenburgh.....	317
Besson v. Southard.....	266	Bingham ads. Braman..	147, 153, 187, 293



	Page.		Page.
Bingham v. Disbrow. ....	419	Blackmar v. Thomas. ....	202, 367
Bingham ads. Harmony. .76, 78, 107,	355	Blackmar ads. Voltz. ....	12, 184
	364	Black River Bank v. Page. ....	420
Bingham v. Weiderwax. ....	154, 155	Black River Ins. Co. v. New York State	
Binghamton Bridge Co. ads. Chenango		Loan and Trust Co. ....	229
Bridge Co. ....	405	Black River Ins. Co. ads. Whitney. .	227
Binninger ads. Barker. .168, 179, 195,	397	Black River & Utica R. Co. v. Clarke.	
Binninger ads. Clark. ....	381		118, 172, 373
Binninger ads. Crater. ....	351	Black River, etc., R. Co. ads. Salter. .	311
Binninger ads. Murray. ....	9	Blacksmith v. Fellows. ....	220
Binninger ads. Orchard. ....	108	Blackstock v. N. Y. & Erie R. Co. . .	76
Binsee ads. Getty. ....	321, 422	Blackstone v. Alemannia Fire Ins. Co.	226
Binse ads. Niblo. ....	106, 112	Blackwell ads. Muldoon. ....	33
Binse v. Paige. .154, 284, 288, 291,	445	Blain ads. Sager. ....	88
Binse v. Wood. ....	420	Blair v. Bartlett. ....	206
Birch ads. Campbell. ....	298	Blair v. Claxton. ....	127, 255
Birdsall v. Clark. ....	302	Blair ads. Dillaye. ....	35
Birdsall ads. Patterson. .293, 441, 450,	474	Blair v. Erie Ry. Co. ....	79
Birdsall v. Russell. ....	324	Blair ads. Heyne. ....	266
Birkbeck v. Ackroyd. ....	272	Blair ads. Lansing. ....	415
Birmingham Iron Foundry v. Glen		Blair v. Wait. ....	171
Cove Starch Manuf'g Co. ....	283	Blake v. Buffalo Creek Co. ....	373
Birmingham Iron Foundry v. Hatfield.	357	Blake v. Buffalo Creek R. Co. ....	446
Bisbey v. Shaw. ....	264, 364	Blake ads. Carpenter. ....	266
Bishop v. Bishop. ....	204	Blake v. Ferris. ....	278
Bishop ads. Edwards. ....	433, 470	Blake v. Lyons & Fellows' Mfg. Co. 36,	384
Bishop ads. Goodyear. ....	32	Blake ads. Penn. Coal Co. .293, 356,	363
Bishop v. Olcott. ....	399	Blake ads. Third Nat. Bank. ....	62, 274
Bishop ads. Tucker. ....	472	Blake ads. Tyson. .	466
Bissell v. Balcom. ....	408	Blakeley v. Calder. ....	245, 348
Bissell v. Campbell. ....	74	Blakeslee ads. Hubbell. ....	293
Bissell ads. Freeson. ....	456	Blakeman ads. Noyes. ....	447
Bissell v. Hamlin. ....	34	Blakeman ads. Warner. ....	131, 211, 279
Bissell v. Kellogg. ....	206, 450	Blanchard ads. Champney. ....	191, 214
Bissell v. Michigan Southern & North-		Blanchard v. N. J. Steamb. Co. .152,	400
ern Indiana R. Co. ....	121	Blanchard ads. Pattison. ....	349, 359
Bissell v. N. Y. Cent. R. Co. .68, 79,	152	Blanchard ads. People. ....	141
Bissell v. Pearce. ....	13, 300	Blanchard ads. Poucher. ....	54
Bissell v. Saxton. ....	340, 420, 421	Blanchard ads. Thompson. .29, 169,	191
Bissell v. Studley. ....	32		299, 300, 408, 448, 475
Bissell ads. Sturgess. ....	76, 146	Blanchard v. Trim. ....	408
Bissell v. Torrey. ....	400, 434	Blanchard v. Western Union Tel.	
Bitter ads. Buffalo Catholic Inst. ....	113	Co. ....	338, 432, 459
Bitter v. Rathman. ....	275	Blanck ads. Thurber. ....	51
Black v. Caffé. ....	326, 345	Bland ads. Field. ....	42, 168
Black ads. Glacius. ....	105, 281, 283	Blank ads. Raubitschek. .325, 407,	475
Black ads. Prunyn. ....	249	Blanke v. Bryant. ....	273
Black ads. Torry. ....	216, 394	Blant v. Gabler. ....	210
Black Hawk Gold Mining Co. ads.		Blatchford ads. Leavitt. ....	56
Carpenter. ....	269	Blaufres v. People. ....	474
Blackman ads. Clarke. ....	302	Blauvelt v. Woodworth. ....	281, 283

	Page.		Page.
Bleakley ads. Colwell .....	168, 206, 207	Board of Apportionment ads. People.	268, 329, 406
Bleakley ads. Emerson.....	2, 175, 442	Board of Assessors ads. People...	85, 122
Bleecker v. Johnston.....	173	213, 284, 371, 427, 428, 529	
Blend v. People.....	137	Board of Comm'rs v. Taylor....	404
Blewitt v. Baker.....	112	Board of Education of Brooklyn ads.	
Bliss ads. Baker.....	211, 337	Reed... ..	106, 114
Bliss v. Greeley... ..	163	Board of Education ads. Stephens.	115, 315
Bliss v. Johnson.....	6, 43, 204	Board of Education of Fairport v.	
Bliss v. Lawrence.....	340	Fonda.....	394
Bliss v. Matteson .....	110	Board of Education of New York ads.	
Bliss ads. McKinnon .....	188	Coulter .....	113
Bliss ads. Merchants' Bank .....	412	Board of Education of New York ads.	
Bliss ads. Mills .....	337	Donovan .....	335
Bliss ads. Nehrboss .....	352	Board of Education of New York ads.	
Bliss ads. Rocky Mountain Nat. Bk..	269	O'Leary .....	171, 331, 340
Bliss ads. Shaler & Hall Quarry Co..	268	Board of Excise of Ontario Co. v.	
Bliss v. Sheldon .....	461	Garlinghouse .....	193
Bliss v. Shwartz.....	90, 380	Board of Excise v. Sackrider ....	194, 340
Bliven v. Hudson R. R. Co.....	76	Board of Fire Commissioners ads.	
Bliven v. Seymour .....	465, 472	People.....	22, 31, 86, 330, 331
Block v. Columbian Ins. Co.....	231	Board of Health ads. Gardner .....	328
Blodgett, Matter of.....	328, 334	Board of Improvement ads. People...	340
Blodgett v. Morris .....	475	Board of Metropolitan Police ads.	
Blodgett ads. Kerr.....	47	People... ..	86, 123, 194, 267, 330, 331, 339
Blogg ads. Miannay.....	21, 28		365
Blood ads. Cramer .....	211	Board of Police and Excise ads. Peo-	
Blood ads. Victory .....	20	ple.....	71, 86
Bloodgood v. Bruen.....	415	Board of Tax Commissioners ads.	
Bloomer ads. Brooklyn Trust Co ....	418	People .....	24
Bloomer ads. Hunt.....	30	Board of Town Auditors of Esopus	
Bloomer v. People.....	143, 144	ads. People.....	219
Bloomer v. Sturges .....	294	Board of Water Comm'rs v. Lansing.	339
Bloomfield, etc., Gas-light Co. v.		Boardman ads. Burrill....	473
Calkins .....	213	Boardman v. Gaillard .....	178, 380, 401
Bloomfield v. Ketcham.....	416	Boardman v. Lake Shore, etc., R. Co.	
Bloss ads. North .....	285, 353	97, 119, 184, 243, 255, 373, 402, 413	
Blossburg, etc., R. Co. v. Tioga R.		Boardman ads. People.....	16, 28, 86, 261
Co .....	109, 380	Boardman v. Tompkins, Supervisors	
Blossom v. Barrett .....	277, 365	of... ..	428
Blossom v. Dodd.....	74	Boas ads. People.....	27, 133, 134, 138
Blossom v. Estes.....	50	Bockes v. Hathorn.....	16, 447
Blossom v. Griffin.....	78	Bockes v. Lansing.....	4, 88, 361, 384
Blossom v. Wycoming Fire Ins. Co..	232	Bodine v. Exchange Fire Ins. Co ...	232
Blot v. Boiceau.....	202	Bodine v. Killeen.....	274
Blumenthal v. Anderson. ....	54, 65	Bodine v. Moore.....	196
Bly ads. Trustees, etc .....	386	Bodine ads. Smith.....	14, 349
Blydenburgh v. Bingham .....	317	Bodle v. Chenango Co. M. Ins. Co.	231, 233
Blydenburgh ads. Brown.....	290	Boehen v. Williamsburgh Ins. Co....	231
Blydenburgh v. Cotheal.....	30	Boeklen v. Hardenbergh.....	441
Blydenburgh v. Johnson.....	156, 290		
Blydenburgh v. Thayer .....	45, 249, 368		

	Page.		Page.
Boerum ads. Cleveland.....	63	Booth ads. People.....	361, 366
Boerum v. Schenck .....	447	Booth v. Powers.....	115, 150, 205, 325
Boese v. King.....	46	Booth v. Spuyten Duyvil Mill Co....	112
Bogardus ads. Parker.....	462		148
Bogardus ads. Rosendale Manufactur- ing Co.....	117	Booth v. Swezey .....	180, 453
Bogart ads. People's Bank of City of New York.....	326	Boots v. Washburn....	110, 218, 340, 359
Bogart ads. Tuthill..	195, 371, 455	Boppe ads. Gordon.....	350
Bogart ads. White.....	247	Boppe ads. Holtz .....	318
Bogert v. Morse.....	172	Bordwell v. Collie....	5, 393
Bogert v. Vermilya.....	359	Boreel v. Lawton.....	127, 259
Boice ads. Decker .....	382	Bork ads. People.....	138, 140
Boiceau ads. Blot.....	202	Borst v. Corey .....	411
Boisaubin v. Reed.....	259, 264, 398	Borst ads. Dayton.....	118
Boldt v. New York Cent. R. Co.....	280	Borst v. Empie .....	123, 156
Bolen v. Crosby.....	45, 268, 385	Borst ads. Fonda.....	152, 461
Bolles v. Duff.....	21, 298	Borst v. Spelman.....	274
Bolt ads. Dillingham.....	299	Borthwick ads. Brinckerhoff.....	446
Bommer v. Am. Spiral Spring, etc., Co.....	117, 407, 413	Boston, etc., Ry. Co. ads. Troy & Boston R. Co .....	374
Bonati v. Welsch .....	92	Boston & Albany R. Co., Matter of ...	374
Bond ads. Conkey.....	12	Boston & Albany R. Co. ads. Booth ...	281
Bond v. Willett.....	195	Boston & Albany R. Co. ads. Flike....	280
Bonesteel v. Mayor, etc.....	334	Boston & Albany R. Co. v. Village of Greenbush.....	376
Bonesteel ads. Sullivan.....	320	Boston & Albany R. Co. ads. Murphy.	281
Bonnaffé, Matter of.....	49	Boston & Albany R. Co. ads. People..	97
Bonner v. Frauenthal.....	179		376
Bonner ads. Rogers.....	50	Boston & Albany R. Co. ads. Rose....	379
Bonnell ads. Babcock.....	90, 491	Boston & Albany R. Co. ads. Sprong...	313
Bonnell v. Griswold.....	269, 270, 361	Boston Carpet Co. v. Journeay .....	13
Bonnett ads. Graff.....	445	Boston & Hoosic R. Co., Matter of....	166
Bonnett ads. Hoyt.....	201, 412		167, 185, 344, 375
Bonsor ads. Beekman.....	445, 463	Bostwick v. Atkin.....	216, 426
Bonynge v. Field .....	52	Bostwick v. Baltimore & Ohio R. Co..	74
Boody ads. Rockford, etc., R. Co.	32, 50	Bostwick ads. Brinckerhoff.....	62, 344
Bookstaver v. Jayne.....	322	Bostwick v. Burnett.....	48, 63
Boon ads. Becker.....	483	Bostwick ads. Fishkill Savings Insti- tution .....	58
Boon ads. Moss ..	207, 214, 390	Bostwick ads. Frankfield.....	256, 284
Boone v. Citizens' Sav. Bank .....	62	Bostwick v. Goetzel.....	43
Boorman v. Atlantic & Pacific R. Co.	184	Bostwick ads. Ingersoll .....	34, 37
Boos v. World Mut. Life Ins. Co.	35, 238	Bostwick ads. McCartney.....	252, 443
Booth v. Pierce.....	9	Bostwick v. Menck .....	48, 381
Booth v. Boston & Albany R. Co.....	281	Bostwick ads. People..	68
Booth v. Bunce.....	152, 169, 208, 269	Bostwick ads. Phelps.....	113
Booth v. Cleveland Rolling Mill Co.	108	Bostwick v. Van Voorhis ....	61, 361, 422
Booth v. Eighmie.....	407	Bosworth v. Vandewalker .....	246
Booth v. Farmers and Mechanics' Nat. Bank. ....	116, 173, 249, 350	Botchford ads. Todd.....	194
Booth ads. Gould .....	218	Bouchaud v. Dias.....	46, 126
Booth v. Kehoe .....	210, 260	Boughton v. Flint.....	424, 470
		Boughton v. Otis .....	268

	Page.		Page.
Bouton ads. Van Rensselaer .....	18	Bracket v. Barney .....	153
Boutwell ads. Sands.....121, 235,	381	Brackett v. Baum .....	297
Bowe ads. People .....	42	Brackett v. Harvey.....64, 299,	300
Bowen v. Beck.....130,	292	Bradford v. Fox.....	355
Bowen ads. Briggs .....	248, 438	Bradley v. Aldrich.....	4
Bowen ads. Brown .....	460	Bradley v. Angell.....	395
Bowen ads. Fowles.....	263	Bradley ads. Barker... ..	178, 410
Bowen ads. Hardmann.....	48	Bradley v. Buffalo, etc., R. Co.....	376
Bowen v. Mandeville.....206,	213	Bradley ads. International Bank...59,	99
Bowen v. Newell.....184,	319		173, 452
Bowen v. N. Y. C. R. Co.....	79	Bradley ads. Kilmer.....	24
Bowen ads. People .....	98, 100	Bradley v. Kingsley.....	110
Bowen ads. Smith.....	444	Bradley v. Mirick.....	175
Bowen v. True.....	42	Bradley v. Mut. Benefit Life Ins. Co.	238
Bower ads. Dunham.....	206	Bradley v. N. Y. Cent. R. Co....279,	314
Bowers ads. Emerson.....	197	Bradley ads. Schultz.....	407
Bowers v. Johnson.....	298	Bradley ads. Tabor.....	460
Bowers ads. People.....	142	Bradley ads. Taylor.....118,	148
Bowers v. Tallmadge.....	30	Bradley ads. Van Bergen .....	28
Bowery Nat. Bk. v. Duryee.....	42	Bradley v. Ward.....	431
Bowery Nat. Bk. v. Mayor, etc.....	105	Bradley v. Wheeler.....	408
Bowery Nat. Bk. ads. Shipsey.....	325	Bradner, Matter of..... 103, 125,	203
Bowery Sav. Bk. ads. Warhus.....	61	Bradner ads. Chemung Canal Bk....	350
Bowles v. Hubermann.....	220	Bradner v. Faulkner ..144, 243,	365, 471
Bowles ads. Miller.....	63	Bradner ads. Hicks.....	475
Bowling Green Sav. Bk. v. Todd....	53	Bradner v. Howard..... ..160,	170, 251
Bowman v. Agricultural Ins. Co. ..	231	Bradner v. Strange.....65, 185,	351
Bowne v. Lynde .....	288	Bradstreet ads. Sunderlin.....	263
Bowns ads. Delaware, etc., R. Co....	105	Bradt v. Benedict.....	122
Bowyer v. Schofield.....	188	Brady, Matter of.... 35, 43, 224,	333, 334
Bowyer ads. Turnbull.....	321	Brady v. Brundage.....	42
Boyce v. Brockway.....	115	Brady ads. Devlin.....	325
Boyce v. People.....	142	Brady v. Donnelly.....	33
Boyce v. Watrous.....	171	Brady v. Mayor, etc.....	301
Boyd ads. Briggs.....114,	162	Brady v. McCosker.....2, 251,	343, 359
Boyd v. Cummings.....	320	Brady ads. People.....	201, 216
Boyd v. De La Montagnie.....	275	Brady v. Reed.....	178
Boyd ads. Nicoll.....26,	382	Brady ads. Smith.....111,	114
Boyd v. Schlesinger.....	455	Brady v. Supervisors.....	419
Boyd ads. Southard.....	110	Bragelman v. Dane.....	300
Boyer v. Schofield .....	247, 254	Bragle ads. People. ....	134
Boylan ads. Fitzpatrick. ....	282	Brague v. Lord .....	192
Boylan ads. Weyh .....	454	Braham v. Bingham .....	293
Boyle v. City of Brooklyn..... ..71,	366	Brainard ads. Buff. & N. Y. R. Co.165,	374
Boyle ads. Roe. ....	24	Brainard v. Cooper.....	344
Boylston v. Wheeler... ..	371	Brainard v. Jones.....68,	145
Boynton v. Andrews.....	269	Brainerd v. Dunning .....	46, 195
Boynton v. Hatch .....	269	Brainerd v. N. Y. & Harlem R. Co... 316	
Boynton ads. Misland.....191,	475, 476	Braman v. Bingham.....147,	153, 187
Brabin v. Hyde.....	408	Bramhall v. Ferris .....	445, 464
Brace v. New York Cent. R. Co.....	376	Bramhall ads. Lathrop.....178,	442

	Page.		Page.
Bramhall ads. Stewart.....	323, 452	Briant v. Trimmer .....	30, 32
Brand v. Focht .....	66, 408, 409	Brick v. Brick .....	424, 462
Brand ads. Hutchinson .....	194, 196	Brick v. Remsen.....	151
Brand ads. Raux.....	414	Brickley v. Wells....	273
Brandon v. Avery.....	98	Bridge ads. Loeschigk.....	210
Brandon v. People .....	476	Bridger v. Pierson .....	19, 157
Brandow v. Brandow .....	469	Bridger v. Weeks.....	30
Brandreth ads. People.....	439	Bridges v. Hyatt .....	474
Brandt ads. Crofut.....	196	Bridges v. Supervisors of Sullivan Co.	435
Brandt ads. De Voe.....	208, 212	Bridges v. Wyckoff .....	217
Braniff ads. Wyeth .....	451	Bridgford v. Crocker.....	146
Bransby ads. People.....	133	Bridgford ads. Van Giessen.....	424, 468
Brasher ads. Van Wyck .....	153, 161	Bridgeport Ins. Co. v. Wilson .....	420
Brassell v. N. Y. Cent., etc., R. Co.	313	Briggs ads. Bailey.....	361, 371, 463
Bray v. Farwell.....	245	Briggs v. Bergen.....	21
Brayman ads. Hathaway .....	300	Briggs v. Bowen .....	248, 438
Braynard v. Hoppock.....	399, 449	Briggs v. Boyd.....	114, 162
Brayton ads. McCabe.....	211	Briggs v. Briggs. ....	352
Brazill v. Isham.....	41, 363	Briggs v. Central Nat. Bank.....	58
Breasted v. Farmers' Loan and Trust Co.....	240	Briggs v. Davis.....	287, 445
Breese ads. Carr .....	210	Briggs ads. Hubbard .....	208
Breese v. U. S. Tel. Co.....	432	Briggs ads. Lutes .....	306
Brenham ads. Miller .....	92, 246, 413	Briggs ads. Murphy .....	210, 407
Brennan ads. Burnham.....	180	Briggs v. New York Cent., etc., R. Co.	379
Brennan ads. Duncan.....	57, 368	Briggs v. North American, etc., Ins. Co.....	234
Brennan ads. English....	338	Briggs v. Oliver.....	130, 294, 300
Brennan v. Mayor, etc.....	129, 363	Briggs v. Partridge.....	11
Brennan ads. Robinson .....	195, 249	Briggs ads. People .....	96
Brennan ads. Stevens .....	174, 208, 441, 475	Briggs ads. Radway .....	461
Brennan ads. Storey.....	66	Briggs v. Rowe .....	70
Brennan ads. Watson .....	397	Briggs v. Sizer .....	104, 342
Brennan v. Willson .....	48	Briggs v. Waldron.....	31, 213, 440
Bresler ads. Tallman.....	18	Brigham v. Tillinghast.....	46
Breslin ads. Brooklyn, City of....	71, 302	Brigham ads. Wiley.....	29
Brett ads. Delaney.....	33, 129	Brill ads. Clearwater.....	340
Brevoort v. Brevoort .....	348	Brill ads. Doughty .....	219
Brevoort v. Brooklyn, City of....	71, 431, 432	Brill v. Tuttle .....	45, 178, 342
Brevoort v. Grace .....	101, 221	Brimmer ads. Adair.....	198, 426
Brewster ads. Darling .....	26, 383	Brinckerhoff v. Bostwick.....	62, 344, 419, 446
Brewster ads. Gage .....	289	Brink ads. Freligh.....	249
Brewster v. Silence .....	178, 215, 322, 408	Brink v. Hanover Fire Ins. Co.....	234
Brewster v. Silliman.....	88	Brinkerads. Hercules Mut. Life Assur. Soc.....	108
Brewster v. Striker .....	464	Brinkerhoff ads. People.....	267, 372, 419
Brewster v. Stryker .....	169, 385	Brinkerhoff ads. Smith.....	64
Brewster v. City of Syracuse.....	98, 101	Brinkley v. Brinkley .....	15, 22, 246, 278
Brewster Iron Mining Co. ads. Mar- vin.....	285, 387	Brintnall ads. Van Voorhis.....	92, 278
Brewers and Maltsters' Ins. Co. ads. Burt .....	237	Brisbane v. Adams.....	8
		Brisbane v. Beebe.....	106
		Brisbane ads. Considerant.....	347

	Page.		Page.
Brisbane v. Delaware, etc., R. Co....	119	Brooklyn, City of, ads. Hogan.....	14
Brisbane ads. De Witt.....	291	Brooklyn, City of, ads. Kingsley.....	72
Brisbane ads. Salisbury.....	8	Brooklyn, City of, ads. Leonard .283,	306
Bristow ads. Staats.....	351	Brooklyn, City of, ads. Marsh.....	88
British Com. L. Ins. Co. v. Comm'rs of Taxes and Ass. ....122, 242, 428,	429	Brooklyn, City of, ads. Mills.....	304
British, etc., Steam Packet Co. ads. Smith .....	80	Brooklyn, City of, ads. Nassau Gas- light Co .....	213, 429
Britton v. Lorenz.....48, 178, 189,	193	Brooklyn, City of, ads. New York, etc., Co.....	70, 71, 305
Broadbent ads. Middlebrook....	252, 354	Brooklyn, City of, ads. People. 70, 71,	303
Broadway Bk. ads. Van Blarcom....	146		404
Broadway Ins. Co. ads. Burr .....	177	Brooklyn, City of, ads. Riley.....	108
Broadway, etc., R. Co. ads. Dickson..	28	Brooklyn, City of, ads. Sage.....71,	101
Broadway, etc., R. Co. ads. Poulin..	80	Brooklyn, City of, ads. Sorchan.....	71
Broadway, etc., R. Co. ads. Putnam..	81	Brooklyn, City of, ads. Strong....70,	152
Brock ads. Tyler.....	64		164, 375
Brockway ads. Boyce.....	115	Brooklyn, Common Council of, ads. People.....	267, 339
Brockway ads. Clark.....382,	395	Brooklyn Benevolent Society ads. Heney....	13
Broistedt v. South Side R. Co. of Long Island.....	6	Brooklyn City R. Co. ads. City of Brooklyn .....	306
Brokhahus ads. Schiele....151, 182,	353	Brooklyn City, etc., R. Co. ads. Fallon.	22
Bronk v. New York & N. H. R. Co..	27	Brooklyn City, etc., R. Co. ads. Low- ery .....	378
Bronner v. Frauenthal.....	191	Brooklyn City R. Co. ads. Mulhado.	186, 312
Bronson ads. Newton....27, 198, 402,	409	Brooklyn City, etc., R. Co. ads. Nolan.	313
Bronson ads. Rodes.....	107	Brooklyn City R. Co. ads. Spooner.	309, 312
Bronson v. Tutthill.....190,	327	Brooklyn Cross-town R. Co. ads. Cregin .....	1
Bronson v. Wiman.....185,	390	Brooklyn Cross-town R. Co. ads. Strong .....	119, 190, 212
Brookfield v. Remsen .....	396, 397	Brooklyn Fire Ins. Co. ads. Baptist Church .....	175, 226, 234, 410
Brookhaven, Trustees of, v. Strong..	204	Brooklyn Fire Ins. Co. ads. Cromwell.	234
	354	Brooklyn Fire Ins. Co. ads. Mayor of New York....	180, 234
Brooklyn, Assessors of, ads. People..	101	Brooklyn Gas-light Co. ads. Wetmore.	461
	430	Brooklyn Grocers' Mfg. Assoc. ads. Gilchrist .....	182
Brooklyn, City of, Matter of Applica- tion of.....	71, 217	Brooklyn Improvement Co. ads. Ter- ritt .....	246
Brooklyn, City of, ads. Architectural Iron Works.....	36	Brooklyn Life Ins. Co. ads. Jones.	241, 442
Brooklyn, City of, ads. Atlantic Dock Co .....	70, 329, 459	Brooklyn Park Co. v. Armstrong.	102, 167
Brooklyn, City of, ads. Boyle.....71,	366	Brooklyn, etc., R. Co., Matter of Ap- plication of .....	98, 373, 374, 375
Brooklyn, City of, v. Breslin.....71,	302	Brooklyn, etc., R. Co. ads. Eppendorf.	313
Brooklyn, City of, ads. Brevoort..71,	431	Brooklyn, etc., R. Co. ads. People.	71, 95, 374
	432		
Brooklyn, City of, v. Brooklyn City R. Co .....	306		
Brooklyn, City of, ads. Brooklyn Steam Transit Co.....	302, 375		
Brooklyn, City of, ads. Chapman....	43		
Brooklyn, City of, ads. Gray.....96,	305		
Brooklyn, City of, ads. Guest....44,	88		
Brooklyn, City of, ads. Hardy.70, 304,	305		
Brooklyn, City of, ads. Heard....152,	374		

	Page.		Page.
Brooklyn, etc., R. Co. ads. Smedis.	314, 441	Brown v. Cayuga & Susquehanna R. Co.	338, 374
Brooklyn, etc., R. Co. ads. Stewart.	81, 279	Brown v. Champlin	68
Brooklyn R. Co. ads. Mangam	312	Brown v. Champney	214, 358, 450
Brooklyn & Newtown R. Co. ads. Sheridan	312	Brown ads. Church	215, 408
Brooklyn Steam Transit Co. v. City of Brooklyn	302, 375	Brown v. Clark	274, 463
Brooklyn Trust Co. v. Bloomer	418	Brown v. Crooke	235
Brookman v. Hamill	35, 97, 399	Brown ads. Cumming	412
Brookman v. Kurzman	156, 401	Brown v. Curtiss	214, 216, 317, 322, 407
Brookman v. Metcalf	235, 316	Brown ads. Dawley	6, 153, 163, 164, 205
Brookman v. Milbank	439	Brown ads. Doty	177, 206, 207, 367
Brooks v. Avery	450	Brown v. Elwell	357
Brooks v. Buffalo & Niagara Falls R. Co.	314	Brown v. Fargo	37
Brooks ads. Chapman	367	Brown ads. Galen	177, 298, 301
Brooks ads. Clarke	20, 327	Brown v. Gallaudet	31, 127
Brooks v. Curtis	353	Brown v. Goodwin	89, 337
Brooks ads. Dresser	34	Brown ads. Harrington	323
Brooks v. Hall	29, 50	Brown ads. Harris	39
Brooks v. Harrison	151, 263, 440	Brown ads. Hough	104
Brooks ads. Johnson	402, 411	Brown ads. Jaffray	321
Brooks ads. Marvin	3, 13, 174	Brown v. Keeney Settlement Cheese Association	22
Brooks v. Mexican Nat. Constr. Co.	26	Brown v. Kiefer	299
Brooks ads. People	95, 144	Brown ads. Knapp	39, 91, 221, 243, 472
Brooks v. Schwerin	272, 311	Brown ads. Lawrence	277
Brooks v. Van Every	384	Brown v. Leavitt	320
Broome v. Taylor	360	Brown v. Leigh	28, 33, 126, 367
Broschell v. Phinney	301	Brown v. Lyon	470
Brotherton v. People	132, 141	Brown v. Mailer	179
Brouwer ads. Cotheal	117	Brown ads. Malins	402
Brouwer ads. Gill	471	Brown v. Mayor, etc.	262, 302, 328
Brouwer v. Harbeck	121	Brown ads. McGregor	175, 458
Brower ads. Gates	271	Brown v. McKee	354
Brower v. Peabody	391	Brown ads. Millard	190
Brown, Matter of	465	Brown ads. Miller	219
Brown ads. Allen	12, 346	Brown v. Montgomery	208
Brown ads. Appleby	3	Brown v. New York Cent. R. Co.	104, 186, 377, 379
Brown ads. Bain	10	Brown v. Nichols	1, 247
Brown ads. Baldwin	69	Brown ads. Paine	456
Brown ads. Bank of Chenango	94, 431	Brown ads. Patterson	220, 337
Brown ads. Barnes	110, 120, 208	Brown v. Penfield	320
Brown ads. Bennett	68, 254	Brown v. Pentz	354
Brown v. Bowen	460	Brown v. People	94, 136, 220, 436
Brown v. Brown	20, 370, 466, 469	Brown ads. Rawley	163, 173
Brown v. Blydenburgh	290	Brown ads. Reformed Prot. Dutch Church	386, 417
Brown v. Buffalo & State Line R. Co.	311, 377	Brown v. Richardson	187, 360, 474
Brown v. Cattaraugus Co. Mut. Ins. Co.	229, 235	Brown ads. Risley	422
		Brown ads. Rockwell	156, 189, 246
		Brown ads. Roosevelt	269

	Page.		Page.
Brown v. Sigourney.....	29	Bryant v. Bryant.....	173
Brown ads. Simson.....	68	Bryant ads. Burns.....	258
Brown v. Snell.....	129	Bryant ads. Foote.....	273, 444
Brown ads. Steward.....	195	Bryant v. Poughkeepsie Mut. Ins. Co.	226
Brown ads. Stewart.....	351	Bryant v. Samuels.....	92
Brown v. St. Nicholas Ins. Co.....	237	Bryce v. Lorillard Fire Ins. Co....	230, 285
Brown ads. Terwilliger.....	198	Buchan ads. Bennett...11, 130, 353,	302
Brown v. Thurber.....	177	Buchan v. Rintoul.....	336, 425
Brown ads. Tuckerman.....	235	Buchanan v. Exchange Fire Ins. Co..	226
Brown v. Volkening.....	337, 383	Buchanan ads. Losee.....	5, 437
Brown v. Weber.....	113, 410	Buck v. Burk.....	107
Brown ads. Willard.....	175	Buck v. Remsen ..	33
Brown ads. Williams.....	394, 395	Buckelew ads. Webb.....	247
Brown ads. Williamson.....	337	Bucking, Premises of, ads. Matter of	
Brown ads. Wood.....	200, 202, 345	Lien of Dowling.....	124
Brown ads. Woolsey.....	274	Buckingham v. Corning.....	293, 450
Browne ads. Wright.....	17	Buckingham v. Dickinson.....	22
Browne v. Taylor.....	31	Buckingham ads. Isham.....	118
Brown v. Vredenburgh.....	450	Buckley ads. Fliess.....	289, 345
Brownell ads. Albany Northern R.		Bucklin v. Bucklin...105, 287, 413,	444
Co.....	102, 166, 218	Buckman ads. Murphy.....	282
Brownell v. Ruckman.....	25	Buckman ads. Ward.....	400
Brownell v. Winnie.....	15, 324	Buckmaster v. Thompson.....	402
Browning v. Home Ins. Co.....	230	Buckmiller ads. Lamb.....	155
Browning ads. Stone ..	407, 409	Budlong ads. Morris.....	287, 414
Bruce v. Burr.....	364, 392, 410	Buel v. Lockport, Trustees of Village	
Bruce ads. City Bank of Columbus...	120	of.....	168, 205, 305, 406, 430
	475	Buell ads. McGregor..18, 27, 34, 126,	197
Bruce v. Davenport. ...	36, 114, 212, 327	Buel v. N. Y. Cent. R. Co.....	312
Bruce ads. Harrington.....	23	Buel v. People.....	134, 141
Bruce v. Nat. Bank.....	130, 260	Buel v. Southwick.....	469
Bruce v. Platt.....	269	Buffalo, City of, Matter of..166, 306,	173
Bruce v. Tilson.....	411	Buffalo, City of, ads. Allen..89, 346,	365
Bruen ads. Bloodgood.....	415	Buffalo, City of, ads. Babcock.....	306
Bruff v. Mali.....	208	Buffalo, City of, ads. Baldwin.....	219
Brummer v. Cohn.....	240	Buffalo, City of, ads. Bennett.....	431
Brumskill v. James.....	191, 249	Buffalo, City of, v. Bettinger.....	302
Brundage ads. Brady.....	42	Buffalo, City of, ads. Brusso.304, 306,	314
Brundage v. Brundage.....	470	Buffalo, City of, ads. Buffalo City	
Brundage ads. People.....	100, 245, 341	Cemetery.....	85, 405, 428, 430
Brundrett ads. Cushman.....	25	Buffalo, City of, ads. Buffalo & Ham-	
Brunner v. Meigs.....	456, 468	burgh Turnpike Co.....	304
Brush v. Barrett.....	412	Buffalo, City of, ads. Crocker.....	109
Brush v. Lee.....	103, 251, 419	Buffalo, City of, ads. Ganson.....	14, 167,
Brush ads. Levy.....	409		305, 306
Brush ads. Young.....	200	Buffalo, City of, ads. Hall.....	44, 302
Brussee ads. Barry.....	240	Buffalo, City of, ads. Hatch.....	44
Brusso v. Buffalo, City of...304, 306,	314	Buffalo, City of, ads. Heywood...4,	430
Bryan v. Baldwin.....	115, 368	Buffalo, City of, v. Holloway ..	305, 360
Bryan v. Stewart.....	198	Buffalo, City of, ads. Howell..43, 89,	101
Bryant ads. Blanke.....	273		222, 305, 406



	Page.		Page.
Buffalo City of, ads. Ketchum.....	305	Buffalo & State Line R. Co. ads. Burtis	77
Buffalo, City of, ads. Le Conteulx.....	305, 427	Buffalo & State Line R. Co. v. Erie,	
Buffalo, City of, ads. Mark.....	124, 415	Supervisors of.....	427
Buffalo, City of, ads. Meech.....	43, 305	Buffalo & State Line R. Co. ads. Fero.	378
Buffalo, City of, ads. Messenger.....	301	Buffalo & State Line R. Co. ads. Roth.	81
Buffalo, City of, ads. Read.....	254, 302, 341	Buffalo & State Line R. Co. ads.	
Buffalo, City of, ads. Tift.....	95, 306, 447	Wohler.....	152
Buffalo ads. Union Steamboat Co. 86,	429	Buffalo Water-works Co. ads. Wall..	363
Buffalo, City of, ads. Wells.....	89	Buffett v. Troy & Boston R. Co. ....	79
Buffalo Catholic Inst. v. Bitter.....	113	Bugbee ads. Bank of the State of In-	
Buffalo City Bank v. Codd.....	58	diana.....	8, 70
Buffalo City Bank v. Howard.....	352	Buhler ads. New York Fire Dept....	327
Buffalo City Bank v. North-western		Bulger v. Albany Railway.....	377
Ins. Co.....	237	Bulkeley v. Keteltas.....	266
Buffalo City Cemetery v. City of Buf-		Bull ads. McKyring.....	366
falo.....	85, 405, 428, 430	Bull ads. People.....	102
Buffalo, Corry & Pittsburgh R. Co.		Bull v. Rice.....	449
ads. Metz.....	63	Bull v. Sims.....	316
Buffalo Creek Co. ads. Blake....	373, 446	Bullard ads. Losee.....	270
Buffalo, etc., R. Co. ads. Bradley ...	376	Bullard v. Pearsall.....	192
Buffalo, etc., R. Co. ads. Conhocton		Bullard v. Raynor.....	453
Stone Road.....	338	Bullard v. Saratoga Victory Mfg. Co.	459
Buffalo, etc., R. Co. ads. Falconer...	435	Bullard v. Sherwood.....	243, 246
Buffalo, etc., R. Co. ads. Fenner ....	77	Bullions v. Robertson.....	386, 446
Buffalo & Erie R. Co. ads. French...	75	Bullis v. Montgomery.....	88, 397
Buffalo, etc., R. Co. ads. Howe....	12, 355	Bullock ads. White.....	200
Buffalo, etc., R. Co. v. Johnson ....	28	Bullymore v. Cooper.....	224
Buffalo, etc., R. Co. ads. Shepard ...	377	Bulson v. Lohnes.....	41
Buffalo, etc., R. Co. v. Stigeler.....	155	Bumstead v. Div'nd Mut. Ins. Co.....	229, 231
Buffalo, etc., R. Co. ads. Sweet.....	98, 167, 306	Bunce ads. Booth.....	152, 169, 208, 269
Buffalo Fire Ins. Co. ads. O'Neil ...	226	Bunce ads. Hasbrouck.....	344
	229, 231	Bundy v. Bundy.....	464
Buffalo Savings Bank v. Newton.....	20	Bunge v. Koop.....	2, 90
Buffalo Steam Engine Works v. Sun		Bunn ads. Mead.....	367
Mut. Ins. Co.....	234	Bunn ads. Rose.....	157
Buffalo & Allegany R. Co. v. Cary...	118	Bunn v. Vaughn.....	287, 371, 444
Buffalo & Erie R. Co. ads. Penn. ....	77	Bunnell ads. Merchant.....	271, 273
Buffalo & Hamburg Turnpike Co. v.		Bunten v. Orient Mut. Ins. Co....	26, 230
City of Buffalo.....	304	Bunting ads. Willard.....	259
Buffalo Hydraulic Ass'n ads. Evan-		Burbank v. Fay.....	72, 370, 403
gelical Lutheran St. John's Orphan		Burch v. Newbury.....	352
Home.....	117, 163	Burch ads. Smith.....	465, 466
Buffalo & Jamestown R. Co. v. Gif-		Burch ads. Yates.....	201, 448
ford.....	373	Burchard ads. Voorhees.....	157
Buffalo & N. Y. R. Co. v. Brainard.....	165, 374	Burchell ads. James.....	106
Buffalo & N. Y. City R. Co. v. Dudley.	118	Burckle v. Eckhart.....	253, 349
Buffalo & Niagara Falls R. Co. ads.		Burdett ads. Harris.....	16
Brooks.....	314	Burdett v. Lowe.....	126
Buffalo & Pittsburgh R. Co. v. Hatch.	373	Burdick ads. Albany City Sav. Inst..	297
Buffalo & State Line R. Co. ads.			385
Brome.....	311, 377	Burgett ads. Ballard.....	390, 391

	Page.		Page.
Burger ads. Sheehy .....	314	Burr ads. Leonard.....	471
Burgess ads. Levy .....	112, 434	Burr ads. Peck.....	111
Burgess v. Simonson.....	38, 172	Burr v. Stenton.....	257
Burgess ads. Stone .....	369	Burr v. Wilcox ...	243, 269
Burhans ads. Thompson ....	90, 153, 163	Burrall v. Bushwick R. Co.....	118, 362
	430	Burrell v. Root.....	409
Burhans v. Van Zandt.....	7, 246, 433	Burrill ads. Battell.....	221
Burk ads. Buck .....	107	Burrill v. Boardman.....	473
Burke, Matter of .....	332	Burritt v. Silliman.....	444, 474
Burke ads. Hill .....	448	Burroughs v. Tostevan.....	282, 359
Burke ads. Meacham.....	39	Burrows v. Baldwin .....	349, 441
Burke ads. Miller.....	184	Burrows v. Erie Ry. Co.....	312
Burke ads. Nicoll.....	257	Burrows v. Smith.....	61
Burke v. Nichols .....	154	Burrows v. Whittaker.....	392
Burke ads. Wolfe.....	437	Burt v. Brewers and Maltsters' Ins.	
Burkhalter v. Second Nat. Bank.....	323	Co .....	237
Burkhardt v. McClellan.....	50, 327, 396	Burt v. Burt.....	197
Barkitt v. Harper.....	256, 282	Burt v. Dewey .....	147
Burkle v. Luce.....	1, 88, 126, 174, 251	Burt v. Dutcher .....	150, 389
Burleigh v. Gebhard Fire Ins. Co....	230	Burt ads. Hermans.....	447
Burlington, etc., R. Co. ads. Hiller..	100	Burt ads. Second Nat. Bk. of Oswego.	
	417		61, 62
Burmeister, Matter of Petition of....	334	Burt ads. Traphagen.....	402, 409
Burnell v. N. Y. Cent. & H. R. R. Co.	77	Burt ads. Weed.....	206, 278
	81	Burtis v. Buffalo & State Line R. Co..	77
Burnett ads. Bostwick.....	48, 63	Burtiss v. Howell .....	107
Burnett v. Phalon.....	437	Burton v. Burton .....	13, 276
Burnett v. Snyder.....	349	Burton ads. Durst.....	11, 184
Burnham ads. Bacon.....	321	Burton ads. People.....	218
Burnham v. Brennan... ..	180	Burton ads. Salt Springs Nat. Bank..	323
Burnham v. Butler.....	37	Burwell v. Jackson.....	456
Burnham ads. Holden .....	210	Bush ads. Adams.....	327
Burnham v. Onderdonk.....	371	Bush v. Cole.....	55
Burnham ads. Payne.....	170, 454	Bush ads. Edgerly.....	92
Burnham ads. Savage.....	446, 473	Bush v. Hicks.....	285, 343
Burnham ads. Sears .....	250	Bush v. Lathrop.....	45, 291
Burnham ads. Washburn.....	89	Bush v. Pettibone ..	223
Burnell v. Weld.....	186	Bush v. Prosser .....	187, 363
Burns ads. Bank of Albion.. ..	272	Bush ads. Union Bank.....	14, 358
Burns v. Bryant.....	258	Bush v. Westchester Fire Ins. Co....	228
Burns ads. Collins.....	77, 457	Bushnell v. Carpenter .....	472
Burns v. Erben .....	134, 266	Bushnell v. Chautauqua Co. Nat. Bk..	57
Burns ads. Myers .....	261	Bushwick R. Co. ads. Burrall....	118, 362
Burnside v. Matthews .....	363, 457	Bushwick R. Co. ads. Mahady....	217, 375
Burnside v. Whitney.....	41	Buswell v. Pioneer.....	178, 380
Burr v. American Spiral Spring Butt		Butchers and Drovers' Bank ads. Far-	
Co .....	108	mers and Mechanics' Bank....	316, 322
Burr v. Beers.....	290	Butler, Matter of Estate of.....	199
Burr v. Broadway Ins. Co.....	177	Butler ads. Adsit.....	130, 262
Burr ads. Bruce.....	364, 392, 410	Butler ads. Burnham.....	37
Burr ads. Coleman .....	211, 272	Butler v. Butler.....	111

# TABLE OF CASES.

499

	Page.		Page.
Butler v. Evening Mail Association..	11	Caldwell ads. Elsworth .....	224, 249
Butler ads. Jones. ....	351	Caldwell ads. Jaycox.....	47, 275
Butler v. Kidder.....	260	Caldwell v. Murphy .....	32, 181
Butler v. Lee.....	18, 250	Caldwell v. New Jersey Steamboat	
Butler v. Miller.....	37, 211, 284	Co .....	30, 79, 151, 188, 438
Butler v. Murray.....	400	Caldwell ads. Sanderson.....	264
Butler v. Patterson.....	474	Calebs ads. Mercantile Mut. Ins. Co..	225
Butler ads. Pike.....	169, 258	Calhoun ads. Trustees of Auburn	
Butler ads. Salles .....	20	Seminary.....	463
Butler v. Sprague.....	381	Calkins ads. Bloomfield, etc., Gas-	
Butler v. Stocking.....	349	light Co.....	213
Butler ads. Wehle.....	151, 346, 437	Calkins v. Falk .....	407
Butterfield ads. Rosa.....	420, 452	Calkins v. Isbell.....	123, 297
Butterfield v. Rudde.....	29, 99	Calkin v. Manhattan Oil Co....	20
Butterfly ads. Fowler. ....	240	Calkins ads. Merrill .....	157
Butterworth v. Crawford.....	161, 163	Calkins v. Smith.....	47, 249, 350
Butterworth v. Gould.....	4	Callaghan ads. Peck .....	176, 182
Butterworth v. O'Brien.....	452	Callahan ads. Darby .....	273, 346
Button ads. Fletcher.....	360	Callahan v. Mayor, etc.....	129
Button v. Hudson R. R. Co.....	314	Callanan v. Edwards .....	58
Button v. McCauley.....	271, 366	Calligan v. New York Cent., etc., R.	
Butts v. Campbell.....	207, 263, 366	Co.....	377
Butts ads. Curtis.....	163	Callmeyer v. Mayor, etc .....	108
Butts v. Wood.....	340	Calvo v. Davies.....	292, 361
Byrd v. Hall .....	180, 208	Calyer ads. Provoost.....	469
Byrne ads. Clancy.....	261	Cambridge Val. Nat. Bank v. Lynch.	22
Byrne ads. Daly.....	264	Cambridge Valley Bank v. Delano...	337
Byrne v. New York Central, etc., R.		Camden & Amboy R. and Transp. Co.	
Co.....	221, 312, 378	ads. Edsall .....	74
Byrne v. Weeks .....	78	Camden & Amboy R. Co. ads. Lamb.	74
Byrnes v. Baer .....	468	Camden & Amboy R. Co. ads. Maghee.	74
Byrnes v. City of Cohoes.....	304	Camden & Amboy R. and Transp. Co.	
Byxbie v. Wood.....	360	ads. Manhattan Oil Co.....	75
Cabot ads. Wright .....	12, 182, 191	Cameron, Matter of Petition of.....	332
Cady v. Allen.....	37, 93	Cameron v. Durkheim .....	416
Cady v. Conger.....	5, 152	Cameron ads. Jaycox.....	4, 30
Cady ads. Kortright.....	294	Cameron ads. Leland.....	174
Caffe ads. Black .....	326, 345	Cameron ads. Parmelee.....	389, 472
Cagger v. Lansing.....	164, 216, 410	Cameron v. Seaman .....	269
Cagwin v. Town of Hancock .....	436	Camp v. Ingersoll .....	384
Cahen v. Continental Life Ins. Co.	239, 359	Camp ads. Vassar .....	103
Cahen v. Platt.....	146, 391	Camp v. Wood.....	309
Cahill ads. Orcutt .....	38	Campbell ads. Adee .....	161
Cahill v. Palmer.....	6, 173	Campbell ads. Barnard.....	170, 208
Cahoon v. Bank of Utica.....	5, 124	Campbell v. Beaumont.....	466
Cain ads. McClure.....	7, 211	Campbell v. Birch.....	298
Cain v. Syracuse, City of.....	305	Campbell ads. Bissell.....	74
Calder ads. Blakeley.....	245, 348	Campbell v. Butts.....	207, 263, 366
Calder ads. White.....	438	Campbell ads. Coit.....	2
Caldwell ads. Collomb.....	47	Campbell v. Conner.....	397, 398
		Campbell v. Consalus.....	206

	Page.		Page.
Campbell v. Cothran.....	52, 196	Carl v. Ayers.....	266
Campbell v. Cypress Hill Cemetery..	85	Carleton v. Darcy..	26, 164, 256
Campbell v. Evans.....	94	Carley ads. Holmes.....	405
Campbell ads. Farnham.....	88	Carll ads. Bedell.....	213, 324
Campbell v. Foster.....	445	Carll ads. Ocean Nat. Bank of New York City.....	181
Campbell ads. Gourley.....	468	Carll ads. Robins.....	243
Campbell v. Hall.....	168	Carll v. Spofford.....	107
Campbell ads. Hofheimer.....	33, 396	Carlton v. Carlton.....	417
Campbell ads. Kelly.....	274	Carman v. Beach.....	13
Campbell ads. Lawrence...167, 169,	396	Carman ads. Bergen.....	17, 211, 297
Campbell ads. Merritt.....	193	Carman ads. Maher.....	40
Campbell ads. People..23, 267, 284,	331	Carman v. McIncrow.....	282
	332, 340, 428	Carman v. Plass.....	347
Campbell v. Perkins.....	65, 73, 366	Carman v. Pultz.....	38, 434, 456
Campbell ads. Phillips.....	116	Carmichael v. Carmichael.....	468, 469
Campbell ads. Post.....	282	Carnal ads. People.....	404
Campbell v. Rawdon.....	471	Carnegie ads. Jessup.....	92, 118
Campbell ads. Sands.....	228, 413	Carnes v. Platt.....	197, 248
Campbell v. Seaman.....	222, 338	Carnes ads. Taylor.....	147
Campbell v. Smith.....	154, 291, 294	Carnley ads. Ely.....	299
Campbell v. Vedder...284, 292, 356,	383	Carnley ads. Hull.....	298, 300, 301
Campbell ads. Wattson.....	30, 92, 299	Carnley ads. Johnson.....	37, 87, 185
Campbell ads. Witty.....	205	Carolus ads. Doty.....	19
Campbell v. Woodworth.....	48, 184	Carow ads. Floyd.....	470
Campbell ads. Young.....	20	Carpenter v. Black Hawk Gold Min- ing Co.....	269
Canandaigua Acad. Trustees v. Mc- Kechnie.....	3, 192, 287	Carpenter v. Blake.....	266
Canaday ads. Chrysler.....	309, 393	Carpenter ads. Bushnell.....	472
Canaday v. Krum.....	185	Carpenter v. Cohoes, City of...188,	304
Canaday ads. Simar.....	209, 343, 346	Carpenter v. Eastern Trans. Co... 400	
Canaday v. Stiger.....	455	Carpenter ads. Hubbell... 422	
Canal Appraisers ads. People.73, 267,	459	Carpenter ads. Lanning. 98, 106, 248,	249
Canal Board ads. People.....	73, 222		458
Canal and Walker Streets, Matter of..	20	Carpenter v. Le Count.....	55
Cancemi v. People.....	85, 134, 136, 233	Carpenter v. Manhattan L. Ins. Co... 127	
Candee v. Hayward.....	262	Carpenter ads. Merritt.....	194
Candee v. Lord.....	20, 172, 365	Carpenter v. Oswego & Syracuse R. Co.....	164
Candee v. Smith.....	249, 321	Carpenter v. People.....	253, 372, 434
Candee ads. Thacher.....	47, 345, 444	Carpenter ads. Potter.....	39, 104
Canfield v. Baltimore & Ohio R. Co. 75, 76		Carpenter ads. Randall.....	145
Canter v. People.....	138, 205, 454	Carpenter ads. Richardson.....	342
Cantrell ads. Conlin.....	276	Carpenter v. Roe.....	210
Cantrell ads. McVey.....	276	Carpenter ads. Schepp.....	323
Cantrell ads. Taddiken.....	321	Carpenter ads. Sheldon.....	246
Capron v. Thompson.....	416	Carpenter v. Soule.....	193, 214
Carbean ads. Flora.....	6, 15	Carpenter ads. Stilwell...31, 33, 183,	248
Card v. Card. ....	474		359, 396, 425
Cardell v. McNiel.....	215, 410	Carpenter v. Ward.....	172
Cardot v. Barney... ..	63, 379	Carpentier v. Willet... 14, 167, 194,	396
Carhart ads. French.....	156, 177		

	Page.		Page.
Carr v. Breese.....	210	Case v. Phelps.....	210
Carr v. Carr.....	163, 289, 441	Case ads. Worth.....	315
Carr v. Lewis.....	317	Casey v. James.....	46
Carr ads. People.....	267, 424	Casey v. New York Cent., etc., R. Co.	187
Carr ads. Spencer.....	221		378
Carr ads. Sutherland.....	418	Casey ads. People.....	138
Carr v. Thompson.....	414	Cash ads. Clement.....	130, 149
Carraher ads. Finnegan.....	170, 346	Casler v. Connecticut Mut. Life Ins.	
Carrington v. Crocker.....	170	Co.....	238
Carrington v. Florida R. Co.....	20	Casler v. Shipman.....	18, 205, 294, 460
Carrington ads. Russell.....	391	Casoni v. Jerome.....	197, 426
Carrington v. Ward.....	368	Cassidy, In Matter of Claim of, ads.	
Carroll v. Carroll.....	185	City of Brooklyn.....	405
Carroll ads. Case.....	52	Cassidy ads. Coe.....	258, 423
Carroll v. Charter Oak Co.....	231	Cassidy ads. Cunningham.....	195
Carroll v. Deimel.....	32, 100, 187	Cassidy ads. Dubois.....	362
Carroll ads. Farmers' Loan and Trust		Cassidy v. LeFevre.....	149, 151, 389
Co.....	30	Cassidy ads. Power.....	465, 467
Carroll ads. Olcott.....	358	Cassidy ads. Stryker.....	283
Carroll v. Staten Island R. Co.....	80, 252	Cassidy ads. Twombly....	27, 28, 295, 421
	400, 418	Cassin v. Delaney.....	37, 275
Carroll v. Upton.....	326	Cassity ads. People.....	428
Carroll ads. White.....	264	Castle v. Duryee.....	310
Carter ads. Beck.....	309	Castellanos v. Jones.....	49
Carter v. Beckwith.....	34	Castle v. Lewis.....	44
Carter v. Holahan.....	284, 288, 356, 420	Castle v. Noyes.....	246
Carter ads. Roberts.....	395	Castle ads. Wallace.....	19, 39, 50
Cartwright v. Maplesden.....	163	Caswell v. Davis.....	39, 437
Cartwright ads. Sage.....	195	Caswell ads. Hazard.....	349, 437
Cartwright v. Wilmerding.....	202	Cathcart v. Fire Department of City	
Caruthers ads. Prindle.....	273, 360	of New York.....	327
Carver v. Creque.....	69	Catlin v. Adirondack Co.....	24, 384
Cary ads. Barber.....	369	Catlin v. Billings.....	19
Cary ads. Buffalo & Allegany R. Co..	118	Catlin v. Grissler....	31, 294
Cary ads. Hun.....	12, 57, 65, 346, 438, 446	Catlin v. Gunter.....	452, 453
	447	Catlin ads. Hauptman.....	275, 282
Cary ads. McLean.....	250	Catlin ads. Johnston.....	250
Cary ads. Peck.....	462	Catlin v. Martin.....	272
Cary ads. Ratcliffe.....	155, 189	Catlin v. Ricketts....	25, 50, 418
Cary ads. Wanzer.....	289	Catlin v. Tobias.....	389
Cary ads. West.....	300	Cattaraugus Co. Mut. Ins. Co. ads.	
Cary v. White.....	192, 382	Brown.....	229, 235
Caryl ads. Hudson.....	100	Cattaraugus Co. Mut. Ins. Co. ads.	
Caryl v. Russell.....	65	Chaffee.....	229
Case ads. Bedell.....	210	Cattaraugus Co. Mut. Ins. Co. ads.	
Case v. Carroll.....	52	Plumb.....	231
Case ads. Donahue..	156, 180	Cattle v. Rochester City Bank.....	113
Case v. Hotchkiss.....	3, 53	Caughy v. Smith.....	17, 342
Case v. Mechanics' Banking Associ-		Caujolle v. Ferrie.....	277
ation.....	319	Cauldwell ads. Alexander.....	120
Case v. People.....	143	Caulfield v. Sullivan.....	424, 465

	Page.		Page.
Caulkins v. Hellman.....	409	Chamberlain ads. Chamberlain..	5, 87, 186
Caussidiere v. Beers.....	66		271, 468
Cavalli v. Allen.....	455	Chamberlain v. Choles.....	16, 295, 387
Caw v. Robertson.....	468, 471	Chamberlain v. Dempsey.....	295
Cawley ads. Owen.....	273, 415	Chamberlain ads. Elwell..	9, 438, 450
Caylus v. New York, Kingston &		Chamberlain ads. Humphrey.....	20
Syracuse R. Co.....	206	Chamberlain ads. Lyons, Town of...	435
Cayuga Co. Bank v. Warden..	14, 317, 318	Chamberlain v. Monterey Plankroad	
	367	Co.....	358
Cayuga Co. Nat. Bk. v. Daniels.....	93	Chamberlain v. Parker.....	129, 148
Cayuga Co. Nat. Bk. ads. Gould.....	212	Chamberlain v. People.....	143, 474
Cayuga Lake R. Co. v. Kyle.....	373	Chamberlain v. Pratt.....	433
Cayuga & Susquehanna R. Co. ads.		Chamberlain v. Prior.....	26, 208, 352
Brown.....	338, 374	Chamberlain ads. Robinson...	72, 309
Cayuga & Susquehanna R. Co. ads.		Chamberlain v. Sprague.....	153
Hance.....	377	Chamberlain ads. Stowell.....	247
Caywood v. Walker.....	217, 357	Chamberlain v. Taylor.....	164
Cazet v. Hubbell.....	297	Chamberlain v. Western Trans. Co..	405
Central Bk. of Brooklyn v. Hammett.	326	Chambers v. Clearwater.....	248, 350
Central Bank of Troy v. Heydorn...	153	Chambers v. Lewis.....	115, 195, 367
Central City Savings. Bk. v. Walker.	269	Chambers ads. Thurber.....	22, 466
	349	Champion v. Joslyn.....	3, 434
Central Nat. Bank ads. Briggs..	58	Champlain v. People.....	134, 361
Central Nat. Bank ads. Hatch.....	24	Champlain Trans. Co. ads. Dongan..	252
Central Nat. Bank ads. McRea.....	204		312, 400
Central Park Commissioners, Matter		Champlin ads. Brown.....	68
of.....	22	Champney v. Blanchard.....	191, 214
Central Park, etc., R. Co. ads. Adolph.	313	Champney ads. Brown.....	214, 358, 450
	380	Champney v. Coope.....	291
Central Park, etc., R. Co. ads. Fallon.	312	Chandler v. Terry.....	69
	342	Chapin v. Dobson.....	92, 178, 384
Central Park, etc., R. Co. ads. Maher.	19	Chapin v. Shafer.....	221
	313	Chapin v. Thompson....	47, 326, 327, 454
Central Park, etc., R. Co. ads. Twom-		Chapin ads. Wood.....	50, 153
ley.....	311	Chapman ads. Betsinger.....	271
Central R. Co. of N. J. ads. Harty...	377	Chapman v. Brooklyn, City of.....	43
Central R. Co. of N. J. ads. People.		Chapman v. Brooks.....	367
	252, 338, 459	Chapman v. Erie Ry. Co....	190, 280, 440
Cesar v. Karutz.....	258	Chapman v. Gates.....	217
Chadwick v. Crapsey.....	431	Chapin ads. Goold.....	75
Chadwick v. Fonner.....	180, 192	Chapman ads. Grant.....	46
Chadsey ads. Lee.....	191, 192, 451	Chapman ads. Hunt.....	22, 125, 363
Chadwick ads. Van Rensselaer.....	259	Chapman ads. Lewis.....	264
Chaffee v. Cattaraugus Co. Mut. Ins.		Chapman v. McCormick.....	440
Co.....	229	Chapman v. New Haven R. Co.....	79
Chaffee ads. Juillard.....	178	Chapman ads. People.....	241
Chalmers ads. James.....	20, 324	Chapman v. Phoenix Nat. Bank of	
Chalmers ads. People.....	48	New York.....	91
Chamberlain ads. Belfast & Angelica		Chapman v. Porter.....	445
Plankroad Co....	358	Chapman v. Rose.....	320
Chamberlain v. Beller.....	398	Chapman ads. Ruggles.....	241

	Page.		Page.
Chapman v. Sheldon .....	326	Cheney v. Arnold .....	271
Chapman v. Taftt. ....	415	Cheney v. Troy Hospital Assoc. ....	282, 283
Chapman v. Thomas .....	46	Cheney v. Woodruff. ....	297
Chapman v. Tibbits. ....	216	Cherry ads. Harvey. ....	225
Chapman v. West. ....	343	Chesebrough v. Tompkins. ....	38
Chapman v. White. ....	316	Cheshire ads. Lamont. ....	51, 337
Chappel v. Chappel .....	249	Chester v. Bank of Kingston. ....	178, 420
Chappell ads. Child .....	164, 259	Chester v. Dickerson .....	351
Charles v. People. ....	142	Chester v. Dorr .....	322
Charter Oak Co. ads. Carroll .....	231	Chester ads. Perry ....	53, 395
Chase ads. Bedell. ....	27, 186	Chesterman v. Eyland. ....	24, 348
Chase v. Chase. ....	89, 334	Chicago, etc., R. Co. v. Dane .....	104
Chase v. Hamilton Ins. Co. ....	226, 228	Child v. Chappell .....	164, 259
Chase v. Lord. ....	2, 229	Children's Aid Society v. Loveridge. ....	463
Chase ads. Moran. ....	31, 281	Children's Aid Society ads. Noyes. ....	27, 35
Chase v. N. Y. Cent. R. Co. ....	379		336
Chase v. Peck .....	291	Childs v. Smith .....	107
Chase ads. Pratt. ....	224, 367	Childs ads. Wegman. ....	99
Chase ads. Soule. ....	224	Childs' Exr. ads. Voorhis. ....	346
Chase ads. Sweet .....	466	Chipman v. Montgomery .....	125, 464
Chase v. Vanderbilt. ....	347	Chipman v. Palmer .....	338
Chase v. Wise .....	107	Chittenango Bank ads. Ehle .....	57
Chatham Bank v. Betts. ....	450	Chittenden ads. Roberts. ....	78
Chatfield ads. Maas. ....	315, 451	Chittenden ads. Robinson. ....	401
Chatfield v. Simonson .....	53, 193	Choles ads. Chamberlain. ....	16, 295, 337
Chauncey v. Arnold. ....	289	Cholwell ads. McCrackan. ....	19
Chautauqua Co. Bank v. Risley. ....	44, 120	Chouteau v. Suydam. ....	104, 197
	196	Chretien v. Doney. ....	257
Chautauqua Co. Bank v. White. ....	33, 131	Christ ads. Pease. ....	457
	464	Christal v. Kelly. ....	40, 50, 222
Chautauqua Co. Nat. Bank ads. Bush-		Christian ads. Whipple. ....	283
nell .....	57	Christie v. Gage. ....	87, 251
Cheesebrough, Matter of Petition of.		Christie v. Hawley .....	466, 468
	161, 335	Christie ads. Noe. ....	3, 325, 343
Cheesebrough ads. Place .....	384	Christy v. Homoeopathic M. L. Ins. Co. ....	238
Chegary v. Jenkins .....	340	Christopher v. Austin. ....	262
Chegary v. Mayor, etc. ....	428	Christopher v. Garr. ....	412
Chemical Bank ads. Peterson. ....	197, 198	Chrome Steel Co. ads. Paulding. ....	122
Chemical Nat. Bank ads. Frank. ....	58	Chrysler v. Canaday. ....	209, 393
Chemical Nat. Bank v. Kohner. ....	90	Chrysler v. Renois. ....	174, 316, 324
Chemical Nat. Bank ads. Robinson. ....	8	Chrystal ads. Graham. ....	175, 192, 243, 441
Chemung Canal Bank v. Bradner. ....	350	Chrystie v. Phyfe. ....	466
Chemung Canal Bank v. Judson. ....	62, 252	Chubbuck v. Vernam. ....	285
Chenango Bridge Co. v. Binghamton		Church, Matter of. ....	95, 166, 410
Bridge Co. ....	405	Church v. Brown. ....	215, 408
Chenango Bridge Co. v. Paige. ....	69, 98, 338	Church ads. Downer. ....	90, 402
	356	Church v. Howard. ....	179, 190, 192
Chenango Co. Mut. Ins. Co. ads.		Church v. LaFayette Fire Ins. Co. ....	228
Bodle. ....	231, 233	Church v. Malloy. ....	451
Chenango Co. Mut. Ins. Co. ads.		Church in Oliver St. ads. Madison	
Murdock. ....	226, 229, 230, 231, 232	Ave. Baptist Church. ....	286

	Page.		Page.
Church ads. People.....	15, 267	Clark v. Barnes.....	95, 99, 258
Church ads. Phoenix Ins. Co.....	320	Clark v. Binninger.....	381
Church ads. Sands.....	453	Clark ads. Birdsall.....	302
Church ads. Simmons.....	448	Clark v. Brockway. . . . .	382, 395
Church ads. Taylor.....	263	Clark ads. Brown.....	274, 462
Churchill, Matter of.....	44, 333	Clark v. Clark.....	175
Churchill ads. Despard.....	92, 470	Clark ads. Comm'rs of Pilots.....	329
Churchill v. Onderdonk.....	371	Clark ads. Cook.....	294
Churchill ads. Scofield.....	197	Clark v. Cottrell.....	157
Churchill ads. Utica, City of.....	60	Clark v. Davenport.....	89
Churchman v. Lewis.....	453	Clark ads. Davis.....	27
Cincinnatus, Town of, ads. Hathaway.	12, 434	Clark v. Dickinson.....	104
Cisco v. Roberts.....	357	Clark v. Dinehart. . . . .	20
Citizens' Gas Co. ads. Poughkeepsie		Clark ads. Easton.....	202
Gas Co.....	213, 222	Clark v. Eighth Ave. R. Co.....	312
Citizens' Sav. Bank ads. Boone.....	62	Clark ads. Fish.....	73
Citizens' Sav. Bank ads. Jemison....	18	Clark v. Ford.....	200, 412, 413
Citizens' Steamboat Co. ads. Rathbun.	79	Clark ads. Gardner.....	364, 390, 442
City Bank ads. Davison.....	78	Clark v. Gilbert.....	112, 148
City Bank v. Rome, etc., R. Co.....	66	Clark ads. Green.....	75, 206
City Bank of Brooklyn v. Dearborn..	187	Clark v. Griffith.....	4
City Bank of Brooklyn v. McChesney.		Clark ads. Gross.....	67
	179, 353, 370	Clark ads. Hagar.....	401
City Bank of Columbus v. Bruce.....	120, 475	Clark ads. Harris.....	214, 446
City Bank of New Haven v. Perkins.	326	Clark ads. Harrison.....	425
City Bank of Rochester ads. People..	59	Clark ads. Johnson.....	316
City Bank of Rochester ads. Whiting.	324	Clark v. Lake Shore, etc., R. Co. . .	411
City Building and Loan Co. v. Fatty.		Clark ads. Lancey.....	323
	26, 38, 450	Clark ads. Lawrence.....	109, 320
City Nat. Bank of Poughkeepsie v.		Clark v. Lourie.....	25
Phelps.....	215, 415, 421	Clark ads. Lyon.....	68, 243
Clack ads. Hosley.....	359	Clark v. Mackin.....	295
Claffin ads. Huntingdon.....	278	Clark v. Mayor, etc.....	105, 109, 148, 434
Claffin v. Ball.....	106	Clark ads. McGrath.....	325
Claffin v. Farmers and Citizens' Bank		Clark v. Merchants' Bank.....	326
of Long Island.....	59	Clark ads. Meyer.....	170, 440
Claffin v. Lenheim.....	9	Clark v. Miller.....	102, 341
Claffin v. Meyer.....	457	Clark v. New York Life Ins. and Trust	
Claffin v. Ostrom.....	130, 216	Co. . . . .	108
Claffin ads. Quimby.....	24, 301	Clark v. Norton.....	341, 430
Claghorn ads. Meeker.....	10, 346	Clark v. Owens.....	255
Clancy v. Bryne.....	261	Clark ads. People.....	136, 347, 372, 404
Clapp v. Fullerton.....	35, 126, 462	Clark ads. Phillips.....	345
Clapp v. Graves.....	254	Clark ads. Pixley.....	460
Clapp ads. Lathrop.....	476	Clark ads. Rector.....	218
Clapp ads. McIntyre.....	189	Clark ads. Rodermund.....	165
Clapp v. Meserole.....	198, 209	Clark v. Rowling.....	65
Clapp v. Rogers.....	353	Clark ads. Scranton.....	392
Clapp v. Schutt.....	397	Clark ads. Seeley.....	191, 346
Clark v. Baird.....	6, 165, 176, 208	Clark ads. Shoop.....	453, 454
		Clark v. Sickler.....	423



	Page.		Page.
Clark v. Sisson .....	316	Cleveland ads. Hicks.....	408
Clark ads. Supervisors of Monroe. 128,	244	Cleveland v. New Jersey Steamboat	
341, 421, 423		Co.....	79, 80, 313
Clark ads. Thayer.....	425	Cleveland Rolling Mill Co. ads. Booth.	108
Clark ads. Tiffany .....	444	Clews v. Bank of New York.....	59
Clark v. Tunnichliff.....	341	Clews ads. Hennequin.....	64
Clark v. Union Ferry Co .....	203	Clews v. Kehr .....	180
Clark ads. Wheeler.....	157, 460	Clews ads. People.....	134
Clark ads. Winslow .....	63, 295	Clickman v. Clickman.....	369
Clark v. Wise.....	210, 416	Clifford v. Dam.....	338
Clark v. Woodruff .....	68	Clift ads. Cox .....	88, 154
Clarke v. Blackman.....	302	Clift v. White.....	284, 296
Clarke ads. Black River & Utica R.		Clifton Air Cure ads. Hotchkiss .....	296
Co.....	118, 172, 373	Clinton v. Hope Ins. Co.....	229
Clarke v. Brooks .....	20, 327	Clinton v. Myers.....	459
Clarke v. Gibbons.....	413	Clinton ads. Western N. Y. Life Ins.	
Clarke v. Goodridge.....	51	Co.....	420
Clarke v. Howland .....	260	Clowes ads. Farmers' Loan and Trust	
Clarke v. Leupp.....	472	Co.....	116, 449
Clarke ads. People.....	123, 354	Cloonan ads. Simmons.....	157, 163, 460
Clarke v. Rochester, City of.....	28, 306	Clute ads. Clute.....	287
Clarke v. Rochester & Syracuse R.		Clute ads. Earl.....	90, 180
Co.....	76	Clute v. Jones .....	457
Clarke v. Sawyer .....	33, 253	Clute ads. Losee .....	309
Clarke ads. Schoop.....	450	Clute v. Newkirk .....	211
Clarke v. Sheehan.....	450	Clute ads. People... 97, 123, 164, 372,	404
Clarke v. Tunnichliff.....	124	Clutterback ads. Wheeler.....	160
Clarkson ads. Heermans .....	293, 381	Clyde ads. Lorillard.....	111
Clarkson v. Hudson R. R. Co.....	374	Clyde ads. People.....	23
Clarkson v. Skidmore .....	297	Clyde v. Rogers ..	25
Classon v. Cooley ..	14	Coates v. First Nat. Bk. of Emporia..	45
Clauson ads. Hale .....	22	Coates ads. Miller.....	380
Clayton v. Wardell.....	271	Coats v. Darby.....	188, 366, 438
Claxton ads. Blair .....	127, 255	Coats v. Donnell .....	61
Clearkin ads. O'Gara.....	197	Coats v. People .....	140
Clearwater v. Brill.....	340	Coatsworth ads. White ...	246
Clearwater ads. Chambers.....	248, 350	Cobb v. Dows.....	5
Cleghorn v. New York Cent., etc., R.		Cobb ads. Ford .....	204
Co.....	151, 281	Cobb v. Harmon.....	68, 224
Clemence v. City of Auburn.....	303	Cobb v. Hatfield.....	113, 212
Clemens v. Clemens .....	348	Cobb v. Knapp .....	11
Clement v. Cash.....	130, 149	Cobb v. Titus .....	421, 451
Clements v. Gerow.....	249	Coburn v. Morton.....	445
Clements ads. Marine Bank of New		Coburn v. Wheelock .....	422
York ..	324	Cochran v. Dinsmore .....	74
Clements ads. People.....	140	Cochran ads. Lampman.....	149
Clements v. Yturria .....	110, 389	Cochran ads. Welsh.....	437
Clerk of Marine Court ads. People...	129	Cochrane's Exr. v. Ingersoll .....	20
	266	Cock ads. Shaw.....	411
Cleveland v. Boerum .....	63	Cockcroft ads. Bayliss .....	190, 453
Cleveland ads. Evans.....	2	Cockcroft ads. Dillon .....	39, 415

	Page.		Page.
Cockcroft v. Muller .....	55, 380	Cole ads. People .....	136, 351
Cockcroft v. N. Y. & Harlem R. Co. .	147	Cole ads. Popham .....	437
Cockcroft ads. Vose .....	457	Cole v. Reynolds .....	351
Cocks ads. Barker .....	19, 177, 250	Cole v. Tyler .....	23, 210
Codd ads. Buffalo City Bank .....	58	Colegrove v. N. Y. & N. H. and N. Y. & H. R. Cos. ....	379
Codd v. Rathbone .....	58, 116, 363	Colegrove v. Tallman .....	351, 422
Codd ads. Sacketts Harbor Bank ....	58	Coleman v. Bean .....	210, 448
Coddington v. Davis .....	106, 318	Coleman ads. Belmont .....	183
Coe v. Cassidy .....	258, 423	Coleman v. Burr .....	211, 272
Coe v. Hobby .....	256	Coleman v. Crump .....	436
Coe ads. Matthews .....	38, 150, 202, 451	Coleman ads. Develin .....	115
Coe ads. Selover .....	217	Coleman v. Eyre .....	106, 407
Coe ads. Smith .....	30, 441	Coleman v. First Nat. Bk. of Elmira. .	57
Coffin v. Coffin .....	462	Coleman ads. Haden .....	112
Coffin ads. Mayor .....	348	Coleman v. Manhattan .....	6, 69, 87
Coffin v. McLean .....	395	Coleman v. People .....	142
Coffin v. Reynolds .....	359, 361, 405	Coleman v. Pleystead .....	28
Coffin ads. Tallman .....	256, 257, 259	Coleman ads. Purvis .....	223
Coffey v. Rose .....	339	Coleman v. Second Ave. R. Co. ....	18, 328
Coggill v. American Exchange Bk. .	325	Coleman v. Wade .....	41, 423
Coghlan v. Dinsmore .....	310	Coles v. Appleby .....	293
Cohen v. Dry Dock, etc., R. Co. ....	279	Colgate ads. Mayor, etc. ....	332
Cohn, Matter of Petition of .....	48	Colgate ads. People .....	155, 354
Cohn ads. Brummer .....	240	Colie v. Tift .....	21
Cohn v. Goldman .....	31, 179, 362	Collender v. Dinsmore .....	177
Cohn ads. Tobias .....	257, 469	Collender v. Phelan .....	187, 352, 384
Cohoes, City of, ads. Byrnes .....	304	Colles ads. Beach .....	106
Cohoes, City of, ads. Carpenter .....	188, 304	Collie ads. Bordwell .....	5, 393
Cohoes, City of, ads. McGaffin .....	406	Collier v. Munn .....	200
Cohoes, City of, ads. Platz .....	304	Collins v. Bennett .....	247
Cohoes, City of, ads. Ring .....	304	Collins v. Burns .....	77, 457
Cohoes, City of, ads. Sewell .....	303	Collins v. Collins .....	16, 277, 307
Cohoes Co. ads. Hays .....	338	Collins v. Drew .....	283
Cohoes Co. ads. Tremain .....	186, 338	Collins ads. Green .....	157
Coit ads. Battle .....	4, 45	Collins v. Hasbrouck .....	256
Coit v. Campbell .....	2	Collins ads. Leonard .....	279
Coit ads. Cowdrey .....	171	Collins ads. McKinney .....	248
Coit v. Patchen .....	462	Collins ads. Peck .....	354
Coit v. Stewart .....	12, 22	Collins ads. Requa .....	317
Coit ads. Winter .....	202	Collomb v. Caldwell .....	47
Colby ads. Klinck .....	264	Collumb v. Read .....	44, 351, 445
Colburn v. Morton .....	47, 48, 444	Colman v. Dixon .....	22
Cold Springs, Trustees of Village of, ads. Holdane .....	152, 219	Colman v. Shattuck .....	90, 430
Cole ads. Bush .....	55	Colson v. Arnot .....	325
Cole ads. Esterly .....	26, 243	Colt v. Owens .....	148
Cole v. Gourlay .....	164, 221, 388	Colt v. Phoenix Fire Ins. Co .....	227
Cole v. Hughes .....	354	Colt v. Sixth Ave. R. Co. ....	439
Cole v. Jessup .....	181, 365, 413	Colton v. Fox .....	469
Cole v. Malcom .....	417	Columbia College, Trustees of, v. Lynch .....	130, 402
Cole v. Mann .....	195		

	Page.		Page.
Columbia College, Trustees of, v. Thacher.....	156	Comm'rs of Emigration ads. Murphy.	165
Columbia Ins. Co. ads. Bentley.....	228	Commissioners of Highways ads. People.....	86, 95, 218
Columbia Ins. Co. v. Stevens.....	125	Comm'rs of Land Office ads. Allen...	262
Columbia Steam Nav. Co. ads. Leonard .....	308	Comm'rs of Pilots v. Clark.....	329
Columbia Turnpike Co. ads. Eggleston.....	310, 447	Commissioners of Pilots v. Pacific Mail Steamship Co. ....	357
Columbian Ins. Co. ads. Block .....	231	Commissioners of Pilots v. Vanderbilt.....	357
Columbian Ins. Co. ads. Evans.....	237	Commissioners of Police ads. People.	97, 193
Columbian Ins. Co. ads. Snow.....	236	Commissioners of Taxes ads. British Com. L. Ins. Co. ....	122, 242, 428, 429
Columbian Ins. Co. ads. Swinnerton.	188, 236	Commissioners of Taxes ads. Hoyt...	428
Columbian Ins. Co. ads. Wallerstein.	237	Commissioners of Taxes ads. Parker Mills.....	427
Colwell v. Bleakley.....	168, 206, 207	Commissioners of Taxes ads. People.	60, 101, 331, 405, 427, 428, 429, 430, 432
Colver ads. Griffin.....	149	Common Council of Brooklyn ads. People .....	372
Colvin v. Holbrook.....	12, 397	Common Council of Buffalo ads. People. ....	305
Colwell ads. Crocker.....	350, 450	Common Council of City of New York ads. People.....	336
Colwell v. Lawrence.....	27, 149	Common Council of Long Island City ads. People.....	86
Coman ads. Belmont .....	291	Common Council of Syracuse ads. People ..	267
Coman v. Lackey .....	269	Common Council of Troy ads. People.	19, 307
Coman ads. Pratt .....	320	Comstock v. Ames .....	212
Comer v. Cunningham.....	390, 391	Comstock ads. Bass .....	365
Comfort ads. Gilchrist.....	196	Comstock v. Drohan.....	291, 294
Comins v. Hetfield.. ..	24, 183, 443	Comstock ads. Gilbert .....	414, 424
Commerce Fire Ins. Co. ads. Reynolds.	227	Comstock ads. Giles.....	262
Commerce Ins. Co. ads. Arkell .....	227	Comstock v. Hier .....	318, 323, 476
Commercial Bank of Albany v. Ten Eyck.....	61, 310, 405	Comstock v. Johnson.....	157
Commercial Bank of Clyde v. Marine Bank .....	56	Comstock ads. McGregor ..	13, 16, 53, 161
Commercial Bank of Kentucky v. Varnum .....	310, 326	Comstock ads. Merchants' Nat. Bank of Syracuse .....	64, 322
Commercial Bank of Pennsylvania v. Union Bank of New York.....	59, 191	Comstock ads. People.....	340, 369
Commercial Bank v. Warren.....	349	Conaughty v. Nichols .....	360
Commercial Bank of Whitehall ads. Dillaye .....	447	Conaughty v. Saratoga Co. Bank..	18, 125
Commercial Fire Ins. Co. ads. O'Brien.	227	Conboy ads. Jennings.....	284, 471
Commercial Ins. Co. ads. Draper ....	236	Concklin v. Taylor.....	23, 123
Commercial Mut. Ins. Co. ads. Stevens	236	Concordia Savings Ass. v. Read..	117, 288
Commercial Warehouse Co. v. Graber.	43		450
Commercial Warehouse Co. ads. Merchants' Ex. Nat. Bank.....	452	Conde ads. Fuller .....	123
Commercial Warehouse Co. ads. Tyng.	361, 452	Condit v. Grand Trunk Ry. Co. ....	74
Commissioners ads. People .....	217	Condit v. Baldwin .....	11, 451
Commissioners ads. Thompson...	265, 292, 297	Cone v. Delaware, etc., R. Co.....	281
Commissioners of Cent. Park, Matter of.....	404		

	Page.		Page.
Cone v. Niagara Falls Fire Ins. Co. . . . .	225	Connelly v. New York Cent., etc., R. Co. . . . .	311
	233, 343	Conner ads. Arteaga. . . . .	42, 203
Cone v. Purcell . . . . .	63	Conner ads. Campbell. . . . .	397, 398
Congdon ads. Dows. . . . .	20	Conner ads. Embury. . . . .	92, 185, 205, 409
Congdon ads. Morgan. . . . .	56	Conner ads. Hoffman. . . . .	398
Congdon ads. Pitts. . . . .	317	Conner ads. Josuez. . . . .	29
Conger ads. Cady. . . . .	5, 152	Conner v. Mayor, etc. . . . .	96, 98, 339
Conger v. Conger. . . . .	17, 186	Conner ads. Parker. . . . .	211
Conger v. Duryee . . . . .	261	Conner ads. People. . . . .	216
Conger ads. Story. . . . .	114, 456	Conner ads. Prince. . . . .	151
Conger ads. Torrance. . . . .	157	Conner ads. Snebley. . . . .	24
Conger v. Weaver. . . . .	148	Conner ads. Valentine. . . . .	38, 450
Congregation Shaaer Hash Moin v. Halladay . . . . .	456	Conner ads. Wehle. . . . .	49, 151, 196, 396, 398
Congress and Empire Spring Co. ads. Knowlton. . . . .	111, 268	Connitt v. Reformed Protestant Dutch Church of New Prospect. . . . .	386
Congress Spring Co. v. High Rock Spring Co. . . . .	437	Connolly ads. Kimball. . . . .	128
Congreve v. Morgan. . . . .	338	Connors v. People. . . . .	476
Congreve v. Smith . . . . .	338	Conover ads. Adams. . . . .	157
Conhocton Stone Road v. Buffalo, etc., R. Co. . . . .	338	Conover v. Hoffman. . . . .	466
Conkey v. Bond. . . . .	12	Conover v. Mut. Insurance Co. . . . .	233, 234
Conkey v. Hart. . . . .	99, 300		454
Conkey v. People. . . . .	143	Conover ads. People . . . . .	329, 339
Conklin ads. Anable . . . . .	361	Conover ads. Sears. . . . .	39, 45, 113, 327
Conklin v. Furman. . . . .	358, 412	Conrad v. Trustees of Village of Ithaca. . . . .	303
Conklin v. Gandall. . . . .	361	Conradt ads. Beecher. . . . .	455
Conklin ads. Goodwin. . . . .	36, 315	Consalus, Matter of Accounting of. . . . .	199, 414
Conklin ads. Long Island R. Co. . . . .	154		452
Conklin ads. Phillips . . . . .	455	Consalus ads. Campbell. . . . .	206
Conklin v. Second Nat. Bk. of Oswego. . . . .	62	Considerant v. Brisbane. . . . .	347
Conklin ads. Tremper. . . . .	188, 476	Constantine ads. Van Winkle. . . . .	271
Conkling v. King . . . . .	3	Consumers' Ice Co. ads. Mott. . . . .	180, 279
Conkling ads. Nat. Mech. Bank Ass'n. . . . .	420	Continental Ins. Co. ads. Attorney-General, Matter of. . . . .	18, 23, 25, 26, 123
Conkling v. Shelley. . . . .	299		240, 241, 242, 325, 382
Conley v. Meeker . . . . .	192	Continental Ins. Co. ads. Haight. . . . .	232
Conley v. Palmer. . . . .	99, 258, 356, 404	Continental Ins. Co. ads. Phoenix Ins. Co. . . . .	130
Conlin v. Cantrell. . . . .	276	Continental Ins. Co. ads. Pindar. . . . .	230
Conn ads. Russell. . . . .	14	Continental Life Ins. Co. ads. Cahen. . . . .	239
Connecticut Fire Ins. Co. v. Erie Ry. Co. . . . .	229		359
Connecticut Life Ins. Co. ads. Attorney-General, Matter of. . . . .	242	Continental Life Ins. Co. ads. McNeilly. . . . .	239
Connecticut Mut. Life Ins. Co. ads. Casler. . . . .	238	Continental Life Ins. Co. ads. Pennie. . . . .	29
Connecticut Mut. Life Ins. Co. ads. Wells . . . . .	238	Continental Nat. Bank v. Nat. Bank of Commonwealth. . . . .	59, 170
Connecticut Mut. Life ads. Wheeler. . . . .	112	Continental Nat. Bank v. Townsend. . . . .	320
	239	Continental Nat. Bank ads. White. . . . .	322
		Contracting Board ads. People. . . . .	72, 267, 405
		Conway, Matter of Petition of. . . . .	334

	Page.		Page.
Conway ads. Roe .....	256	Coon v. Syracuse & Utica R. Co.....	280
Conway ads. Scott.....	276	Coope ads. Champney .....	291
Cook v. Banker .....	265	Coope ads. Haydock .....	46
Cook v. Barnes.....	450	Cooper ads. Bullymore.....	224
Cook v. Burr.....	178, 179	Cooper, Matter of.....	52, 96, 171
Cook ads. Bennett.....	247, 412, 413	Cooper ads. Bevan.....	424, 472
Cook v. Clark.....	294	Cooper ads. Brainard.....	344
Cook ads. Ely.....	53	Cooper ads. Develin .....	224
Cook v. Freudenthal.....	42, 448	Cooper v. Eastern Trans. Co.....	404
Cook v. Gregg .....	94	Cooper ads. Hodges.....	440
Cook v. Harris.....	152, 218	Cooper ads. Main.....	254
Cook v. Holt.....	56	Cooper ads. McDougall.....	285, 359
Cook ads. Hurd.....	371	Cooperstown, Trustees of, ads. Gor-	
Cook v. Jenkins.....	443	ham.....	303
Cook v. Kelsey .....	417	Cope ads. Martin.....	107, 388
Cook v. Litchfield.....	91, 319, 322	Cope v. Wheeler.....	4, 450
Cook v. Lowry.....	201, 473	Copeland ads. Davis.....	68
Cook v. McClure.....	69	Copley ads. Bearss.....	175, 179, 191
Cook ads. Miller.....	215, 408	Copley v. Rose.....	254
Cook ads. Mitchell.....	90	Copperman v. People.....	143
Cook v. Nellis .....	5	Corbett ads. Donnelly.....	91, 97
Cook v. N. Y. Cent. R. Co.....	311, 315, 379	Corbin ads. People.....	141
Cook v. N. Y. Floating Dry Dock Co.	15	Corcoran v. Holbrook.....	281
Cook ads. People .....	372	Corcoran v. Judson.....	145
Cook v. Phillips.....	70	Cordell v. N. Y. Cent., etc., R. Co.	
Cook v. Soule .....	261		313, 378
Cook v. Spraker.....	195, 261	Corey ads. Borst.....	411
Cook v. St. Paul's Church, Wardens		Corkins ads. VanKeuren... ..	291, 383
of.....	386	Corlies ads. White.....	104
Cook v. Travis.....	7	Cormier v. Hawkins .....	42
Cook ads. Van Alstyne.....	351	Cornell ads. Adee.....	47, 350
Cook v. Warren .....	361, 366	Cornell v. Barney .....	382
Cook v. Whipple.....	63, 249	Cornell ads. Cowee.....	207, 214
Cook ads. Woodruff.....	469	Cornell ads. Cowell.....	320
Cooke ads. Beach.....	297, 474, 370	Cornell v. Dakin .....	195, 363
Cooke v. Davis.....	110	Cornell ads. Denham.....	371
Cooke ads. Ely.....	224, 249	Cornell ads. Marsden.....	299
Cooke v. Meeker.....	243, 472	Cornell ads. Thurston.....	186, 450, 453
Cooke v. Millard.....	392, 409	Cornell v. Woodruff.....	297
Cooke v. State Nat. Bank of Boston..	59	Cornell v. Woolley .....	472
	387	Cornen ads. Belmont.....	418
Cooke ads. Wintermute.....	262	Cornen ads. President, etc.....	120
Cookingham v. Lasher.....	344, 349	Cornes ads. Gordon.....	98
Cooley ads. Olsson.....	14	Cornes v. Harris.....	338, 358
Cooley ads. Guilford, Town of.....	418	Cornes v. Wilkin.....	201, 372, 416
Coon ads. Grover .....	37, 97	Cornetti ads. People.....	142, 253
Coon v. Knap.....	3, 178, 380, 385	Corn Ex. Bk. v. Nassau Bk. .	59, 145, 170
Coon ads. Morton.....	422		184, 204, 244
Coon ads. Pendell.....	370	Corn Ex. Ins. Co. ads. Allison.....	237
Coon ads. Russell .....	454	Corn Ex. Ins. Co. v. Babcock.....	275
Coon v. Smith.....	69, 286	Corn Ex. Ins. Co. ads. Savage... ..	149, 225

	Page.		Page.
Cornfield ads. Stratton.....	26	Coulter v. Richmond.....	317
Corning ads. Buckingham.....	293, 450	Coulter ads. White.....	27
Corning v. Corning.....	14, 43	Countryman ads. Smith....	212, 364, 438
Corning ads. Cuykendall.....	44, 268	County Court of Jefferson Co. ads.	
Cornish v. Farm Buildings Fire Ins.		People.....	161
Co.....	227	Coursen ads. Hazewell.....	441
Corning v. Geib.....	474	Courtney v. Baker.....	28
Corning v. McCullough.....	117, 412	Court of Oyer and Ter. ads. People..	140
Corning ads. People.....	138	Covell ads. Bevier.....	451
Corning ads. Pullman.....	111	Covell v. Hill.....	115, 150, 390
Corning ads. Robert.....	465, 467	Covell ads. Hill.....	442
Corning ads. Schroepf.....	361, 412, 453	Covert ads. N. Y. L. Ins. and Trust	
Corning, Village of, ads. Sill.....	96	Co.....	246
Corning v. Slosson.....	253	Cowan ads. Allen.....	214
Corning v. Smith.....	294, 343	Cowan ads. Farmers' Bank of Wash-	
Corning v. Troy Iron and Nail Fac-		ington Co.....	29, 300, 441
tory.....	69, 170, 442, 460	Cowden ads. Benedict.....	325
Corning Ins. Co. ads. Teerpenning..	175	Cowdin v. Gottgetren.....	410
Cornwell v. Haight.....	390	Cowdin v. Teal.....	36
Cornwell v. Wooley.....	471	Cowdrey v. Coit.....	171
Correl v. Deimel.....	295	Cowdrey ads. Vose.....	121
Corse ads. Ireland.....	200	Cowee v. Cornell.....	207, 214, 320
Corse ads. Tracey.....	337, 388	Cowee ads. Joslin.....	38, 202, 212
Cortland Co. v. Herkimer Co....	181, 186	Cowell ads. Ruckman....	64, 65, 252, 339
Corwin v. Freeland.....	42	Cowen v. Newell.....	319
Corwin v. Corwin.....	153	Cowenhoven ads. Terrett....	170, 259, 262
Corwin v. N. Y. & Erie R. Co.....	376	Cowing v. Altman....	26, 39, 173, 320, 325
Cory v. Leonard.....	422	Cowing ads. James.....	39, 445
Corydon ads. Pitts.....	422	Cowing ads. Seymour.....	33, 315, 441
Cosgrove v. Ogden.....	279, 312	Cowles ads. People.....	100, 216
Cosgrove v. New York, etc., R. Co..	378	Cowley v. People.....	133
Costello v. Mayor, etc.....	330	Cowperthwaite v. Sheffield.....	44, 326
Coster v. Mayor, etc.....	4, 145	Cox v. Clift.....	88, 154
Coster's Executors ads. Union Bank.		Cox v. James.....	155, 461
	215, 407	Cox ads. McPherson.....	8, 399
Costigan v. Cuyler.....	19	Cox v. New York Cent., etc., R. Co.2	415
Cotheal ads. Blydenburgh.....	30	Cox v. People.....	134, 137, 142
Cotheal v. Brouwer.....	117	Cox ads. People.....	306
Cotheal v. Cotheal.....	465	Coyne v. Weaver.....	47
Cotheal v. Talmage.....	149	Cozine v. Walter.....	397
Cothran ads. Campbell.....	52, 196	Cozzens v. Higgins.....	182, 438
Cott v. Lewiston R. Co.....	374, 460	Crabb v. Young.....	199, 207
Cottenet ads. Fish.....	226	Craft v. Merrill.....	89, 245, 398
Cottrell, Matter of Will of.....	35, 464	Crafts v. Aspinwall.....	288
Cottrell ads. Clark.....	157	Crafts v. Mott.....	65, 422
Couch v. Delaplaine.....	470	Cragg ads. Riggs.....	425
Coughlin v. New York Cent. R. Co..	54	Cragin v. Lovell.....	357, 363
Coughtry v. Globe Woolen Co.....	309	Cragin v. New York Cent. R. Co....	77
Coulter v. Am. Merch. Un. Ex. Co..	192	Craig v. Town of Andes.....	436
	254, 311	Craig ads. Granger.....	25
Coulter v. Board of Education.....	113	Craig ads. Husted.....	111

## TABLE OF CASES.

511

	Page.		Page.
Craig v. Parkis .....	214	Crocker v. Buffalo, City of .....	109
Craig v. Rochester, etc., R. Co. ....	166	Crocker ads. Carrington .....	170
Craig ads. Ten Eyck .....	196, 290	Crocker v. Colwell .....	350, 450
Craig v. Ward..11, 31, 54, 212, 247,	295	Crocker v. Crocker .....	393
	296	Crocker ads. Croninger .....	92, 434
Craig v. Wells .....	156	Crocker v. Knickerbocker Ice Co ....	310
Craighead ads. Hauck .....	345, 359	Crocker v. Whitney .....	57, 62, 289
Craighead v. Peterson .....	9	Crookford ads. Hill .....	182
Crain ads. Beach .....	130, 147, 246, 461	Crofoot ads. Morse .....	475
Cram, Matter of Petition of .....	333	Croft v. Williams .....	199
Cram ads. Freeman .....	282	Crofut v. Brandt .....	196
Cram v. Union Bank .....	388	Crofut ads. Thomas .....	458
Cram v. Union Bank of Rochester...	350	Croghan v. Livingston .....	348
Cramer v. Blood .....	211	Crommelin v. New York & Harlem R. Co .....	78, 380
Crandall ads. Dodge .....	201, 293, 407	Cromwell v. Brooklyn F. Ins. Co ....	234
Crandall ads. Richardson .....	340, 407	Cromwell v. Hewitt .....	317
Crandall ads. Wendell .....	168	Cromwell ads. Meakings ....	33, 467, 473
Crane v. Bandonine .....	27, 104	Cromwell ads. McCluskey .....	5, 68
Crane v. Genin .....	283	Cromwell ads. Noble .....	251, 348
Crane v. Kimbel .....	112	Cromwell ads. Potter .....	204
Crane v. Price .....	451	Cromwell v. Selden .....	156
Crane v. Turner .....	290, 291	Cronin ads. McMillan .....	43, 461
Crane v. Stiger .....	20	Cronin v. People .....	302, 306
Cran ads. Warfield .....	347	Croninger v. Crocker .....	92, 434
Crans v. Hunter .....	152	Cronkhite v. Cronkhite ....	163, 265, 459
Crapo ads. Kelly .....	91	Cronkhite ads. Foster .....	369
Crapo ads. People .....	137	Cronkhite v. Wells .....	77
Crapsey ads. Chadwick .....	431	Crooke v. Andrews .....	89
Crary v. Goodman .....	6, 163	Crooke ads. Brown .....	235
Crary ads. Lynch .....	50	Crooke ads. Eno .....	44, 58, 420
Crary v. Smith .....	251, 434	Crooke ads. Sands .....	28, 106
Crater v. Bininger .....	351	Crooks ads. People .....	365
Crawford ads. Butterworth .....	161, 163	Cropsey ads. Bacon .....	151, 397
Crawford ads. Eager .....	183, 349	Cropsey v. Ogden .....	278
Crawford ads. Ferguson .....	247	Crosby ads. Bolen .....	45, 268, 385
Crawford ads. Hildebrandt .....	474	Crosby v. Day .....	189, 384
Crawford ads. Rector, etc .....	4, 386	Crosby v. Wood .....	248
Crawford v. West Side Bank .....	29	Cross v. Beard .....	398
Creed v. Hartman .....	309, 346	Cross ads. Moore .....	322
Cregin v. Brooklyn Cross-town R. Co.	1	Cross ads. Ockerman .....	46, 91
Creque ads. Carver .....	69	Cross v. O'Donnell .....	409
Crichton v. People .....	139	Cross ads. Rollin .....	282
Crim v. Starkweather .....	36, 318	Cross ads. Smith .....	193
Crippen v. Hudson .....	130	Crossman v. Crossman .....	463
Crippen v. Morss .....	179, 433	Crouch ads. Granger .....	289
Crispin v. Babbitt .....	281	Crouch v. Parker .....	174
Crissey ads. People .....	95, 307	Crounse v. Fitch .....	179, 184
Crist v. Erie Ry. Co .....	187	Crounse v. Wemple .....	461
Crittenden v. Dennis .....	88, 475	Crow ads. Mechanics and Traders' Nat. Bk .....	320
Crittendon v. Fairchild .....	467		
Crocker ads. Bridgford .....	146		

	Page.		Page.
Crowe v. Lewin .....	285	Curtis ads. Durand .....	351
Crowfoot v. Bennett .....	389	Curtis v. Leavitt.....58, 91, 111, 210	
Cruger, Matter of Petition of.....	333	Curtis v. McNair.....	128
Cruger v. Dougherty.....	427	Curtis ads. People.....	100
Cruger v. Douglass .....20, 274, 287, 444		Curtis v. Rochester & Syracuse R. Co.	
Cruger ads. Gosman.....	274		148, 173, 379
Cruger v. Hudson River R. Co.41, 374, 404		Curtis ads. Swarthout....19, 26, 216, 292	
Cruger v. McLaury.....	164	Curtis v. Thompson.....	112
Crump ads. Colman .....	436	Curtiss v. Ayrault .....	459
Cudlipp ads. Dunham.....442, 452		Curtiss ads. Brown.. ..214, 216, 322, 407	
Cudney v. Cudney.....	463	Curtiss ads. Lake Ontario Shore R.	
Cuff v. Dorland.....	35	Co.....	113
Culhane v. New York Cent., etc., R.		Curtiss ads. Ross.....	419
Co .....	378	Cushman v. Brandreth.....	25
Cullen ads. Meyer.....	439	Cushman v. Hatfield.....	33
Cullen v. St. John.....	309	Cushman v. Henry.....	274
Culver ads. Mahaiwe Bank.....130, 214		Cushman v. Horton.....464, 466	
Culver v. Rhodes.....6, 433		Cushman v. Leland.....365, 369	
Culver v. Sisson.....4, 298		Cushman v. Thayer Manufg. Jewelry	
Cummings ads. Boyd.....	320	Co.....	270
Cummings v. Brown.....	412	Cushman v. United States Life Ins.	
Cummings v. Morris.....	346	Co .....	238
Cummings ads. People.....	270	Cutler v. Mayor of New York....243, 336	
Cummins v. Agricultural Ins. Co....	231	Cutler v. Wright.....173, 366, 453	
Cummins v. Barkalow.....	110	Cutting v. Cutting.....	473
Cunliff ads. Mayor.....	309	Cutting v. Damerel.....	119
Cunningham v. Bay State Shoe and		Cutting v. Marlow.....	61
Leather Co.....116, 309		Cutts v. Guild.....	249
Cunningham v. Cassidy.....	195	Cuykendall v. Corning.....44, 268	
Cunningham ads. Comer.....390, 391		Cuyler ads. Costigan.....	19
Cunningham v. Jones.....	112	Cuyler ads. Equitable Life Ass. Soc..	262
Curley ads. Murtha .....	123, 250	Cuyler v. McCartney.....47, 180	
Curley ads. Van Schoonhoven.....	457	Cyphers v. People.....	253
Curnen v. Mayor....44, 170, 302, 383, 430		Cypress Hill Cemetery ads. Campbell.	85
Curran v. Warren Chemical and			
Manufg. Co.....	279	Daby v. Ericsson .....	346, 352
Currie v. White.....	393	Dada ads. Judson.....288, 383	
Currier ads. Van Etten.....144, 273, 296		Dack v. Dack.....	35
Curry v. Fowler.....	349	Dagal v. Simmons.....	453
Curry v. Powers .....	213	Dagg ads. Bell .....	321
Curser, Matter of.....197, 274		Dagrow ads. De Metz.....	8
Curtin ads. Hogan.....	472	Dain v. Wyckoff... ..	397
Curtis ads. Brooks.....	353	Dake ads. Mutual Life Ins. Co.....	383
Curtis ads. Brown.....	317	Dakin ads. Cornell.....195, 363	
Curtis v. Butts.....	163	Dakin v. Liverpool, etc., Ins. Co .....	227
Curtis ads. Farmers' Loan and Trust		Dakin ads. Mechanics and Traders'	
Co.....120, 287, 455		Bank.....	49
Curtis v. Fox.....131, 210		Dale v Delaware, etc., R. Co.....	379
Curtis v. Gano .....	175	Dalley ads. Wakeman .....	208
Curtis v. Gokey.....40, 41, 110		Dalrymple v. Hannum.....	28
Curtis v. Delaware, etc., R. Co.81, 272, 343		Dalrymple v. Hillenbrand.....63, 318	



## TABLE OF CASES.

513

	Page.		Page.
Dalrymple v. Williams.....	442	Davenport ads. Clark.....	89
Dalton v. Smith.....	63, 450	Davenport ads. Genet.....	31, 34, 124
Daly ads. Baird.....	187, 252, 310, 398, 434	Davenport v. Kelly.....	131
Daly v. Byrne.....	264	Davenport v. Mayor, etc ..	330, 331, 431
Daly ads. Howard.....	104, 278	Davenport v. McChesney.....	298
Dam ads. Clifford.....	338	Davenport ads. People.....	122, 429
Dambmann v. Schulting.....	2, 209, 286	Davenport v. Ruckman.....	303, 308
Damerel ads. Cutting.....	119	David ads. Earle.....	297
Dana v. Fiedler.....	146, 177	David v. Williamsburgh City Fire	
Dana ads. First National, etc....	32, 107	Ins. Co.....	153
Dana v. Howe.....	37	Davies ads. Calvo.....	292, 361
Dana v. Munson.....	235	Davies v. Marshall.....	292, 439
Danat v. Mayor, etc.....	334	Davies v. Mayor of, etc.....	249, 302, 303, 335
Dane ads. Bragelman.....	300	Davies ads. Phillips.....	465
Dane ads. Chicago, etc., R. Co.....	104	Davidsburgh v. Knickerbocker Life	
Danforth ads. Dudley.....	210	Ins. Co.....	71
Danforth ads. Gilbert.....	112	Davidson ads. Adams.....	47
Danforth ads. Suydam.....	72, 404	Davidson v. Alfaro.....	29, 395
Daniell ads. People.....	94	Davidson ads. Goulding.....	275
Daniels v. Atlantic Mut. Ins. Co....	398	Davidson ads. Isham.....	363
Daniels ads. Cayuga Co. Nat. Bk....	93	Davidson ads. Laytin.....	468
Daniels ads. Gutchees.....	395	Davidson ads. Pitt.....	103
Daniels v. Lyon.....	124	Davidson ads. Wakely.....	460
Daniels v. Patterson.....	423	Davis v. Allen.....	169, 350, 352
Dannenhoffer ads. Huwer.....	437	Davis v. American Soc. for Preven-	
Danolds v. State.....	102, 128, 146, 403	tion of Cruelty to Animals.....	15
Danolds ads. Wilbor.....	22	Davis v. Bechstein.....	290, 291, 346
Danks v. Quackenbush.....	95	Davis ads. Briggs.....	287, 445
D'Argencour ads. People.....	138, 141	Davis ads. Caswell.....	39, 437
Darby v. Callahan.....	273, 346	Davis v. Clark.....	27
Darby ads. Coats.....	188, 366, 438	Davis ads. Coddington.....	106, 318
Darcy ads. Carleton.....	26, 164, 256	Davis ads. Cooke.....	110
Darg ads. Demarest.....	246	Davis v. Copeland.....	68
Darling v. Brewster.....	26, 383	Davis v. Davis.....	277
Darling ads. People.....	260	Davis v. Duffie.....	5, 116, 252
Darling ads. Waddell.....	363	Davis v. First Cong. Society.....	347, 386
Darlington v. Mayor, etc.....	94	Davis v. Garr.....	316, 411, 449
Darnall v. Morehouse.....	355	Davis v. Gorton.....	278, 411
Darragh ads. Dorr.....	32	Davis ads. Gray.....	409
Darragh ads. Welsh.....	384	Davis ads. Holmes.....	4, 149
Darrin ads. Fiedler.....	453	Davis ads. Horton.....	169
Darrow v. Morgan.....	283	Davis v. Keyes.....	352
Darry v. People.....	141	Davis v. Leopold.....	27, 211
Dash v. Van Beuren.....	466, 471	Davis v. Lottich.....	433
Dart v. Ensign.....	78, 93	Davis v. Mayor, etc.....	14, 16, 328, 338
Dart ads. Schenck.....	34, 200	Davis v. McCready.....	315
Daubney v. Hughes.....	272	Davis ads. Mills.....	22
Dauchey v. Drake.....	111	Davis ads. Morford.....	453
Dauchy ads. Gage.....	273	Davis v. Morris.....	256, 359
Dauchy ads. Ormes.....	33, 110, 440, 441	Davis ads. Mut. Benefit Life Ins. Co.	
Davenport ads. Bruce.....	36, 114, 212, 327		235, 237

	Page.		Page.
Davis ads. Myers.....	395	Deck v. Johnson.....	272, 275
Davis v. New York Cent., etc., R. Co.	313	Decker v. Boice .....	383
Davis ads. Palmer .....	40, 273, 343	Decker v. Furniss.....	107
Davis v. Pattison .....	75	Decker v. Judson .....	422
Davis ads. People.....	132, 133, 135, 193	Decker ads. Lee .....	113
Davis v. Read.....	306, 371	Decker ads. Mason .....	389
Davis ads. Rensselaer & Saratoga R. Co .....	125, 166	Decker v. Matthews....	115, 150, 319, 361
Davis v. Spencer .....	252, 356	Decker ads. Read .....	108
Davis ads. Stedman.....	91, 174	Decker v. Saltzman.....	69
Davis v. Stover.....	127	Dederer v. Voorhies.....	44, 89
Davis v. Tallcot.....	205	Dederer ads. Yale.....	274, 275
Davis ads. Tillman .....	465, 466, 468	Dedieu v. People .....	133
Davis v. Toulmin .....	395	Dedrick ads. Fitch.....	104
Davis v. Van Buren.....	421, 423	Deems ads. Lafond.....	48
Davis ads. Young .....	21	Deen ads. Wilson .....	258
Davison v. Associates of Jersey Co....	403	Deering, Matter of .....	40, 43, 333
Davison v. City Bank.....	78	Deering v. Metcalf .....	108, 190
Davy v. Field.....	411, 412	De Forest ads. Barbour.....	473
Davidsburgh v. Knickerbocker L. Ins. Co.....	251	De Forest v. Farley .....	251
Dawley v. Brown.....	6, 153, 163, 164, 205	De Forest v. Jewett.....	280
Dawson v. People.....	133	De Gogorza v. Knickerbocker Life Ins. Co.....	240
Day v. Bach .....	51, 438	De Graaf ads Volkening .....	3, 31
Day ads. Bell .....	451	De Graff v. N. Y. Cent., etc., R. Co..	279
Day ads. Crosby.....	125, 189, 384	De Grau w ads. Delafield.....	105, 390
Day v. Day .....	69, 435	De Graw v. Elmore .....	366
Day ads. Douglass.....	18, 32	De Groff v. Amer. Linen Thread Co..	269
Day v. Hammond .....	41	De Groot ads. Benedict .....	133
Day v. Mayor, etc .....	129, 330	De Groot ads. Osgood .....	237
Day v. New York Cent. R. Co.....	410	De Grove v. Metropolitan Ins. Co.....	228, 231
Day v. Pool.....	392	De Herques v. Marti.....	171
Day v. Roth.....	2, 182, 446	Dehon ads. Milliken.....	107
Day v. Saunders.....	316	Deimel ads. Carroll....	32, 100, 187, 295
Day ads. St. Clair.....	29	De lafield v. De Grau w.....	105, 390
Day ads. Van Brunt .....	189, 262	De lafield v. Parish .....	462
Dayharsh v. Enos.....	253	De lafield ads. Wright .....	262
Dayton v. Borst.....	118	De lahunt ads. Scott.....	399
Dayton v. Johnson.....	68, 345	Delamater ads. Pierce.....	100
Dayton ads. People .....	72, 73, 102	De La Montagnie ads. Boyd.....	275
Dayton ads. Standard Sugar Refinery. 42, 202		Delancey, Matter of.....	94, 328, 332
Dean, Matter of Accounting of.....	46	De Lancey v. Stearns .....	383
Dean ads. Hurlbert.....	47, 346, 370	De Lancy v. Ganong .....	257
Dean v. Thornton.....	474	Delaney v. Brett.....	33, 129
Deansville Cemetery Asso'n, Matter of Petition of .....	85, 102, 165	Delaney ads. Cassin .....	37
Dearborn ads. City Bank of Brooklyn	187	Delaney v. McCormack.....	473
Dearing ads. Palmer.....	314	Delaney ads. People.....	86
De Barante v. Deyermant.....	28	Delaney v. Van Aulen.....	473
De Berski v. Paige.....	407	Delaney ads Whittlesey.....	117, 253, 345, 361
		Delano ads. Cambridge Valley Bank.	337
		Delany ads. Cassin.....	275
		Delaplaine ads. Couch.....	470

	Page.		Page.
Delaplaine v. Lawrence .....	426	Denison ads St. Peter.....	72, 438
Delaplaine ads. Peters.....	403, 412	Denison ads. Weissner.....	37, 58
De Launy ads. Leavitt .....	450	Denham v. Cornell.....	371
De Lavallette v. Wendt.33, 145, 178,	412	Denn ads. Little.....	217, 254
Delavan v. Duncan.....	403, 456	Denneth v. American Institute.....	108
Delaware Bank v. Jarvis....	321, 392	Dennis v. Crittenden.....	88, 475
Delaware and Hudson Canal Co., Mat- ter of Application of.....	23	Dennis ads. King.....	19
Delaware, etc., R. Co. v. Bowns....	105	Dennis ads. Olmsted.....	161
Delaware, etc., R. Co. ads. Brisbane.	119	Dennis v. Ryan.....	266
Delaware, etc., R. Co. ads. Cone....	281	Dennison ads. People.....	127, 403
Delaware, etc., R. Co. ads. Curtis....	81	Dennison ads. Van Rensselaer.....	157
	272, 343	Denniston ads. Fellows.....	220, 427
Delaware, etc., R. Co. ads. Dale....	379	Denniston ads. Jermain.....	181
Delaware & Hudson Canal Co. ads. Dolan.....	378	Denniston ads. People.....	96
Delaware, etc., R. Co. ads. Eaton....	79	Dennistoun ads. Milbank.....	202
Delaware & Hudson Canal Co. ads. English.....	80	Denny v. Smith.....	413
Delaware, etc., R. Co. ads. Higgins..	105	De Nottebeck v. Astor.....	470
Delaware, etc., Can. Co. ads. Hough- kirk.....	150, 311	Dent v. North American Steamship Co.....	9, 389
Delaware, etc., Canal Co. ads. Mann.	281	Denton ads. Freer .....	359, 455
Delaware & Hudson Canal Co. ads. Massoth.....	313	Dept. of Pub. Parks, Matter of Ap- plication of.....	328, 335
Delaware, etc., Canal Co. ads. Penn. Coal Co.....	402, 438	Dept. of Pub. Works, Matter of Ap- plication of.....	96
Delaware, etc., R. Co. ads. Rounds.	279, 380	Depew v. Dewey.....	22
Delaware & Hudson Canal Co. ads. Selden.....	21, 183, 264	De Peyster, In Matter of Petition of.	329
Delaware, etc., R. Co. ads. Taber....	80	De Peyster v. Mali.....	336
Delaware, etc., R. Co. ads. Wasmer.	338, 378	De Peyster v. Michael.....	255
DeLeyer ads. Wade.....	26, 36	De Peyster v. Murphy.....	156, 332
Delhi, Village of, v. Youmans.....	460	De Peyster v. Sun Mut. Ins. Co....	237
Del Hoyo ads. Simpson.....	169, 293	De Pierris, Matter of.....	336
Delvecchio ads. People.....	21	De Puy v. Strong.....	37, 344, 346
Demainville v. Mann.....	256	De Puyster v. Hasbrouck.....	212, 385
Demarest v. Darg.....	246	Deraismes v. Deraismes.....	200, 469
Demarest v. Mayor, etc.....	97, 328	Deraismes v. Merch. M. Ins. Co....	228
Demarest v. Wickham.....	306	Derby ads. Jones.....	21
DeMeir ads. Myers.....	112	Derham v. Lee.....	247
Demets ads. Hayden .....	389, 434	Dering v. Metcale.....	36
DeMetz v. Dagrow .....	8	De Ruyter v. St. Peter's Church....	386
DeMill ads. Ehrichs.....	35, 326, 342	Des Arts v. Leggett.....	5, 324, 434
Dempsey ads. Chamberlain.....	295	Des Arts ads. Moore.....	4
Dempsey v. Kidd.....	178, 260, 461	Deshler ads. Rawls.....	66, 205
Denike v. Harris.....	465	Despard v. Churchill .....	92, 470
Denike v. New York, etc., Lime, etc., Co.....	270	Despard v. Walbridge .....	168, 178, 256
		Detmold v. Drake.....	335
		Develin v. Coleman .....	115
		Develin v. Cooper.....	224
		Devens v. Mechanics and Traders' Ins. Co.....	237
		Dever ads. O'Hara.....	276, 466, 467
		Devin v. Patchin.....	34, 126, 425

	Page.		Page.
Devlin v. Brady.....	325	Dickinson ads. Thomas.....	409
Devlin v. Devlin.....	222, 437	Dickson v. Broadway, etc., R. Co....	28
Devlin ads. Getty.....	208	Dickson v. McCoy.....	15
Devlin v. Mayor, etc.....	94, 149, 302	Diefendorf v. Spraker.....	444
Devlin ads. McKnight.....	114, 177	Dierkes ads. Kissam.....	443
Devlin ads. People.....	403	Dietz v. Farish.....	104, 402
Devlin ads. Schell.....	347	Dietz ads. Schiffer.....	455
Devlin ads. Smith.....	257, 280	Diez, Matter of Probate of Will of...	464
De Voe v. Brandt.....	208, 212	Dike v. Erie Ry. Co.....	91, 114
Devoy v. Mayor, etc.....	98	Dikeman ads. People.....	398, 448
Devyr v. Schaefer.....	7, 39, 265	Dill v. Wisner.....	198
Dewey ads. Burt.....	147	Dillaye ads. Ballin.....	273
Dewey ads. Depew.....	22	Dillaye v. Blair.....	35
Dewey v. Hotchkiss.....	181	Dillaye v. Commercial Bk. Whitehall.	447
Dewey v. Moyer.....	65, 365	Dillaye ads. Edson.....	16
Dewey v. Supervisors of Niagara Co.	128	Dillaye v. Greenough.....	271
Dewey ads. Ward.....	89	Dillaye ads. Mickles.....	297
De Witt ads. Allen.....	468	Dillaye ads. Robbins..	450, 453
De Witt v. Barly.....	276	Dilleber v. Home Life Ins. Co....	175, 239
De Witt v. Brisbane.....	291		241
De Witt v. Elmira Nobles Mfg. Co..	354	Dilleber v. Knickerbocker Life Ins.	
De Witt v. Hastings.....	168, 269	Co.....	239
De Witt ads. Odell.....	94	Dillenbach ads. Waffle.....	123, 440
De Witt ads. Palmer.....	116	Dillingham v. Bolt.....	299
De Witt ads. Westerlo.....	214	Dillon v. Anderson.....	68, 114
De Witt v. Walton.....	322	Dillon v. Cockcroft.....	39, 415
De Wolf ads. New York Exchange Co.	417	Dillon ads. O'Hagan.....	193
Dexter v. Norton.....	5, 145	Dimock ads. Revere Copper Co.....	65
Dexter v. Syracuse, etc., R. Co..	81	Dimon v. Dunn.....	363
Deyermard ads. De Barante.....	28	Dimon v. Hazard.....	350
Deyo v. Abbey.....	273	Dinehart ads. Clark.....	20
Deyo v. New York Cent. R. Co..	187, 309	Dingledein v. Third Ave. R. Co.....	113
Deyoe ads. Board of Supervisors Sar-		Dinunny ads. Doolittle.....	36, 407, 448
atoga Co.....	67, 244	Dinunny v. New York and New Haven	
Dias ads. Bouchand.....	46, 126	R. Co.....	81
Dibble ads. People.....	93, 220	Dinsmore v. Adams.....	21
Dibble ads. Whintringham.....	187	Dinsmore v. Belger.....	73, 74
Dickens v. N. Y. Cent. R. Co.....	311	Dinsmore ads. Cochran.....	74
Dickerson ads. Chester....	351	Dinsmore ads. Coghlan.....	310
Dickerson ads. Perry.....	206	Dinsmore ads. Collender.....	177
Dickerson v. Wason... ..	8	Dinsmore ads. Drinkwater.....	150
Dickey ads. Dickinson.....	416	Dinsmore v. Duncan.....	325
Dickins v. New York Cent. R. Co....	145	Dinsmore ads. Kirkland.....	75
Dickinson ads. Buckingham.....	22	Dinsmore ads. Magnin.....	74, 75, 147
Dickinson ads. Clark.....	104	Dinsmore ads. Rosebrooks.....	441, 454
Dickinson v. Dickey.....	416	Dinsmore ads. Wetzel.....	78
Dickinson v. Edwards.....	92, 449	Diossy v. Morgan.....	88, 168
Dickinson ads. Johnson.....	64	Direct U. S. Cable Co. v. Dominion	
Dickinson v. Mayor, etc.....	335, 413	Tel. Co.....	117
Dickinson v. City of Poughkeepsie..	110	Disborough ads. Ingraham.....	290
	184	Disbrow ads. Bingham.....	419

## TABLE OF CASES.

517

	Page.		Page.
Disbrow v. Garcia.....	145	Dolph v. White.....	256
Disbrow ads. Green...3, 173, 181, 189,	190	Dominion Tel. Co. ads. Direct U. S.	
Disbrow v. Mills.....	424	Cable Co.....	117
Disosway, Matter of .....	425	Dominy ads. Hallock.....203, 247, 253	
Disosway v. Winant..... 86, 345,	385	Donahue v. Case... ..	156, 180
Distin v. Rose.....	263	Donaldson ads. French.....	72, 73
Ditchett v. Spuyten Duyvil, etc., R.		Dongan v. Champlain Trans. Co. 252,	312
Co .....	378		400
Diven v. Lee.....	117	Donley v. Graham.....	28
Diveny v. Elmira, City of.....	303, 306	Donnell ads. Coats.....	61
Dividend Mut. Ins. Co. ads. Bumstead.		Donnell ads. Hallenbeck .....	295, 381
	229, 231	Donnell ads. Johnson.....	9, 355
Dix ads. Bell .....	387	Donnell ads. Phoenix Bank.....	361
Dixon ads. Ashley.....	5, 113	Donnell ads. Roberts.....	35
Dixon ads. Ayers.....	292	Donnell v. Walsh.....	346
Dixon ads. Coleman... ..	22	Donnelly ads. Brady.....	33
Doane ads. Gawtry....182, 190, 317,	405	Donnelly v. Corbett.....	91, 97
Dobiecki v. Sharp.....	313	Donnelly ads. East River Gas-light	
Dobson ads. Chapin.....92, 178,	384	Co .....	341
Dobson v. Pearce..... ..186, 212,	246	Donohue v. People.....	136, 201, 476
Dobson v. Racey.....	8, 474	Donovan v. Board of Education.....	335
Dodd, Matter of .....	21	Donovan v. Mayor, etc.....	301
Dodd ads. Blossom.....	74	Donovan v. McAlpin.....	341
Dodd ads. Johnson.....	40, 369	Donovan v. Van De Mark.....	443, 473
Dodd v. Neilson.....	295, 297, 344	Doolittle v. Broome, Supervisors of..	5
Dodd ads. Otis.....	282	Doolittle v. Dininny..... ..	36, 407, 448
Dodd ads. Taylor.....	472	Doran v. Franklin Fire Ins. Co...233,	235
Dodge v. Crandall.....	201, 293, 407	Dord ads. Beirne... ..	389
Dodge v. Gardiner.....	107	Doremus ads. Post.....	36
Dodge ads. Genesee College.....	109, 316	Dorland ads. Cuff.....	35
Dodge v. Mann.....	28	Dorn v. Backer.....	428
Dodge v. Manning.....	471	Dorn v. Fox .....	244
Dodge ads. March .....	354, 366	Dorn ads. Hicks.....	341
Dodge v. Platte, County of.....	169, 435	Dorr ads. Chester .....	322
Dodge v. Stevens..343, 444, 445, 446,	471	Dorrance v. Henderson.....	64, 397
Dodge v. Wilbur... ..	10	Dorris v. Sweeney.....	417
Dodge & Stevenson Manuf. Co., Matter		Dorsheimer v. Nichols.....	45, 189
of.....	245, 347	Dorrity v. Rapp.....	336
Dohring ads. People.....	143, 252	Dorwin v. Strickland .....	43, 430
Doke v. James.....	41	Doscher ads. Bache.....	295
Dolan, Matter of Application of.....	425	Doscher ads. Schofield.....	297
Dolan v. Delaware & Hudson Canal		Doscher v. Shaw.....	106
Co .....	378	Doty v. Brown.....	177, 206, 207, 367
Dolan v. Mayor, etc.....	332, 341	Doty v. Carolus.....	19
Dolan ads. People.....	427	Doty ads. Newell.....	364, 450
Dolan v. People .....	133, 135	Doty ads. People.....	61
Dole ads. Gridley .....	350	Doty v. Willson.....	214
Dole ads. Ludlow .....	148	Doubleday v. Heath....99, 129, 252,	347
Doll ads. Meltzer...92, 126, 192, 205,	315	Doubleday v. Kress.....	8, 322
Doll ads. Redlich.....	323	Doncy ads. Chretien .....	257
Dolloway ads. Oswego Starch Factory.	429	Dougherty ads. Cruger.....	427

	Page.		Page.
Dougherty ads. Kerr....	117, 328, 404, 469	Drake v. Gilmore .....	403
	471, 472	Drake v. Price .....	200
Doughty v. Brill.....	219	Drake ads. Stewart.....	415
Doughty v. Hope.....	43, 404, 440	Draper v. Commercial Ins. Co.....	236
Douglass v. Cruger .....	20, 274, 287, 444	Draper ads. Hackley.....	382
Douglas v. Haberstro .....	194, 397	Draper ads. Handy .....	269, 413
Douglas ads. Hamilton.....	274	Draper ads. McKay.....	56
Douglas v. Knickerbocker Life Ins.		Draper ads. People.....	98, 284, 327
Co .....	238	Draper ads. Richardson.....	215, 244
Douglas, Village of, ads. Weismer..	101	Draper ads. Roosevelt.....	305, 331
	302, 429	Draper v. Snow.....	104, 215, 408
Douglass, In re Petition of .....	336	Draper v. Stouvenel..	33, 205, 247, 273
Douglass ads. Auburn & Cato Plank-		Dresser v. Brooks .....	34
road Co.....	357	Drew ads. Bartlett..	118
Douglass v. Day.....	18, 32	Drew v. Collins.....	283
Douglass v. Ireland.....	269	Drew v. Hastings .....	117
Douglass ads. Monroe.....	395	Drew ads. Nichols .....	343, 365
Douglass ads. Ormsby.....	264	Drew v. Sixth Ave. R. Co....	80, 148, 279
Douglass ads. Wright....	19, 49, 182, 196		312
	447	Drew v. Swift.....	155, 164
Dounce v. Dow.....	392	Drew Theo. Sem. ads. Hollis.....	468
Dounce v. Parsons.....	351	Drexel ads. Lake Sup. Iron Co.....	120
Doupe v. Genin.....	261	Driggs ads. Jarvis.....	205, 262
Dow v. Darragh ..	32	Drinkwater v. Dinsmore.....	150
Dow ads. Dounce.....	392	Driscoll v. Newark, etc., Co....	309, 460
Dow v. New Jersey Steam Nav. Co..	74	Driscoll v. W. Bradley, etc., Manuf'g	
Dow v. Platner.....	47, 249	Co .....	269
Dowdney v. Mayor, etc.....	332	Drohan ads. Comstock .....	291, 294
Dowdney v. McCullom.....	282	Drummond v. Husson .....	36
Dowling v. People.....	138	Drury ads. Winter.....	325
Dowling ads. People....	136, 143	Dry Dock Bank v. Amer., etc., Trust	
Downer v. Church.....	90, 402	Co.....	449
Downs ads. Erwin.....	320	Dry Dock Sav. Bank ads. Schrauth..	419
Downs v. N. Y. Cent. R. Co....	188, 312	Dry Dock, etc., R. Co. ads. Martin...	198
Downs v. Sprague.....	175, 440	Dry Dock, etc., R. Co. ads. Cohen...	279
Downing ads. Kelly.....	27, 144, 365	Duane v. Northern R. Co.....	28
Downing v. Marshall..	126, 369, 446, 449	Duanesburgh, Town of, v. Jenkins..	435
	469	Duanesburgh, Town of, ads. Williams.	436
Dows ads. Cobb.....	5	Du Beirat v. Wolfe .....	162
Dows v. Congdon.....	20	Du Bois ads. Armstrong..	39, 54, 156, 157
Dows v. Greene.....	66		195, 438
Dows v. Kidder.....	244, 391	Dubois v. Baker.....	176
Dows v. Perrin.....	8, 66	Dubois v. Beaver.....	262, 437, 438
Dox ads. Ryan....	446	Dubois v. Cassidy.....	362
Doyle v. Lord.....	163, 261	Du Bois v. Ray.....	464
Doyle ads. Oswego, Bank of.....	457	Ducker v. Rapp.....	345, 423
Doyle v. Sharp.....	63	Duchardt ads. Smith .....	107
Drake ads. Baker.....	150, 416	Duckinfield ads. Bangs.....	381
Drake ads. Baxter .....	42	Duckworth v. Roach.....	251, 269
Drake ads. Dauchey.....	111	Dudley ads. Buffalo & N. Y. City R.	
Drake ads. Detmold.....	335	Co.....	118

	Page.		Page.
Dudley v. Danforth .....	210	Dunlop v. Avery.....	234, 289
Dudley ads. Graves.....	4	Dunlop v. Edwards.....	30
Dudley v. Mayhew .....	116, 354	Dunlop v. Gregory .....	110
Dudley ads. People.....	99, 257, 297	Dunlop ads. McKnight.....	146, 408, 439
Dudley v. Scranton.....	439	Dunlop v. Patterson Fire Ins. Co.	17, 24
Dudley ads. Tompkins.....	113		50
Duff ads. Bolles.....	21, 298	Dunn ads. Dimon .....	363
Duffany v. Ferguson .....	209	Dunn v. Hornbeck .....	71, 111, 337
Duffie ads. Davis .....	5, 116, 252	Dunn ads. Leeds.....	215
Duffie ads. Younger .....	462	Dunn ads. People.....	134, 137, 192
Duffield v. Horton .....	63	Dunn ads. Tuomy.....	251
Duffy v. People .....	135, 137	Dunning ads. Brainerd.....	46, 195
Duffy v. Duncan .....	48, 362	Dunning v. Leavitt.....	292
Duffy v. Masterson .....	18, 444	Dunning v. Ocean Nat. Bank.	198, 297, 412
Duffy v. O'Donovan.....	402, 484	Dunning ads. Smith.....	360
Duffy v. Wunsch .....	410	Dunspaugh ads. Walker.....	189
Dugro, Matter of Petition of.....	329	Duntley ads. Beardsley.....	209, 274, 410
Duke ads. Young.....	409	Dupuy v. Wurtz.....	161
Duke of Cumberland v. Graves.....	13	Durand v. Curtis.....	351
Duly v. Ericsson.....	173	Durand v. Hankerson.....	131
Dumesnil, Matter of.....	35	Durando v. Durando.....	276
Duncan ads. Algeo.....	442	Durant v. Abendroth.....	31, 352
Duncan v. Berlin.....	57, 811	Durant ads. Andrews.....	44, 107
Duncan v. Brennan.....	57, 368	Durant ads. Hurlburt.....	200
Duncan ads. Delavan.....	403, 456	Durant ads. Odell.....	95, 99
Duncan ads. Dinsmore.....	325	Durant ads. Rogers.....	22
Duncan ads. Duffy .....	48, 362	Durant ads. Warner.....	469
Duncan v. Great Western Ins. Co.....	236	Durfoo ads. Kellum .....	19, 24
	237, 398	Durgin v. Ireland .....	2, 30, 344
Duncan ads. Trenton Banking Co.	131, 248	Durham v. Manrow .....	215, 322, 408
Dunckel v. Wiles.....	186, 248	Durkheim ads. Cameron.....	416
Duncliff ads. Mayor.....	303	Durkin v. Sharp.....	311
Duncomb v. New York, Housatonic, etc., R. Co .....	62, 120, 368, 373	Durland ads. Gray.....	394
Dunford v. Weaver.....	167, 199, 397, 398	Durst v. Burton.....	11, 184
	417, 426	Duryea v. Mayor.....	156
Dung v. Parker .....	407	Duryea ads. Neuendorff.....	96, 328, 418
Dunham v. Bower.....	206	Duryea ads. Seaman.....	424
Dunham v. Cudlipp.....	442, 452	Duryea ads. Union Dime Savings Inst.	294
Dunham ads. Luce.....	464, 465, 466	Duryee ads. Bowery Nat. Bk.....	42
Dunham v. Mann .....	389	Duryee ads. Castle .....	310
Dunham v. Sage .....	411	Duryee ads. Conger .....	261
Dunham v. Troy Union R. Co....	88, 115	Duryee v. Lester .....	33, 441
Dunham v. Waterman .....	46, 249	Duryee ads. Mathews.....	276
Dunham v. Watkins.....	18	Dusenbury v. Hoyt.....	64
Dunham v. Whitehead .....	46	Dusenbury v. Hulbert.....	289
Dunham v. Williams.....	155	Dusenbury v. Keiley .....	203, 414
Dunlap v. Hawkins.....	211	Dusenbury ads. Nichols.....	255, 257, 262
Dunlap ads. Nevius.....	285, 344, 385		362, 364, 365, 366, 440
Dunlap ads. People....	96, 328	Dustan v. McAndrew.....	149
Dunlevy v. Tallmadge.....	130	Dutcher ads. Alexander.....	475
		Dutcher ads. Burt.....	150, 389

	Page.		Page.
Dutcher v. Importers and Traders'		East Hampton, Trustees of, v. Kirk.	7, 441
Nat. Bank .....	60, 64	Eastman v. Shaw .....	452
Dutcher ads. People .....	99, 129	East New York, etc., R. Co. v. El-	
Dutchess Company v. Harding...	183, 391	more .....	207
Dutchess Co. Mut. Ins. Co. v. Hach-		Easton v. Clark .....	202
field .....	325	Easton ads. Judson .....	300
Dutchess & Columbia R. Co. v. Mab-		Easton v. Pickersgill .....	19, 296
bett. ....	373	East River Bank v. Hoyt .....	449
Dutchess & Columbia R. Co. ads. Peo-		East River Bank v. Kennedy....	36, 324
ple .....	266, 376	East River Bank ads. Tallmadge ...	163
Dutilh ads. Almgren ..	399	East River Gas-light Co. v. Donnelly.	341
Dutton v. Willner .....	12	East River Ins. Co. ads. Ogden .....	233
Duvall v. English and Evangelican		East River Mut. Ins. Co. ads. Wall...	229
Lutheran Church .....	473	East River Nat. Bank v. Gove .....	57
Dwight v. Enos .....	88, 250	East River Nat. Bank ads. Romertze.	192
Dwight v. Germania Life Ins. Co.	25, 67	East River Saving Inst. ads. Roderi-	
Dwight v. Newell .....	265	gas .....	197, 198, 425
Dwight ads. Shaw .....	131	Eastwood ads. People .....	176
Dwight v. St. John .....	245, 301	Eaton ads. Abbe. ....	74
Dwinelle ads. Kincaid .....	122	Eaton v. Alger. 33, 55, 178, 192, 345,	451
Dwyer ads. People .....	18, 103, 222, 303	Eaton v. Aspinwall .....	117
Dwyer ads. Springer .....	364, 421	Eaton v. Delaware, etc., R. Co. ....	79
Dyckman v. Mayor, etc .....	166	Eaton v. Erie Ry Co. ....	377
Dyckman v. Valiente .....	401	Eaton ads. Nelson .....	229
Dye ads. Austin .....	391	Eaton ads. Partridge .....	157
Dyer v. Erie Ry. Co. ....	312, 378	Eaton ads. Pratt .....	120, 293
Dyger v. Remerschnider .....	271	Eaton v. Wells .....	367
Dykens v. Townsend .....	405, 408	Eaton, Cole & Burnham Co. v. Avery.	209
Dyle ads. People .....	137	Eberle v. Mehrbach .....	418
Eddie ads. Wiltsie .....	32, 384	Eckert v. Long Island R. Co. ....	311
Eadie v. Slimmon .....	162, 240	Eckert ads. Winter .....	26, 251
Eager, Matter of .....	332	Eckhardt v. People .....	139, 141
Eager v. Crawford .....	183, 349	Eckhart ads. Burekle .....	253, 349
Eagle Bank of Rochester ads. Hooker.		Eckler ads. Babcock .....	210
	44, 121	Eckler ads. Rust .....	392
Eames ads. Rome Exch. Bk. ....	444, 446	Edgar ads. Swords .....	461
Earl v. Clute .....	90, 180, 287	Edge ads. Bean .....	260
Earl v. Peck .....	315	Edgell v. Hart .....	299
Earle v. David .....	297	Edgerly v. Bush .....	92
Earle v. Earle .....	200, 384	Edgerton v. N. Y. & H. R. Co. ....	79, 186
Earle ads. Haley .....	311	Edgerton v. Page .....	258
Earle ads. Homan .....	271	Edgerton v. Thomas .....	169, 300
Earle ads. Merritt .....	78, 418	Edgerton ads. Youmans .....	286
Earle ads. Miller .....	249	Edick ads. Green .....	192
Earle ads. Solinger .....	162, 323	Edington v. Ætna Life Ins. Co. ....	177, 241
Earle ads. Wilkins .....	19, 173, 223, 476	Edmonds ads. Howland .....	235
Easterly v. Barber .....	268, 324	Edmonstone v. Hartshorn .....	13, 189
Eastern Trans. Co. ads. Carpenter...	400	Edmonston v. McCloud .....	30, 131
Eastern Trans. Co. ads. Cooper .....	401	Edmunds v. Barton .....	396
Eastern Plankroad Co. v. Vaughan ..	357	Edmunds ads. Whitney .....	7, 39, 87, 260
		Edmundstone ads. McKenna .....	282, 336



	Page.		Page.
Edsall v. Camden & Amboy R. and Trans. Co.....	74	Elias v. Farley .....	47, 195
Edson v. Dillaye.....	16	Elkin ads. Hatch.....	179
Edwards v. Bishop.....	433, 470	Elkin v. People.....	143
Edwards ads. Callanan.....	58	Elkins ads. Pratt .....	193, 453
Edwards ads. Dunlop.....	30	Ellice ads. Potter.....	346
Edwards ads. Dickinson.....	92, 449	Ellicott v. Mosier .....	276
Edwards ads. German Bank.....	8	Elliott v. Gibbons .....	188
Edwards v. Noyes .....	174, 438	Elliott ads. Rankine.....	373
Edwards ads. Perry .....	405	Elliott v. Wood.....	297
Edwards ads. Pierrepont.....	472	Ellis v. Albany City Fire Ins. Co....	226
Edwards ads. Sheldon .....	284, 298	Ellis v. Andrews.....	209
Edwards ads. Smith.....	470, 473	Ellis ads. Barhydt....	257
Edwards v. Woodruff.....	248	Ellis v. Horrmann.....	337, 383
Eggert ads. Parshall.....	368	Ellis v. New York, Lake Erie, etc., R. Co.....	280
Eggler v. People.....	135	Ellis ads. Stanton .....	224
Eggleston v. Columbia Turnpike Co.....	310, 447	Ellis ads. Supervisors.....	419
Ehele ads. Rice.....	17, 358, 388	Ellis v. Willard.....	74
Ehle ads. Ely.....	4	Ellison ads. Kruider.....	5, 390
Ehle v. Chittenango Bank.....	57	Ellithorp ads. Sanford.....	180, 475
Ehrichs v. De Mill .....	35, 326, 342	Ellsworth, Matter of Petition of....	19
Eickemeyer, etc., Co. ads. Sheldon, etc., Co.....	10, 117	Ellsworth v. Aetna Ins. Co.....	440
Eighmie ads. Booth.....	407	Ellsworth ads. Heermans.....	45
Eighmy v. People..	134, 138, 143, 181, 342	Ellsworth v. Lockwood .....	291, 296
Eight Ave. R. Co. ads. Clark ..	312	Ellsworth ads. Marsh.....	264
Eighth Ave. R. Co. ads. Hegan.....	217, 313	Elmendorf v. Lockwood .....	276
Eighth Ave. R. Co. ads. Maverick.....	79, 474	Elmendorf's Adm'r ads. Waddell's Adm'r.....	245, 404
Eighth Ave. R. Co. ads. Sanford.....	37, 80	Elmer ads. Green.....	451
Eighth Ave. R. Co. ads. Traver.....	285, 311	Elmer ads. Sloane.....	440
Eighth Ave. R. Co. ads. Whitaker....	380, 405	Elmira, City of, ads. Nat. Bank of Chemung .....	4, 430
Eighth Nat. Bk. of City of New York v. Fitch....	351	Elmira, City of, ads. Diveny.....	303, 306
Eimer ads. Luhrs .....	13	Elmira Nobles Manuf. Co. ads. De Witt .....	354
Eimer ads. Phyfe.....	261	Elmore ads. Bassell .....	264
Eisenlerd ads. Lipe.....	151, 394	Elmore ads. De Graw.....	366
Eisenlohr ads. O'Gara.....	271	Elmore ads. East New York, etc., R. Co.....	207
Eisenlord v. Snyder.....	276	Elmore v. Sands.....	80
Elder ads. Mooney.....	10	Elston v. Schilling.....	256
Elder ads. Olmsted.....	265	Elsworth v. Caldwell.....	224, 249
Elder ads. Sherman .....	273	Eltinge ads. Kingston Bank.....	285
Elderkin ads. Merchants' Bank.....	318	Elverson v. Vanderpoel.....	144
Eldredge ads. Howland.....	266	Elwell ads. Atkins.....	179, 190
Eldridge, Matter of.....	17, 52	Elwell ads. Brown.....	357
Eldridge v. Mather.....	183	Elwell v. Chamberlain.....	9, 438, 450
Eleventh Ave., Matter of.....	162, 334	Elwell v. Johnson.....	24
Elevated R. v. Kings Co....	166	Elwell ads. Randall.....	374, 427
Eleventh Ward Bank ads. Harley....	3	Elwell v. Skiddy.....	399
		Elwood v. Gardner.....	194

	Page.		Page.
Elwood ads. Johnson . . . . .	90, 222, 448	English ads. Slocum. . . . .	199
Elwood v. Rochester City Bank. . . . .	420	English Evangelical Lutheran Church	
Elwood v. Roof . . . . .	25, 35	ads. Dewall. . . . .	473
Elwood v. West. Union Tel. Co. . . . .	433	Eno v. Crooke . . . . .	44, 58, 420
Elwood ads. Wilson. . . . .	474	Eno ads. Hamilton. . . . .	264
Ely v. Carnley. . . . .	299	Eno v. Mayor, etc. . . . .	332
Ely v. Cook. . . . .	53	Eno ads. Muller. . . . .	147, 392
Ely v. Cooke . . . . .	224, 249	Eno v. Woodworth . . . . .	455
Ely v. Ehle . . . . .	4	Enoch Morgan's Sons Co. v. Troxell. . . . .	437
Ely ads. Harris. . . . .	199, 425	Enos ads. Dayharsh. . . . .	253
Ely ads. Hathorn. . . . .	77	Enos ads. Dwight . . . . .	88, 250
Ely v. Holton. . . . .	16, 403	Ensign ads. Dart . . . . .	78, 93
Ely ads. Lawrence. . . . .	28	Ensign ads. McIntosh. . . . .	346
Ely v. Norton. . . . .	3, 445	Eppendorf v. Brooklyn, etc., R. Co. . . . .	313
Ely ads. Sidenberg. . . . .	291, 427, 433	Equitable Life Ass. Society ads. Barry. . . . .	91, 240, 371, 474
Ely v. Supervisors . . . . .	286	Equitable Life Ass. Soc. v. Cuyler. . . . .	262
Ely ads. Weaver. . . . .	125	Equitable Life Assurance Society ads. . . . .	
Emans ads. Miller. . . . .	469	Flynn. . . . .	239
Embury v. Conner. . . . .	93, 185, 205, 409	Equitable Life Assurance Society ads. . . . .	
Embury v. Sheldon. . . . .	465	Harris. . . . .	249
Emerson v. Bleakley. . . . .	2, 175, 442	Equitable Life Ins. Co. ads. Flynn. . . . .	239
Emerson v. Bowers. . . . .	197	Equitable Life Ins. Co. ads. Harris. . . . .	239
Emerson ads. Fish. . . . .	254	Equitable Life Ins. Soc. v. Stevens. . . . .	17, 295
Emerson v. Parsons. . . . .	353	Erben ads. Burns. . . . .	134, 266
Emerson v. Spicer. . . . .	216	Erben v. Lorillard . . . . .	148, 179, 327, 409
Emery v. Baltz. . . . .	423	Erben ads. Mayor, etc . . . . .	305, 335
Emery v. Pease . . . . .	359	Erhard v. Zimmerman. . . . .	205, 349, 389
Emery v. Wilson. . . . .	353	Erickson v. Quinn . . . . .	412
Emigrant ads. Mulcahey. . . . .	62	Erickson v. Smith. . . . .	175, 182
Emigrant Indus. Sav. Bank, Matter		Ericsson ads. Daby . . . . .	346, 352
of Petition of. . . . .	329	Ericsson ads. Duly. . . . .	173
Emigrant Indus. Sav. Bank v. God-		Erie & N. Y. City R. Co. v. Patrick. . . . .	105
man. . . . .	282	Erie County Sav. Bank ads. Appleby. . . . .	61
Emigrant Indus. Sav. Bank v. Gold-		Erie County Sav. Bank v. Roop. . . . .	294, 297
man. . . . .	294	Erie, etc., R. Co. v. Patrick. . . . .	4
Emigrant Indus. Sav. Bank v. Roche. . . . .	46	Erie Preserv. Co. ads. Fox . . . . .	254
Emmet v. Reed. . . . .	228	Erie Ry. Co. ads. Arnot . . . . .	215
Emmons ads. Van Dyke. . . . .	469	Erie Ry. Co. ads. Blair . . . . .	79
Empie ads. Borst. . . . .	153, 156	Erie Ry. Co. ads. Burrows. . . . .	312
Empire City Bank, Matter of. . . . .	60	Erie Ry. Co. ads. Chapman. . . . .	190, 280, 440
Empire Ins. Co. ads. People. . . . .	239	Erie Ry. Co. ads. Connecticut Fire	
Empire Ins. Co. ads. Rowley. . . . .	228, 233	Ins. Co. . . . .	229
Empire Stone Dressing Co. ads. Pen-		Erie Ry. Co. ads. Crist. . . . .	187
dleton . . . . .	10, 191	Erie Ry. Co. ads. Dike. . . . .	91, 114
Empire Woolen Co. ads. Avery. . . . .	69, 459	Erie Ry. Co. ads. Dyer. . . . .	312, 373
Enders v. Sternburgh . . . . .	175	Erie Ry. Co. ads. Eaton. . . . .	377
Engell ads. Seeley. . . . .	189, 364	Erie Ry. ads. Farmers and Mechanics'	
Englishbe v. Helmuth. . . . .	93, 167	Bank . . . . .	78
English v. Breman. . . . .	338	Erie Ry. Co. ads. Gibson. . . . .	313
English v. Delaware & Hudson Canal			
Co. . . . .	80		

# TABLE OF CASES.

523

	Page.		Page.
Erie Ry. Co. ads. Gorton .....	313	Everitt v. Everitt.....	472
Erie Ry. Co. ads. Havens .....	313	Everson v. Powers.....	146
Erie Ry. Co. ads. Lyons .....	311	Evertson v. Nat. Bank of Newport..	316
Erie Ry. Co. ads. Morrison.....	221, 312	Exchange Fire Ins. Co. ads. Buchanan.	226
Erie Ry. Co. ads. Nicholson.....	308	Exchange Fire Ins. Co. ads. La Farge.	476
Erie Ry. Co. v. Ramsey.....	16, 221	Ex. Fire Ins. Co. ads. Mayor of New York.....	303
Erie Ry. ads. Steinweig .....	74	Excelsior Fire Ins. Co. v. Royal Ins.	
Erie Ry. Co. ads. Stoneman .....	81, 92	Co. of Liverpool.....	226, 228, 229
Erie Ry. Co. ads. Thompson. ....	345, 364	Excelsior Ins. Co. ads. Audubon.	205, 226
Erie Ry. Co. ads. Warner .....	280	Excelsior Petroleum Co. v. Lacey...	268
Erie Ry. Co. ads. Whitworth .....	76	Exchange Bank v. Monteath ....	11, 325
Erie Ry. Co. ads. Wood .....	76	Exchange Fire Ins. Co. ads. Bodine..	232
Erie Ry. Co. ads. Woodruff. 120, 169,	257	Exchange Fire Ins. Co. ads. Mayor, etc.....	229, 331
Ernst v. Hudson River R. Co .....	377	Exempt Firemen's Fund, Trustees of, v. Roome .....	94, 328
Erwin v. Downs.....	320	Express Propeller Line ads. Mailler.	145, 400
Erwin ads. Hall.....	212	Eyland ads. Chesterman .....	24, 348
Erwin v. Loper ...	199	Eyre ads. Coleman.....	106, 407
Erwin v. Nevesink Steamboat Co....	401	Eycleshimer ads. Stover.....	45
Erwin ads. Smith .....	196, 323	Faber ads. People .....	139, 278
Erwine ads. Van Alstyne .....	49	Fabey ads. Jenkins.....	417
Esmond v. Apgar .....	64	Fabbri v. Phoenix Ins. Co. ....	234
Esopus, Board of Town Auditors of, ads. People.....	267	Fabbri v. Kalbfleisch.....	31
Esselstyn v. Weeks .....	415	Fagan v. Mayor, etc. ....	330
Essex County Bank v. Russell....	19, 320	Fagnan v. Knox.....	266
Estabrook ads. Beebe .....	6, 161, 406	Fahey ads. Jenkins. .	348, 402
Estêrbrook ads. Gillott .....	437	Fairbanks ads. City of Watertown.	96, 307
Esterly v. Cole.....	26, 243	Fairchild ads. Crittendon .....	467
Estes ads. Blossom.....	50	Fairchild v. Fairchild.....	351
Estes v. Wilcox.....	446	Fairchild v. Liverpool & London Fire and Life Ins. Co .....	227
Estevez v. Purdy .....	451	Fairchild ads. Mann.....	382, 414
Eten v. Luyster.....	147, 257	Fairchild v. Ogdensburgh, etc., R. Co.	316
Evangelical Lutheran St. John's Or- phan Home v. Buffalo Hydraulic Assn. ....	117, 163	Fairchild ads. People....	54, 267, 340, 372
Evans ads. Campbell.....	94	Fairchilds ads. Staples. ....	49
Evans v. Cleveland.....	2	Fairfax v. N. Y. Cent., etc., R. Co.	81, 457
Evans v. Columbian Ins. Co.....	237	Fairley ads. Harper .....	414
Evans v. Millard.....	21	Fairman ads. People.....	20, 268
Evans v. People.....	141, 143	Fake v. Smith .....	321
Evans v. Root .....	202	Fake v. Whipple.....	421
Evans v. United States Life Ins. Co..	238	Falconer v. Buffalo, etc., R. Co.....	435
Evans v. Utica, City of.....	314	Falconer ads. Kelly.....	196
Evansville Nat. Bank v. Kaufman...	215	Falk ads. Calkins .....	407
Eveland v. Wheeler... ..	455	Falker ads. Marsh .....	208
Evening Mail Assn. ads. Butler.....	11	Falkland v. St. Nicholas' Nat. Bank.	65, 395
Evening Mail Assn. ads. Samuels....	364	Fallon v. Brooklyn City, etc., R. Co..	22
Everett v. Everett.....	444		
Everett v. Vendryes.....	91, 326		
Evergreen, The Matter of.....	404		

	Page.		Page.
Fallon v. Cent. Park, etc., R. Co.	312, 342	Farmers and Citizens' Bk. v. Sherman.	363
Fallon v. People . . . . .	132, 142	Farmers and Citizens' Nat. Bank v.	
Fancher ads. First Nat. Bk. of Sandy Hill . . . . .	60, 429, 430	Noxon . . . . .	320
Fancher ads. People . . . . .	99	Farmers and Mechanics' Bank v.	
Fannan ads. Spoor . . . . .	33	Barker . . . . .	451
Fant ads. Ocean Nat. Bank of N. Y. .	318	Farmers and Mechanics' Bank v.	
Fargo ads. Brown . . . . .	37	Butchers and Drovers' Bk. . . . .	316, 322
Fargo ads. Thompson . . . . .	12, 78	Farmers and Mechanics' Bank v. Erie Ry . . . . .	78
Fargo ads. Wakefield . . . . .	118	Farmers and Mechanics' Bank v. Joslyn . . . . .	441, 452
Fargo ads. Westcott . . . . .	75, 117, 245, 363	Farmers and Mechanics' Bk. v. Wadsworth . . . . .	360
Farish ads. Dietz . . . . .	104	Farmers and Mechanics' Nat. Bank v.	
Farley ads. De Forest . . . . .	251	Atkinson . . . . .	67
Farley ads. Elias . . . . .	47, 195	Farmers and Mechanics' Nat. Bank	
Farley ads. Lawrence . . . . .	26	ads. Booth . . . . .	116, 173, 249, 350
Farley v. McConnell . . . . .	424	Farmers and Mechanics' Nat. Bank v.	
Farm Buildings Fire Ins. Co. ads.		Hazeltine . . . . .	66
Cornish . . . . .	227	Farmers', etc., Nat. Bank v. Lang . .	215
Farm Buildings Ins. Co. ads. Matson.	226	Farmers and Mechanics' Nat. Bank v.	
Farmer ads. Hall . . . . .	215, 322, 408	Logan . . . . .	67
Farmers' Bank v. Hale . . . . .	59, 452	Farmers and Mechanics' Nat. Bk. ads.	
Farmers' Bank v. Maxwell . . . . .	316	Mechanics and Traders' Bk. . . . .	66, 202
Farmers' Bank ads. McBride . . . . .	45, 57	Farmers and Mechanics' Bank ads.	
Farmers' Bank of Bridgeport v. Vail.	319	Seranton . . . . .	198
Farmers' Bank of Washington Co. v.		Farmers and Mechanics' Nat. Bank v.	
Cowan . . . . .	29, 300, 441	Sprague . . . . .	42
Farmers', etc., Ins. Ass'n ads. Van Loan . . . . .	226	Farnam, Matter of Assignment of . . .	48
Farmers' Joint-Stock Co. ads. Underwood . . . . .	232	Farnam v. Feeley . . . . .	203, 266
Farmers' Joint-Stock Ins. Co. ads.		Farnham v. Campbell . . . . .	88
Van Allen . . . . .	232	Farnham v. Hotchkiss . . . . .	38, 188, 289, 294
Farmers' Loan and Trust Co. ads.		Farnham v. Mallory . . . . .	169, 250, 293
Breasted . . . . .	240	Farnish ads. Dietz . . . . .	402
Farmers' Loan and Trust Co. v. Carroll . . . . .	30	Farnsworth ads. Martin . . . . .	9
Farmers' Loan & Trust Co. v. Clowes.	116	Farnsworth v. Wood . . . . .	270
	449	Farr ads. Reed . . . . .	69
Farmers' Loan and Trust Co. v. Curtis . . . . .	120, 287, 455	Farrar v. McCue . . . . .	369
Farmers' Loan & Trust Co. v. Kursch.	124	Farrington ads. Farrington . . . . .	411
Farmers' Loan and Trust Co. ads.		Farrington ads. Howe Machine Co. .	170
Lawrence . . . . .	287		216, 423
Farmers' Loan and Trust Co. ads.		Farrington ads. Whittemore . . . . .	457
Morey . . . . .	411	Farron v. Sherwood . . . . .	360
Farmers' Loan and Trust Co. ads.		Farwell ads. Bray . . . . .	245
Minturn . . . . .	453	Farwell v. Importers, etc., Bank . .	70, 438
Farmers' Loan and Trust Co. v. Walworth . . . . .	9, 278, 292, 340	Fassett v. Smith . . . . .	152, 403, 457
Farmers' Nat. Bank v. Lang . . . . .	457	Fassin v. Hubbard . . . . .	191, 317, 319
Farmers and Citizens' Bk. ads. Claffin.	59	Fatty ads. City Building and Loan Co.	
			26, 38, 450
		Faulkner ads. Bradner . . . . .	144, 243, 365, 471
		Faulkner v. Hart . . . . .	92

	Page.		Page.
Faure v. Martin.....	285, 456	Fiedler v. Darrin.....	453
Favill v. Roberts.....	170	Fiedler ads. Stedman....	401
Fawcett v. Nichols.....	223	Field ads. Benedict.....	391
Fawcett v. Vary.....	22	Field ads. Bonynge.....	52
Fay ads. Burbank.....	72, 370, 403	Field ads. Davy.....	411, 412
Fay v. O'Neill.....	266	Field v. Field.....	125
Fay ads. Ostrander.....	299	Field ads. Lefler.....	21, 363, 370
Fay ads. Wheaton.....	66, 67, 224	Field v. Mayor, etc.....	45, 331
Fearing v. Irwin.....	102, 329, 416	Field v. Munson.....	30, 177
Feeley ads. Farnam.....	203, 266	Field v. New York Cent. R. Co.....	379
Feeter v. Weber.....	90	Field ads. Sartwell.....	23
Feitner ads. Tipton.....	107	Field ads. Stearns.....	175
Feldman v. Beier.....	293, 355	Fielden v. Lahens...18, 34, 249, 317, 349	474
Fellows ads. Blacksmith.....	220	Fielding v. Lucas.....	139
Fellows v. Denniston.....	220, 427	Fields v. Bland.....	42, 168
Fellows v. Longyor.....	216, 450	Fields ads. Genter.....	16, 36
Fellows v. Northrup.....	11	Fields ads. People.....	328, 336
Fellows ads. Seymour.....	175, 275	Fiester v. Shepard.....	35, 424
Fellows ads. Vedder.....	80	Filer v. New York Cent. R. Co...148, 175	176, 274, 312, 313
Fells v. Vestrall.....	360	Filkins v. People.....	139
Felt ads. Sherman.....	19, 20, 252, 301	Filkins v. Whyland.....	104
Felton ads. Smith.....	398	Fillo v. Jones.....	187
Felton ads. Teall.....	5, 115	Finch ads. Beal.....	474
Feltz ads. Van Alen.....	411, 414	Finch v. Parker.....	26, 402
Fenner v. Buffalo, etc., R. Co.....	77	Fincke v. Fincke.....	471
Ferguson v. Crawford.....	247	Fincke ads. Rodman.....	473
Ferguson ads. Duffany.....	209	Fingar ads. Younghanse.....	21, 126
Ferguson ads. Furniss.....	248	Finkelmeier v. Bates.....	204, 257
Ferguson ads. Lindley.....	212	Finley v. Bent.....	472
Ferguson ads. People.....	427	Finn ads. Batterman.....	20
Ferguson v. Tweedy.....	277	Finn ads. Gandall.....	249
Fernandez v. Great Western Ins. Co.	237	Finn ads. People.....	142
Fero v. Buffalo & State Line R. Co...	378	Finnegan v. Carraher.....	170, 346
Fero v. Ruscoe.....	264	Fire Association, etc., ads. People..101, 229	
Ferrer v. Pyne.....	465	Fire Department of City of New York	
Ferrie ads. Caujolle.....	277	ads. Cathcart.....	327
Ferrin v. Myrick.....	199	Fire Department of Troy v. Bacon..	228, 235
Ferris, Matter of Application of....	138	Fireman's Fund Ins. Co. ads. Jones..	227
Ferris ads. Blake.....	278	Fireman's Fund Ins. Co. ads. Wil-	
Ferris ads. Bramhall.....	445, 464	liams.....	227
Ferris v. Kilmer.....	11	Fireman's Ins. Co. ads. Graham.....	233
Ferris ads. Pearce.....	345	First Baptist Church, Trustees of, v.	
Ferris ads. People.....	85, 129, 267	Brooklyn Fire Ins. Co... ..	226, 410
Ferris v. Union Ferry Co.....	79, 203	First Bapt. Soc., Trustees of, v. Rob-	
Ferris v. Van Vechten.....	446	inson.....	106, 417
Ferry ads. Ross.....	291	First Cong. Soc., Trustees of, ads.	
Ferry v. Stephens.....	213, 402	Davis.....	347, 386
Ferward ads. North-western Ins. Co.	399	First Nat. Bank ads. Bates.....	9, 57
Fethers ads. Mowers.....	223		
Fettretch v. McKay.....	362		
Fiedler ads. Dana.....	146, 177		

	Page.		Page.
First Nat. Bank v. Dana .....	32, 107	Fischer v. Raub.....	103
First Nat. Bk. v. Fourth Nat. Bk. ....	60, 150	Fish ads. Bassett..14, 309, 311, 341, 394	
	184, 243, 310		418
First Nat. Bk. v. Green.....	324	Fish v. Clark .....	73
First Nat. Bank v. Ocean Nat. Bank..	62	Fish v. Cottenet....	226
First Nat. Bank ads. Talmage.....	368	Fish v. Emerson .....	254
First Nat. Bank v. Tamajo.....	384	Fish v. Jacobsohn .....	315, 321, 343
First Nat. Bk. of Angelica v. Hall.		Fish ads. Pardee .....	98, 316
	320, 324	Fisher v. Banta .....	426, 468
First Nat. Bk. of Ballston Spa v. In-		Fisher v. Gould.....	24
surance Co. of N. A. ....	230	Fisher v. Hall .....	153, 346, 465
First Nat. Bk. of Buffalo v. Wood...	318	Fisher v. Hepburn .....	17, 33, 250, 371
First Nat. Bk. of Chittenango v. Hin-		Fisher v. Hersey .....	24, 433
termister.....	452	Fisher ads. Kain.....	195, 276
First Nat. Bk. of Chittenango v. Mor-		Fisher v. Mayor, etc .....	335, 413
gan.....	286, 323, 352	Fisher v. New York Cent., etc., R. Co.	
First Nat. Bank of Cincinnati v.			373, 379
Kelly .....	66	Fisher ads. Roberts.....	285, 355
First Nat. Bank of Cooperstown v.		Fisk ads. Barton.....	149
Tamajo .....	415	Fisk v. Potter.....	288, 455
First National Bank of Elmira ads.		Fisk ads. Wood.....	421, 423, 448
Coleman .....	57	Fiske v. Bailey.....	272, 363
First Nat Bk. of Emporia ads. Coates.	45	Fiske ads. Gray.....	28
First Nat. Bk. of Jersey City v. Leach.	323	Fiske ads. Hazard.....	66, 202
First Nat. Bk. of Kingston ads. Van		Fiske ads. Marine Bank of Buffalo...	115
Leuven .....	62	Fishkill Savings Institution v. Bost-	
First Nat. Bk. of Meadville v. Fourth		wick .....	58
Nat. Bank of New York ..10, 126,	325	Fishkill Sav. Inst. v. Nat. Bk. of	
First Nat. Bk. of Memphis ads. South-		Fishkill .....	61, 127
wick .....	40, 286, 324	Fitch v. American Popular Life Ins.	
First Nat. Bk. of New York ads. Mor-		Co.....	238, 240
ris .....	63	Fitch ads. Crounse.....	179, 184
First Nat. Bk. of Norfolk ads. Gra-		Fitch v. Dedrick.....	104
ham.....	91, 272	Fitch ads. Eighth Nat. Bk. of City of	
First. Nat. Bk. of Oxford ads. Town		New York.....	351
of Hancock.....	367, 370, 417	Fitch v. Gardenier .	410
First Nat. Bk. of Oxford v. Wheeler.	435	Fitch v. Hassler .....	439
First Nat. Bank of Sandy Hill v.		Fitch ads. King. ....	212
Fancher .....	60, 430	Fitch ads. Knowlton.....	415
First Nat. Bk. of Selma ads. Tracy..16,	381	Fitch v. Mayor, etc.....	14, 183, 331
First Nat. Bk. of Toledo v. Shaw..91,	202	Fitch v. Rathbun .....	276
	458	Fitch v. Snedaker .....	388
First Nat. Bk. of Union Springs ads.		Fitch ads. Williams. ....	4, 189, 193, 327
Simons .....	62, 289	Fitzgerald ads. Kirby.....	249, 297
First Nat. Bk. of Utica v. Ballou....	414	Fitzgerald v. People....	141
First Nat. Bk. of Whitehall v. Lamb.		Fitzgerald v. Topping .....	245, 444
	59, 452	Fitzhugh ads. Folger.....	21
First Nat. Fire Ins. Co. ads. Wilkin-		Fitzhugh ads. Hobart College.....	416
son .....	232	Fitzhugh ads. Williams. ....	453
Fischer v. Hope Mut. Life Ins. Co.		Fitzhugh v. Wiman .....	78, 88, 207, 250
	206, 238	Fitzpatrick v. Boylan.....	282

	Page.		Page.
Fitzpatrick ads. Kirby.....	15	Folsom, Matter of.....	334
Fitzpatrick v. Slocum.....	70, 341	Fonda ads. Board of Education.....	394
Fitzsimmons ads. People.....	339	Fonda v. Borst.....	152, 461
Flack v. State of New York.....	196, 398	Fonda ads. Hilton.....	43, 429
Flack ads. Stover.....	105	Fonda v. Sage.....	88, 153
Flagg v. Munger.....	90, 106, 294	Fonner ads. Chadwick.....	180, 192
Flagg ads. People.....	101, 334	Foose v. Whitmore.....	445, 471
Flake v. Van Wagenen.....	26	Foot v. Ætna Life Ins. Co.....	37, 239
Flandrow, Matter of.....	50, 201	Foot v. Bentley.....	174, 392
Flanagan v. People.....	132, 165, 328, 372	Foot v. Farrington.....	411
Flanagan ads. Sickles.....	442, 451	Foot v. Marsh.....	389
Flatbush, Lands in, Matter of.....	71	Foot v. Stiles.....	218
Flaurand ads. Lowenstein.....	45	Foot v. Beecher.....	31, 180
Fleet ads. Wood.....	347	Foot v. Bryant.....	273, 444
Fleet ads. Woodgate.....	179, 265, 446	Foot v. Lathrop.....	21
Fleischmann v. Bennett.....	26, 263, 359, 360	Foot ads. Overing.....	430, 431
Fleischmann v. Stern.....	25, 170, 364	Foot ads. Pratt.....	32, 57, 92
Fleming v. People.....	139, 196	Foot v. People.....	140
Fleming v. Village of Suspension Bridge.....	302	Forbes v. Halsey.....	198
Fleming ads. Wright.....	426	Forbes v. Waller.....	47, 130, 185, 363
Fletcher v. Button.....	360	Force ads. Kerrigan.....	94
Fletcher ads. Foxell.....	109	Ford v. Belmont.....	371
Fletcher v. Hutton.....	456	Ford v. Cobb.....	204
Fleury ads. Thomas.....	112	Ford ads. Clark.....	200, 412, 413
Fliess v. Buckley.....	245, 289	Ford ads. Frees.....	252, 359
Flike v. Boston & Albany R. Co.....	280	Ford v. Harrington.....	54
Flint ads. Boughton.....	424, 470	Ford v. James.....	154
Flood v. Mitchell.....	183	Ford v. Joyce.....	285
Flora v. Carbeau.....	6, 15	Ford ads. Kinne.....	107
Florence v. Hopkins.....	347	Ford v. Williams.....	53, 54, 169, 185, 191 299, 301
Florence Sewing Machine Co. ads. Hayden.....	35, 262	Ford v. Mayor, etc.....	329
Florida R. Co. ads. Carrington.....	20	Fordham v. Smith.....	190
Florida R. Co. ads. Vose.....	422	Forman v. Marsh.....	221
Flower v. Lance.....	287, 355	Forman v. Whitney.....	470
Flower ads. Stone.....	405, 411, 441	Forney ads. Towle.....	248
Floyd v. Carow.....	470	Forrest v. Forrest.....	18, 19, 129
Floyd ads. Rice.....	37	Forrest v. Havens.....	36, 129
Flues ads. Becar.....	256	Forrester ads. Meehan.....	12
Flynn v. Equitable Life Assurance Society.....	239	Fort v. Bard.....	25
Flynn ads. New York Guaranty and Indemnity Co.....	150	Fort Edward, etc., Plankroad Co. v. Payne.....	109, 118
Flynn ads. People.....	129, 330	Ft. Edward, Trustees of Village of, ads. People.....	435
Fobes ads. Backus.....	41	Fort Plain Bank ads. Adams.....	243, 411
Focht ads. Brand.....	66, 408, 409	Fort Plain Bridge Co. v. Smith.....	69, 102
Fogel ads. Glacius.....	201, 262, 345, 425	Fort Plain and Cooperstown Plank- road Co. ads. Palmer.....	154, 357, 358
Foley ads. Palmer.....	223	Fort Stanwix v. Leggett.....	131
Folger v. Fitzhugh.....	21	Forty-second Street, etc., R. Co. ads. Ihl.....	15, 312, 342, 406
Follett v. People.....	72		

	Page.		Page.
Forty-second Street, etc., R. Co. ads.		Fox ads. Adams.....	21, 30, 343
Kellinger.....	163, 374, 416	Fox ads. Allen.....	150
Forty-second Street, etc., R. Co. ads.		Fox ads. Bradford.....	355
Unger.....	80, 379	Fox ads. Colton.....	469
Forty-second Street, etc., R. Co. ads.		Fox ads. Curtis.....	131, 210
Watson.....	311, 413	Fox ads. Dorn.....	244
Forty-second Street, etc., R. Co. ads.		Fox v. Erie Preserv. Co.....	254
Wooster.....	377, 379, 413	Fox v. Kidd.....	283
Foster v. Beals.....	187, 293	Fox ads. Lawrence.....	113
Foster ads. Beardsley Scythe Co.....	130	Fox v. Moyer.....	210, 442
Foster ads. Campbell.....	445	Fox ads. Stephens.....	184, 373
Foster v. Cronkhite.....	369	Foxell v. Fletcher.....	109
Foster ads. Harloe.....	152	France ads. Howard.....	4, 8
Fosgate v. Herkimer Manuf. and Hyd. Co.....	366	Francis v. Schoellkopf.....	338
Foster v. Julien.....	318	Francis v. City of Troy.....	302
Foster v. Newbrough.....	178	Frank v. Chemical National Bank....	58
Foster v. People.....	139, 140, 141, 143	Frank v. Lanier.....	204, 325
Foster v. Persch.....	31, 192	Frank v. Wessels.....	316
Foster v. Pettibone.....	55	Frankfield ads. Bostwick....	256, 284
Foster v. Townshend.....	54, 381	Frankfield ads. Smith.....	168, 247
Foster ads. Vail.....	420, 454, 456	Franklin ads. Atlantic Nat. Bank.....	320, 415
Foster v. Van Reed.....	292	Franklin ads. Pendleton.....	399
Foster v. Van Wyck.....	43	Franklin ads. Tallman.....	177, 408
Fountain v. Pettee.....	189	Franklin Fire Ins. Co. ads. Doran.....	233, 235
Fourth Nat. Bank ads. Allen.....	58, 325	Franklin Fire Ins. and Trust Co. ads. International Life Ins. and Trust Co.	232
Fourth Nat. Bank ads. First Nat. Bank.....	60, 150, 184, 243, 310	Frantz ads. Whittlesey.....	269
Fourth Nat. Bank of New York ads. First Nat. Bank of Meadville.....	10, 126	Fraser v. Freeman.....	279
Fowler, Matter of.....	165, 406	Fraser v. Wyckoff.....	70
Fowler v. Butterfly.....	240	Frauenthal ads. Bronner.....	179, 191
Fowler ads. Curry.....	349	Frazer, Matter of.....	272, 412, 425, 466, 470
Fowler v. Haynes.....	88, 254		475
Fowler ads. Leonard.....	389	Frazier v. McCloskey.....	264
Fowler v. Liverpool and Great West. St. Co.....	109	Frecking v. Rolland.....	275, 360
Fowler v. McCabe.....	199	Freday ads. Van Alstyne.....	218, 364
Fowler v. New York Gold Ex. Bank.	9	Fredenburgh v. Biddlecom.....	18, 189
Fowler v. New York Indemnity Ins. Co.....	361	Fredericks v. Taylor.....	17, 358
Fowler v. Palmer.....	324	Freeborn ads. Belloni.....	68, 421
Fowler ads. People.....	26, 44, 267, 431	Freeborn v. Wagner.....	469, 470
Fowler ads. Ryan.....	280	Freel ads. Gibbon.....	50, 417, 418
Fowler v. Seaman.....	273	Freeholders of Cattaraugus, Matter of Petition of.....	70
Fowler ads. Walter.....	364	Freeholders of Irondequoit, Matter of.	69
Fowler, ads. Wilmerdings, Matter of.	52	Freeland ads. Corwin.....	18, 35, 42
Fowler ads. Winegar.....	170	Freeland v. Van Campen....	319, 355
Fowles v. Bowen.....	263	Freeman v. Auld.....	291
Fox, Matter of.....	126, 424, 448, 471	Freeman v. Cram.....	282
		Freeman ads. Fraser.....	279
		Freeman v. Freeman.....	403
		Freeman v. Kendall.....	19
		Freeman ads. McLean.....	126, 471



	Page.		Page.
Freeman ads. Morrow . . . . .	224	Fuller v. Jewett . . . . .	280
Freeman v. Ogden . . . . .	86, 255	Fuller ads. Robbins . . . . .	353
Freeman ads. People . . . . .	19	Fuller v. Robinson . . . . .	184
Freeman ads. Pierson . . . . .	42	Fuller v. Rowe . . . . .	116
Freeman ads. Sharpe . . . . .	182	Fuller v. Scribner . . . . .	295, 337
Freeman ads. Slocum . . . . .	286	Fuller ads. Woodward . . . . .	113
Freeman v. Spaulding . . . . .	474	Fullerton ads. Clapp . . . . .	35, 126, 462
Freeman ads. Williams . . . . .	465	Fullerton v. McCurdy . . . . .	287
Freeman ads. Wottrich . . . . .	186, 474	Fulton ads. People . . . . .	344, 386
Freeman Printing, etc., Ass'n ads. Kraft . . . . .	117	Fulton v. Staats . . . . .	188
Freer v. Denton . . . . .	359, 455	Fulton ads. Teall . . . . .	369
Freer ads. Payne . . . . .	348, 450	Fulton v. Whitney . . . . .	296, 426, 444, 445
Freer ads. Russell . . . . .	68	Fulton Fire Ins. Co. v. Baldwin . . . . .	72, 73
Freer v. Stotenbur . . . . .	206, 258, 259		365
Frees v. Ford . . . . .	252, 359	Furman ads. Conklin . . . . .	358, 411
Freeson v. Bissell . . . . .	456	Furman v. Mayor, etc . . . . .	329
Freligh v. Brink . . . . .	249	Furman ads. Story . . . . .	94, 269
French ads. Bendétson . . . . .	223	Furman v. Van Sise . . . . .	394
French v. Buffalo & Erie R. Co. . . . .	75	Furniss ads. Decker . . . . .	107
French v. Carhart . . . . .	156, 177	Furniss v. Ferguson . . . . .	248
French v. Donaldson . . . . .	72, 73	Furst v. Second Ave. R. Co . . . . .	179
French v. New . . . . .	40, 41		
French ads. People . . . . .	32, 331	Gabler ads. Blant . . . . .	210
French v. Powers . . . . .	34, 388	Gadsden ads. Moore . . . . .	220, 309, 338
French ads. Read . . . . .	52, 249	Gaffney v. People . . . . .	134, 137, 476
French v. Importers and Traders' Nat. Bank . . . . .	323, 325	Gage v. Brewster . . . . .	289
Freudenthal ads. Cook . . . . .	42, 448	Gage ads. Christie . . . . .	87, 251
Frick v. White . . . . .	395	Gage v. Dauchy . . . . .	273
Fried ads. Johnson . . . . .	309	Gage ads. Martin . . . . .	200, 413, 414
Fried v. Royal Ins. Co . . . . .	226	Gage ads. Stearns . . . . .	185, 211, 455
Friedman, Matter of . . . . .	19	Gager v. Babcock . . . . .	398
Friery v. People . . . . .	134, 141	Gaillard ads. Boardman . . . . .	178, 380, 401
Friess v. Rider . . . . .	454	Gailor ads. Stoddard . . . . .	295, 296
Frink ads. Harris . . . . .	455	Gale, Matter of . . . . .	52
Frink ads. Martin . . . . .	213	Gale v. Miller . . . . .	315, 353
Frink ads. Scott . . . . .	285	Gale v. New York Cent., etc., R. Co. 24, 192, 378	
Frisbie ads. Bacon . . . . .	54	Galen v. Brown . . . . .	177, 298, 301
Frost v. Koon . . . . .	168, 249, 297	Gallagher v. Nichols . . . . .	112, 410
Frost v. Mott . . . . .	115, 195, 287, 301	Gallagher ads. People . . . . .	99, 393
Frost ads. Newman . . . . .	326	Gallant ads. Phillip . . . . .	104
Frost ads. Smith . . . . .	444, 445	Gallarati v. Osser . . . . .	396
Frost v. Warren . . . . .	299	Gallaudet ads. Brown . . . . .	31, 127
Frost v. Yonkers Savings Bank . . . . .	289	Gallup v. Albany Ry. Co. . . . .	257
Fry v. Bennett . . . . .	263, 361, 438, 442	Galvin ads. King . . . . .	29
Fry ads. Green . . . . .	293, 355, 434	Galvin v. Prentice . . . . .	184
Fryer v. Rockefeller . . . . .	153, 154, 294	Gambling v. Haight . . . . .	283
Fudickar v. Guardian Mut. Life Ins. Co . . . . .	40, 415	Gandall ads. Conkling . . . . .	361
Fuller v. Conde . . . . .	123	Gandall v. Finn . . . . .	249
		Gandolfo v. Appleton . . . . .	187
		Gannon ads. Reed . . . . .	300, 337

	Page.		Page.
Gano ads. Curtis .....	175	Garrison ads. Mills.....	206
Gano v. Hall.....	133	Garvey, Matter of Petition of.....	333
Ganong ads. De Lancy .....	257	Garvey ads. Hartnett.....	175
Ganson v. Buffalo, City of ...	14, 167, 305	Garvey v. Jarvis.....	212
	306	Garvey v. McDevitt.....	467
Ganson v. Tift .....	261	Garwood v. N. Y. Cent., etc., R. Co.	460
Gantz, Matter of .....	333	Gaskin v. Meek.....	98
Ganyard ads. Hamilton .....	109	Gates v. Andrews.....	44
Ganz ads. Osborn .....	389	Gates v. Beecher.....	191, 318
Garcia ads. Disbrow .....	145	Gates v. Brower.....	271
Garcia ads. Wheeler.....	112	Gates ads. Chapman.....	217
Gardenier ads. Fitch .....	410	Gates v. Madison Co. Mut. Ins. Co....	226
Gardiner ads. Dodge .....	107		229
Gardiner v. Gardiner .....	463	Gates v. McKee.....	214, 215
Gardiner ads. Payne.....	104, 411	Gates ads. People...99, 153, 183, 193,	342
Gardiner ads. Schaettler.....	21		396
Gardiner v. Suydam.....	457	Gates v. Preston .....	247
Gardiner ads. Tyler . . . .	381, 463	Gates ads. Wambaugh.....	251
Gardiner ads. Watson.....	126	Gates ads. Wheaton .....	386
Gardner, Matter of .....	267, 339	Gauge v. Roberts.....	184
Gardner ads. Algur .....	441, 451	Gavin ads. McManus.....	426
Gardner v. Barden .....	291	Gawtry v. Doane.....	182, 190, 317, 405
Gardner v. Board of Health.....	328	Gay ads. People.....	136
Gardner v. Clark.....	364, 390, 442	Gaylord Manuf. Co. v. Allen.....	391
Gardner ads. Elwood .....	194	Gebhard Fire Ins. Co. ads. Burleigh..	230
Gardner v. Gardner .....	222	Gedney v. Purdy.....	28
Gardner v. Hamilton Ins. Co.....	116	Gedney ads. Salmon .....	35
Gardner v. Heart.....	82	Geery v. Geery.....	130, 246, 352
Gardner ads. Leary.....	1, 283	Geib ads. Corning .....	474
Gardner v. McEwen.....	299	Geib v. Topping ...	384
Gardner v. Ogden .....	252, 445	Geiger ads. Prentice.....	459
Gardner ads. People....72, 129, 165,	245	Geisler v. Acosta. ....	257
	330	Geiszler ads. Guggenheimer .....	451
Gardner ads. Reid.....	247	Gelston v. Shields.....	465, 466
Gardner ads. Tabor.....	21	Genesee College v. Dodge.....	109, 316
Garfield v. Hatmaker.....	445	Genesee Mut. Ins. Co. ads. Western..	235
Garlinghouse ads. Board of Excise,		Genesee Mut. Ins. Co. ads. Wilson...	228
Ontario Co.....	193	Genesee River, etc., Bank v. Mead..	211
Garlinghouse v. Jacobs.....	218	Genet v. Beekman.....	465
Garlinghouse ads. Wright.....	321	Genet v. Davenport.....	31, 34, 124
Garlock ads. Bennett.....	6, 164, 445	Genet ads. Mayor, etc.....	50
Garner ads. Hoard.....	11	Genet ads. People.....	19, 138
Garnsey v. Rogers.....	287	Genin ads. Crane.....	283
Garr ads. Betts. ....	194	Genin ads. Doupe .....	261
Garr ads. Christophers.....	412	Genoa, Town of, ads. Starin.. . .	99
Garr ads. Davis.....	316, 411, 449	Genter v. Fields.....	16, 36
Garr v. Martin.....	420	George ads. Pier.....	269
Garr v. Selden .....	54, 264	Geraty v. Reid .....	71
Garrison v. Haughwout.....	453	German, etc., Church ads. People.	267, 386
Garrison v. Howe.....	117, 268	German-American Bank v. Morris	
Garrison ads. Marie.....	110	Run Coal Co.....	24, 398

## TABLE OF CASES.

531

	Page.		Page.
German-American Bank ads. Welsh..	57	Gilbert v. Peteler .....	457
	58	Gilbert v. Wiman .....	111
German Bank v. Edwards.....	8	Gilbert Elevated Ry. Co., Matter of	
Germania Fire Ins. Co. ads. Alexan-		Petition of.....	96, 375
der.....	239	Gilbert, etc., R. Co. ads. New Eng.	
Germania Fire Ins. Co. v. Memphis,		Iron Co....	114, 120, 224
etc., R. Co. ....	74	Gilbert Elevated R. Co. ads. Sixth	
Germania Fire Ins. Co. ads. Rohrback.	230	Ave. R. Co. ....	23
Germania Fire Ins. Co. ads. Whited..	232	Gilchrist v. Brooklyn Grocers' Mfg.	
Germania Life Ins. Co. ads. Dwight..	25	Assoc. ....	182
	67	Gilchrist v. Comfort... ..	196
Germania Savings Bank v. Habel... ..	103	Gilchrist ads. Murdock .....	156
	123, 222	Gildenmeister ads. Partridge....	105, 393
Gernon v. Hoyt .....	174	Gildersleeve v. Landon.....	190, 300
Gerould v. Wilson .....	67, 197, 421	Gile ads. Groat.....	149, 391
Gerow ads. Clements.. ..	249	Giles v. Austin.....	165, 257
Gerwig v. Sitterly.....	452	Giles v. Comstock.....	262
Getman v. Second Nat. Bank. .59, 64,	247	Giles v. Halbert .....	16, 124
Getty v. Binsse.....	321, 422	Giles v. Lyon .....	404
Getty v. Devlin .....	208	Giles ads. Perkins.....	41
Getty v. Spaulding.....	22	Gilhooley v. Washington.....	259
Gibbon v. Freel.....	417	Gill v. Brouwer.....	471
Gibbons ads. Elliott.....	188	Gill ads. Hurd.....	107
Gibbons ads. Clarke.....	413	Gill v. McNamee.....	184
Gibbons ads. Harrison.....	249	Gill ads. Wilkinson .....	265
Gibbs v. Bates.....	350	Gillender ads. Lovett .....	466
Gibbs v. Queen Ins. Co. ....	235	Gillespie ads. Andrews. ....	295
Gibbs v. People.....	135, 139	Gillespie ads. Hamill .....	300
Gibney v. Marchay.....	180	Gillespie v. Newburgh, City of....	314
Gibson v. American Mut. Life Ins. Co.		Gillespie ads. Sanders.....	110, 410
	185, 238	Gillespie v. Torrance .....	322
Gibson v. Erie Ry. Co.....	313	Gillespie v. Zittlosen.....	357
Gibson v. Haggerty .....	419	Gillett ads. Baird.....	188
Gibson ads. Lake.....	18	Gillett v. Bate.....	354
Gibson v. Lenane.....	282, 356	Gillett ads. Mallory .....	410
Gibson v. Tobey.....	355, 393	Gillet v. Moody.....	60
Gibson v. Walker.....	464	Gillet v. Phillips.....	60
Giddings v. Seward.....	187, 472	Gillett v. Roberts .....	115
Gidley v. Gidley .....	41	Gillet v. Van Rensselaer.....	243
Gifford ads. Buffalo & Jamestown R.		Gillies ads. Taylor .....	437
Co.....	373	Gillies ads. Williams.....	294, 349
Gifford ads. Murdock.....	254	Gillig v. Maass.....	289
Gifford v. Waters.....	145	Gillilan v. Sun Mut. Ins. Co.....	400
Gihon v. Stanton.....	10	Gillis ads. Ryckman.....	157
Gilbert v. Beach .....	34	Gillott v. Esterbrook.....	437
Gilbert ads. Clark .....	112, 148	Gilman ads. Bartle.....	126
Gilbert v. Comstock .....	414, 424	Gilman v. Gilman. ....	426
Gilbert v. Danforth.....	112	Gilman v. Reddington.....	446
Gilbert v. Gilbert .....	443	Gilmore ads. Drake.....	403
Gilbert v. Knox.....	462	Gilmore v. Ontario Iron Co.....	109, 257
Gilbert ads. Partridge .....	354	Gilmore ads. People.....	25, 125

	Page.		Page.
Gilmore ads. Spies.....	317, 318	Goetchins v. Matthewson .....	165
Ginna v. Second Ave. R. Co .....	313	Goetzel ads. Bostwick... ..	43
Givan ads. Green.....	286, 472	Goff ads. People.....	31, 430
Glacius v. Black. ....	105, 281, 283	Goillotel v. Mayor, etc... ..	411
Glacius v. Fogel.....	201, 262, 345, 425	Goit ads. Wilson.....	263
Gleadell v. Thomson.....	74	Gokey ads. Curtis.....	40, 110
Gleason ads. Morss.....	350	Golden ads. Hulder .....	87
Gleason ads. National Trust Co.....	204, 475	Golden ads. Parish.....	431
Gleason ads. New York Guard. and		Goldenberg v. Hoffman....	90
Indemnity Co.....	8, 185, 204	Goldbery v. Utley .....	22
Gleason ads. Westbrook.....	382, 383	Goldman ads. Cohn.....	31, 179, 362
Glen Cove Starch Manuf. Co. ads.		Goldman ads. Emigrant Industrial	
Birmingham Iron Foundry.....	283	Sav. Bank.....	294
Glen v. Hope Mut. Life Ins. Co. of		Goldman ads. Littauer.....	321, 452
New York .....	238	Goldschmidt ads. Golendorf.....	348
Glens Falls Ins. Co. ads. Pitney.....	227, 346	Goldstein v. People... ..	133, 143
Glens Falls Ins. Co. ads. Smith.....	17, 234	Golendorf v. Goldschmidt.....	348
Glens Falls Ins. Co. ads. Titus.....	232	Gonies ads. Hancock. ....	9
Glenn & Hall Manfg. Co. v. Hall....	127	Gonzales v. New York & H. R. Co... ..	313
Glenney v. Stedwell....	347, 388	Gonzalez ads. People.....	136
Glenny ads. Williams.....	3, 169	Good ads. Robert.....	30
Glenville Woolen Co. ads. Allen....	145	Goodale v. Beers.....	246
Glenville Woolen Co. ads. Andrews.		Goodale v. Lawrence.....	272
	149, 222	Goodale v. Tuttle .....	458
Glenville Woolen Co. ads. O'Brien..	49	Goodell v. Harrington .....	20
Glenville Woolen Co. v. Ripley.....	419	Goodhue ads. Marfield.....	202
Globe, etc., Ins. Co. ads. People.....	10, 242	Goodman ads. Crary.....	6, 163
Globe Marble Hills Co. v. Quinn ....	204	Goodnow ads. Hyde .....	235
Globe Mutual Life Ins. Co. ads. Wis-		Goodrich ads. Austin.....	361
wall .....	241	Goodrich v. People.....	144
Globe Mutual Life Ins. Co. v. Reals. 5,	238	Goodrich ads. Ranger.....	292, 293, 344
Globe Woolen Co. ads. Coughtry....	309	Goodrich v. Russell.....	13
Glover ads. Harrison .....	202	Goodrich v. Thompson.....	11, 207
Glover ads. Stevens.....	26	Goodridge ads. Clarke.....	51
Gloversville, Village of, v. Howell.		Goodspeed ads. Ahern .....	11, 454
	97, 193	Goodwin v. Baltimore & Ohio R. Co.,	77
Goddard, Matter of.....	254, 404	Goodwin ads. Brown .....	89, 337
Goddard v. Merchants' Bank.....	326	Goodwin v. Conklin .....	36, 315
Goddard v. Stiles.....	53, 382, 419	Goodwin v. Griffis.....	167, 224
Godfrey ads. Allen.....	418	Goodwin v. Massachusetts Mutual	
Godfrey v. Godfrey .....	24	Life Ins. Co.....	241, 363
Godfrey ads. Hoyt.....	210	Goodwin v. Nelin .....	455, 456
Godfrey v. Johnston.....	26	Goodwin ads. People .....	86, 218
Godfrey ads. McGraw .....	282	Goodwin v. Simonson.....	297
Godfrey v. Mosher.....	38	Goodyear v. Bishop.....	32
Godfrey v. People.....	142	Goold v. Chapin.....	75
Godillot v. Harris.....	436	Goold ads. Morse.....	93
Godman ads. Emigrant Industrial		Gordon v. Boppe.....	350
Savings Bank.....	282	Gordon v. Cornes.....	98
Goedel ads. Moore.....	308	Gordon v. Hartman.....	328
Goelet v. Spofford.....	250	Gordon v. Hosteller.....	165

	Page.		Page.
Gordon ads. Livingston.....	472	Graham ads. Bate.....	201
Gordon ads. Merrick.....	106, 348	Graham v. Chrystal ...	175, 192, 243, 441
Gordon v. People.....	135	Graham ads. Donley.....	28
Gorham v. Trustees of Cooperstown..	303	Graham v. Fireman's Ins. Co.....	233
Gorham v. Phillips.....	96, 359	Graham v. First Nat. Bk. of Norfolk.	91, 272
Gorham ads. Robbins..	254	Graham ads. Jones.....	299
Formerly v. McGlynn.....	388	Graham v. Linden.....	17, 288
Gorton ads. Ackerman.....	469	Graham v. Phoenix Ins. Co.....	234
Gorton ads. Davis.....	278, 411	Graham ads. Stacy.....	160, 243, 476
Gorton v. Erie Ry. Co.....	313	Gram v. Prussia, etc., Society.....	386
Gosman v. Cruger.....	274	Grand Trunk Ry. Co. ads. Conduct... 74	
Goss ads. Kennedy.....	321, 421	Grand Trunk R. Co. ads. Keeney....	77
Goss v. Mather.....	4	Grand Street, etc., R. Co. ads. Wooley.	378
Gossler ads. Welsh.....	109, 389	Granger v. Craig.....	25
Gottgebrew ads. Cowdin.....	410	Granger v. Crouch..	289
Gottsberger v. Taylor.....	420	Granger ads. Trull.....	259
Gouge ads. Greaves.....	117, 347	Granite Ins. Co. ads. McComber....	336
Gould v. Bennett.....	357	Grant v. Chapman.....	46
Gould ads. Bearns..	424	Grant v. Griswold.....	26, 295
Gould v. Booth.....	218	Grant ads. Hier.....	192, 366
Gould ads. Butterworth.....	4	Grant ads. Hill.....	287
Gould v. Cayuga Co. Nat. Bank.....	212	Grant v. Johnson.....	456
Gould ads. Fisher....	24	Grant v. Morse.....	38
Gould ads. Hall.....	262	Grant ads. Smith.....	34, 422
Gould ads. Howell.....	112, 442	Grant v. Tallman....	147
Gould v. Hudson River R. Co.....	459	Grantz v. Griswold.....	26
Gould ads. L'Amoureux.....	113	Graser v. Stellwagen..	250
Gould ads. Manning.....	36, 421, 423	Grattan v. Metropolitan, etc., Ins. Co.	177
Gould ads. Marston.....	3	182, 185, 193, 240, 239, 384	
Gould v. McCarthy.....	161	Graves v. American Exchange Bank..	321
Gould ads. Morse.....	254	Graves v. Berdan.....	259
Gould v. Oneonta, Town of.....	436	Graves ads. Clapp.....	254
Gould ads. Staples.....	111	Graves v. Dudley.....	4
Gould v. Sterling, Town of.....	99	Graves ads. Duke of Cumberland....	13
Gould ads. Tyler.....	325	Graves ads. Remsen.....	168, 216
Gould ads. Vandevoort...7, 149, 273,	359	Graves ads. Sands.....	228
Goulding v. Davidson .....	275	Graves v. Wait,.....	208, 360, 418
Goulet v. Asseler.....	300	Graves v. Waterman.....	447
Gouraud, Matter of Will of.....	463	Graves v. White.....	114
Gourlay ads. Cole.....	164, 221, 388	Gray ads. Bangs.....	235
Gourley v. Campbell..	468	Gray v. Barton.....	213, 304
Gove ads. East River Nat. Bank....	57	Gray ads. Bellinger....	431
Governors of Alms-house v. American Art Union.....	265	Gray ads. Bensel.....	402
Graber ads. Commercial Warehouse Co .....	43	Gray v. Brooklyn, City of ..	96, 305
Grace ads. Brevoort.....	101, 221	Gray v. Davis.....	409
Gracie v. Freeland.....	18, 35	Gray v. Durland.....	394
Gracy v. Albany Exchange Co.....	255	Gray v. Fiske.....	28
Graff v. Bonnett.....	445	Gray v. Hook.....	109
Graff v. Morehouse.....	297	Gray v. Judson.....	52
		Gray v. Ratcliffe.....	69, 155

	Page.		Page.
Gray v. Schenck.....	344	Greene v. Republic Fire Ins. Co.	234, 246
Gray v. Tompkins, Supervisors of.		Greene v. Warwick.....	591
	40, 221, 303	Greene v. White.....	37
Gray ads. Watson .....	7, 10	Greenfield v. Massachusetts Mut. Life	
Greasert ads. Allant.....	409	Ins. Co. ....	238, 364
Greason v. Keteltas.....	253, 444	Greenfield v. People.....	134, 135, 136
Great Western Ins. Co. ads. Atkinson.	236	Greenough ads. Dillaye.....	271
Great Western Ins. Co. ads. Duncan.		Greenpoint Sugar Co. v. Whittin....	269
	236, 237, 398	Greentree v. Rosenstock .....	11, 51, 360
Great Western Ins. Co. ads. Fernan-		Greenway ads. King.....	399
dez. ....	237	Greenwich Ins. Co. ads. Adams....	192
Great Western Ins. Co. ads. Hubbell.	237	Greenwich, Town of, ads. Potter....	385
Great Western Ins. Co. ads. Roker...	236	Gregg ads. Cook.....	94
Great Western Ins. Co. ads. Root....	75	Gregg ads. Westervelt.....	96, 273
Great Western T. Co. v. Loomis....	189	Gregory ads. Dunlop.....	110
Great Western Ry. Co. ads. Sloman..	81	Gregory v. Mayor, etc.....	328
Greaves v. Gouge.....	117, 347	Greider ads. Lewis.....	30, 147, 349
Greeley ads. Bliss.....	163	Grenier ads. Kiah.....	464
Green v. Ames.....	414	Gretton v. Smith.....	258
Green v. Bates.....	318	Grey v. Grey.....	187, 213
Green v. Clark:.....	75, 206	Gribbon v. Freel.....	50, 418
Green v. Collins.....	157	Gridley v. Dole .....	350
Green v. Disbrow....	3, 173, 181, 189, 190	Gridley v. Gridley.....	4, 472
Green v. Edick.....	192	Grier ads. Person .....	476
Green v. Elmer.....	451	Grierson v. Mason.....	178
Green ads. First Nat. Bk.....	324	Griffin v. Banks.....	214
Green v. Fry.....	293, 355, 434	Griffin ads. Barney.....	46, 48
Green v. Green.....	221	Griffin ads. Blossom.....	78
Green v. Givan.....	286, 472	Griffin v. Colver.....	149
Green ads. Home Ins. Co. ....	319	Griffin ads. Griffin.....	125
Green v. Homestead Ins. Co. ....	231	Griffin v. Helmbold .....	51
Green v. Hudson River R. Co.....	5, 308	Griffin v. Marquardt.....	27, 47, 185
Green ads. Lawton.....	222	Griffin v. Mayor, etc.....	303, 314, 335
Green ads. Merrill.....	353	Griffin ads. Poughkeepsie & Salt Point	
Green ads. People, 129, 268, 329, 330,	335	Railroad Co. ....	358
	340	Griffing ads. Beebe.....	20, 160, 348
Green v. Shumway.....	95, 165	Griffis ads. Goodwin .....	167, 224
Green ads. Underwood .....	22, 302, 337	Griffith ads. Clark.....	4
Green ads. Wait.....	390, 391	Griffith ads. Ladue .....	73
Green ads. Waters ..	20	Griffith ads. Scovill.....	76, 146, 178
Green ads. Wilcox Silver Plate Co.		Griffiths v. Hardenbergh.....	188, 341
	10, 390, 409	Griffiths ads. Van Vechten..	188, 207, 440
Greenbaum ads. Hoover.....	63	Griffiths ads. Vrooman.....	273
Greenbush, Village of, ads. Boston &		Griggs v. Griggs .....	145, 343
Albany R. Co. ....	376	Griggs v. Howe.....	319, 421, 453, 454
Greenbush, Prest., etc., ads. Den-		Grinnell ads. Merrill .....	81
burgh.....	281	Grippen v. New York Cent. R. Co....	377
Green ads. Dows.....	66	Griscom v. Mayor, etc.....	26
Green ads. Livingston....	464	Grissler ads. Catlin .....	31, 294
Greene ads. Maltby .....	26, 283, 370	Grissler v. Powers.....	168
Greene v. Mayor, etc.....	334	Griswold ads. Arthur. 22, 120, 208, 327,	440

	Page.		Page.
Griswold ads. Bonnell.....	269, 270, 361	Guillaume ads. Monroe.....	29, 65
Griswold ads. Grant.....	26, 295	Guillaume v. Rowe.....	162
Griswold v. Haven.....	350	Guion ads. Marshall.....	329
Griswold ads. Merchants' Bank....	8, 92	Guiterman v. Liverpool, etc., Steam-	
	449, 451	ship Co.....	175, 357
Griswold ads. Newcomb.....	191	Gunter ads. Catlin.....	452, 453
Griswold v. Onondaga Co. Sav. Bk....	356	Gurley ads. James.....	396
Griswold ads. People.....	219	Gurney v. Atlantic & Gt. West. R.	
Griswold v. Sheldon.....	287	Co.....	105, 380, 382
Groat v. Gile.....	149, 391	Gurney ads. Hubbard.....	324
Groat v. Moak.....	157, 338, 459, 460	Gurney ads. Schroeder.....	89
Grocers' Bank v. Penfield.....	320	Gutchees v. Daniels.....	395
Groh ads. Tanton.....	244	Guy v. Mead.....	182
Gross v. Clark.....	67	Guy ads. Young.....	456
Gross ads. Powers.....	124		
Grosvenor v. Atlantic Fire Ins. Co....	234	H——, an Attorney, Matter of...52,	54
Grosvenor v. New York Cent. R. Co....	78	Haas v. O'Brien.....	63
Grover v. Coon.....	37, 97	Haberstro ads. Douglas.....	194, 397
Grover v. Morris.....	265	Habel ads. German Savings Bank...	103
Grube, Matter of Petition of.....	334		123, 222
Grumann v. Smith.....	150, 416	Hackett v. Badeau.....	283
Grymes v. Howe.....	214	Hackett v. Belden.....	22
Guardian Mutual Life Ins. Co. ads.		Hackett v. Richards.....	259
Attorney-General.....	122, 242, 381	Hackett ads. White.....	351
Guardian Mut. Life Ins. Co. ads.		Hackfield ads. Dutchess County Mut.	
Fudicker.....	40, 415	Ins. Co.....	325
Guardian Mut. Life Ins. Co. ads.		Hackford v. New York Cent., etc., R.	
Homer.....	239	Co.....	19, 310
Guardian Mut. Life Ins. Co. ads. Hig-		Hackley v. Draper.....	382
bie.....	176, 238	Hackley v. Hope.....	18
Guardian Life Ins. Co. ads. Koelges.	438	Hackley ads. People.....	100
Guardian Mut. Life Ins. Co. ads.		Hadden v. People.....	142
O'Reilly.....	240	Haddow v. Lundy.....	181, 201
Guardian Sav. Inst., Matter of.36, 61,	381	Haden v. Coleman.....	112
Guckenheimer v. Angevine.....	209	Hadley v. Mayor, etc.....	302
Guenther v. People.....	138	Hadley ads. People.....	430
Guernsey v. Guernsey.....	471	Hagadorn v. Raux.....	418
Guernsey v. Miller.....	35	Hagan v. Clark.....	401
Guernsey v. Rexford.....	3, 243	Haggart v. Morgan.....	5, 41, 50, 363
Guernsey ads. Scott.....	347, 464	Hagerty v. Andrews.....	358
Guest v. Brooklyn, City of.....	44, 88	Hagerty v. People.....	139
Guest ads. Taylor.....	27, 212	Haggerty ads. Gibson.....	419
Guggenheimer v. Geiszler.....	451	Haight v. Continental Ins. Co.....	232
Guild ads. Cutts.....	249	Haight ads. Cornwell.....	390
Guild v. Thomas.....	68	Haight ads. Gambling.....	283
Guilford ads. Poor.....	343	Haight v. Hayt.....	1, 208
Guilford, Town of, v. Cooley.....	418	Haight v. Price.....	6, 460
Guilford, Town of, v. Supervisors...	101	Haight ads. Turner.....	34, 113
Guillander v. Howell.....	91	Haight ads. Warren.....	325
Guillaume v. Hamburg and Am.		Haight ads. White.....	235
Packet Co.....	74	Haines v. Hollister.....	345

	Page.		Page.
Haines ads. People .....	43, 166	Hallahan v. Herbert.....	282
Haire v. Baker.....	285, 366	Halleck v. Dominy.....	203, 247, 253
Hakes v. Peck.....	109	Hallenbeck ads. Spaulding .....	179
Halbert ads. Giles.....	16, 124	Hallgarten ads. Becker .....	391
Hale v. Clauson.....	22	Halliday v. Hart .....	423
Hale ads. Farmers' Bank.....	59, 452	Halsey, Matter of .....	28
Hale v. Hays.....	389	Halsey ads. Forbes.....	198
Hale ads. Hobson.....	467, 468	Halsey ads. Howard Ins. Co.....	296
Hale ads. Newcomb .....	215	Halsey v. McCormick.....	69, 459
Hale v. Omaha Nat. Bk.....	298, 358, 365	Halsey ads. People .....	266, 431
Hale v. Patton .....	67	Halsey ads. Scholey.....	4, 367
Hale v. Smith.....	314	Halsey v. Sinsebaugh.....	191
Hale v. Sweet.....	224, 299	Halstead v. Mayor, etc.....	302
Haley v. Earle .....	311	Halstead v. Seaman .....	41
Haliday ads. Noble.....	253	Halsted v. Halsted.....	348
Hall v. Augsburg .....	458	Halsted v. McChesney.....	198, 271, 273
Hall ads. Bigelow .....	182	Ham v. Mayor, etc.....	335
Hall ads. Bigler.....	112	Ham ads. Salter.....	349, 351
Hall v. Brooks .....	29, 50	Ham v. Van Orden.....	45, 213, 473
Hall ads. Byrd .....	180, 208	Hamann ads. Lenihan .....	63
Hall ads. Campbell.....	168	Hamburgh & Am. Packet Co. ads.	
Hall v. Carnley .....	298, 300, 301	Guillaume.....	74
Hall v. City of Buffalo.....	44, 302	Hamel ads. Siewert.....	451
Hall v. Erwin.....	312	Hammersley v. Mayor, etc.....	335
Hall v. Farmer.....	215, 322, 408	Hamill ads. Brookman.....	35, 97, 399
Hall ads. First Nat. Bk. of Angelica.		Hamill ads. Gillespie.....	300
	320, 324	Hamilton College, Trustees of, v.	
Hall ads. Fisher.....	153, 346, 465	Stewart.....	417
Hall ads. Gano.....	133	Hamilton v. Douglas .....	274
Hall ads. Glenn & Hall Mfg. Co.....	127	Hamilton v. Eno.....	264
Hall v. Gould .....	262	Hamilton v. Hay.....	177, 448
Hall v. Hall .....	13, 200, 445	Hamilton Fire Ins. Co. ads. Mayor,	
Hall Mfg. Co. v. Hall.....	437	etc .....	227
Hall v. Ins. Co. of North America...	227	Hamilton Fire Ins. Co. ads. Mellen..	229
Hall v. Kellogg.....	224	Hamilton v. Ganyard.....	109
Hall v. Lauderdale .....	10	Hamilton Ins. Co. ads. Chase....	226, 228
Hall ads. Low.....	38, 405	Hamilton Ins. Co. ads. Gardner.....	116
Hall ads. Merchants' National Bk. of		Hamilton ads. Moore.....	2, 180
Whitehall .....	44	Hamilton v. McPherson.....	146
Hall ads. Miller.....	344, 365, 457	Hamilton v. New York Cent. R. Co.	181
Hall v. Naylor .....	185	Hamilton ads. People.....	85, 261
Hall v. People .....	95, 140, 329, 339	Hamilton ads. Sheehan .....	284
Hall v. Robinson .....	115	Hamilton ads. Story .....	298
Hall v. Sampson.....	301	Hamilton v. Taylor.....	177
Hall v. Sheehan.....	283	Hamilton v. Third Ave. R. Co.....	151
Hall ads. Smith.....	363	Hamilton ads. Vail .....	270
Hall v. Stryker.....	49, 210	Hamilton v. Van Rensselaer .....	214
Hall ads. Tonnele .....	462	Hamilton v. White.....	461
Hall v. Western Trans. Co .....	257	Hamilton v. Wright.....	6, 54
Halladay ads. Congregation Shaaar		Hamlin ads. Bissell.....	34
Hash Moiu.....	456	Hamlin v. Sears.....	39, 115, 170



	Page.		Page.
Hammett ads. Central Bank of Brooklyn .....	326	Hardenbrook ads. Quinn.....	468
Hammett v. Linneman.....	391	Hardenburgh v. Lakin.. .....	382, 403
Hammon v. Zehner .....	163	Hardenburgh ads. People. ....	267, 396
Hammond ads. Day.....	41	Hardin ads. Ross.....	104
Hammond v. Pennock .....	114, 212	Harding ads. Dutchess Company.	183, 391
Hammond v. Varian.....	176, 183	Harding v. Tift .....	356
Hammond v. Zehner.....	6, 173	Hardmann v. Bowen.....	48
Hance v. Cayuga & Susquehanna R. Co.....	377	Hardt v. Schulting.....	212
Hancock, Matter of.....	424	Hardy v. City of Brooklyn ...	90, 304, 305
Hancock, Town of, ads. Cagwin....	436	Hardy ads. Van Wyck .....	14, 347, 417
Hancock, Town of, v. First Nat. Bk. of Oxford.....	367, 370, 417	Harger v. Worrall.....	320
Hancock v. Gomez.....	9	Hargous ads. Renard... ..	49, 129
Hancock v. Hancock.....	2, 250, 344, 470	Hargous v. Stone .....	389
Hancock v. Rand.....	223	Harison ads. Brooks.....	263
Hancock v. Sears.....	419	Harland v. Lilienthal .....	53, 176
Hancox v. Jaques .....	259	Harlem Gaslight Co. v. Mayor, etc. .	301
Hancox v. Meeker... ..	201	Harlem, etc., R. Co. ads. Thurber...	35, 312
Hand v. Ballou.....	90, 101	Harley v. Eleventh Ward Bank .....	3
Hand v. Kennedy.....	292	Harloe v. Foster .....	152
Hand v. Newton.....	204, 435, 459	Harmony F. & M. Ins. Co., Matter of.	116
Hand v. Williamsburgh City Fire Ins. Co.....	225	Harmon ads. Cobb.....	68, 224
Handy v. Draper .....	269, 413	Harmon v. Hope .....	248
Hane v. Kent .....	466	Harmony v. Bingham....	76, 78, 107, 355
Hanes ads. Saunders.....	155		364
Hanmer ads. Pope .....	7	Harmony ads. Low.....	465, 466
Hanmore ads. Pier .....	269	Harpending v. Munson .....	374
Hannam ads. Dalrymple.....	28	Harper v. Albany Mut. Ins. Co....	230
Hannahs v. Hannahs .....	200	Harper ads. Burkett.....	256, 282
Hannahs ads. Morgan .....	216	Harper v. Fairley .....	414
Hannibal & St. Joseph R. Co. ads. Miller.....	74, 107	Harper v. New York City Ins. Co....	230
Hanover Fire Ins. Co. ads. Brink....	234	Harper ads. Wilkes.....	417, 471
Hanover Fire Ins. Co. ads. McKeage.	45, 204	Harrington v. Brown.....	323
Hanover Fire Ins. Co. v. Tomlinson..	17	Harrington v. Bruce.....	23
Happy v. Mosher.....	97, 399	Harrington ads. Ford... ..	54
Hauptman v. Catlin .....	275, 282	Harrington ads. Goodell .....	20
Hauselt v. Vilmar.....	124	Harrington v. Keteltas .....	199, 412
Hauser ads. Sherwood.....	385	Harris v. American Bible Society....	468
Hay ads. Humerton .....	448	Harris ads. Barnes.....	253
Harbeck ads. Brower.....	121	Harris v. Brown .....	39
Harbeck v. Vanderbilt.....	248	Harris v. Burdett.....	16
Harbeson ads. Rice .....	92, 465	Harris v. Clark.....	214, 446
Hard ads. Alexander.....	272, 438	Harris ads. Cook.....	152, 218
Hardenbergh ads. Becklen.....	441	Harris ads. Cornes.....	338, 358
Hardenbergh ads. Griffiths.....	188, 341	Harris ads. Denike.....	465
Hardenbrook ads. Larkin .....	315, 355	Harris v. Ely.....	199, 425
		Harris v. Equitable Life Ins. Co.	239, 249
		Harris v. Frink .....	455
		Harris ads. Godillot.....	436
		Harris v. Harris .....	174, 463
		Harris ads. Hiscock.....	37, 41, 246, 257
		Harris v. Jex .....	434

	Page.		Page.
Harris v. Kasson.....	389, 440	Hartman ads. Creed.....	309, 346
Harris ads. King.....	248	Hartman ads. Gordon .....	328
Harris v. Moody.....	398	Hartnett v. Garvey.....	175
Harris v. Murray.....	352	Hartnett v. Wandell.....	467
Harris ads. Newton .....	191	Hartt ads. Russell .....	425, 467
Harris v. Northern Indiana R. Co. ..	76	Hartshorn ads. Edmonstone.....	13, 189
Harris v. People...102, 138, 143, 219,	331	Hartshorn ads. Market Bank.....	319
Harris v. Perry .....	309, 328	Hartshorn ads. Price .....	76, 175
Harris ads. Pulver.....	53	Hartshorne ads. Johnson...243, 257,	352
Harris v. Pratt.....	391	Hartshorne ads. Market Bank .....	336
Harris v. Rathbun.....	109	Hartshorne v. Union Mut. Ins. Co...236	
Harris ads. Tallcott.....	171, 183	Hartung v. People .....	16, 98, 137, 139
Harris v. Tumblebridge.....	35, 66, 416	Harty v. Cent. R. Co. of N. J.....	377
Harris v. Uebelhoer.....	401	Harvey ads. Brackett.....	64, 299, 300
Harris v. White.....	66	Harvey v. Cherry .....	225
Harrison ads. Brooks. . . . .	151, 440	Harvey ads. Johnson.....	421, 422
Harrison v. Clark . . . . .	425	Harvey v. N. Y. Cent.....	281
Harrison v. Gibbons.....	249	Harvey v. Olmstead.....	466
Harrison v. Glover.....	202	Harvey ads. Sands.....	100, 383
Harrison v. Harrison .....	466	Harway ads. Murray .....	256
Harrison ads. Hartley.....	291, 452	Harwood v. People.....	139
Harrison ads. McEntee .....	204	Hasbrouck v. Bunce.....	344
Harrison ads. McMahon.....	15, 173, 197	Hasbrouck ads. Collins.....	256
Harrison v. People.....	142	Hasbrouck ads. De Puyster.....	212, 385
Harrison v. Wilkin . . . . .	88, 168, 194, 448	Hasbrouck v. Hasbrouck.....	199
Harsha v Reid...130, 145, 402, 407,	456	Hasbrouck v. Kingston Board of Edu-	
Hart ads. Conkey.....	99, 300	cation.....	20
Hart ads. Edgell.....	299	Hasbrouck v. Kingston Board of	
Hart ads. Faulkner.....	92	Health.....	20
Hart ads. Halliday.....	423	Hasbrouck v. Lounsbury.....	391
Hart v. Hudson River Bridge Co. 187,	310	Hasbrouck ads. President, etc...199,	426
	314	Hasbrouck v. Vandervoort.....	475
Hart ads. Low.....	123, 179, 222, 437	Hascall ads. People.....	173
Hart v. Lyon .....	354	Hassan v. City of Rochester.....	307
Hart ads. Mayor, etc. ....	90, 336	Haskin ads. Bathgate...127, 296,	411
Hart v. Messenger.....	68	Haskins v. People.....	137, 139, 142
Hart v Rensselaer & Saratoga R. Co. 81		Hassler ads. Fitch.....	439
Hart ads. Stief.....	368, 404	Hastings ads. De Witt.....	168, 269
Hart ads. Stoddard .....	285, 287	Hastings v. Drew .....	117
Hart v. Taylor.....	104	Hastings v. Palmer.....	220
Hart ads. Taussig.....	150, 416	Hastings v. Westchester Fire Ins. Co.233	
Hart ads. Trow's Printing, etc., Co..	51	Hastings ads. Souyles .....	461
Hart v. Wandle.....	296	Haswell v. Lincks.....	130, 418
Hart v U. S. Direct Cable Co....	433	Haswell v. Mayor, etc.....	308, 340
Harteau ads. Jaffe... ..	258	Hatch v. Bassett .....	468
Hartford Fire Ins. Co. ads. Angell...228		Hatch ads. Boynton.....	269
Hartford Fire Ins. Co. ads. McLaren.225		Hatch ads. Buffalo & Pittsburgh R.	
Hartford Fire Ins. Co. ads. Walsh...232		Co.....	373
Hartley v. Harrison.....	291, 452	Hatch v. Buffalo, City of.....	44
Hartley v. James .....	456	Hatch v. Central Nat. Bank.....	24
Hartley v. Tatham.....	290, 294	Hatch v. Elkin.....	179

	Page.		Page.
Hatch ads. Heiser.....	247	Haviland v. Wehle.....	50, 151
Hatch v. Mayor.....	336	Hawes v. Lawrence.....	392
Hatch v. Pryor.....	175	Hawker v. People... ..	133, 138
Hatch ads. Wicks.....	415	Hawkins v. Baker.....	407
Hatcher v. Rocheleau.....	246	Hawkins ads. Cormier.....	42
Hatfield v. Birmingham Iron Foundry	357	Hawkins ads. Dunlap.....	211
Hatfield ads. Cobb.....	113, 212	Hawkins v. Pemberton.....	392
Hatfield ads. Cushman.....	33	Hawkins ads. People.....	267
Hatfield v. Lasher.....	264	Hawley ads. Christie.....	466, 468
Hatfield ads. Loder.....	413, 472	Hawley v. Keeler.....	408
Hatfield ads. Loeschigk.....	153, 352	Hawley v. North. Cent. Ry. Co.	280, 310
Hatfield ads. Pistor.....	27	Hawley ads. Phelps.....	218, 406
Hatfield v. Sneden.....	277, 471	Hawley ads. Sprights.....	298
Hathaway, Matter of Will of.....	424	Hawley ads. Shand.....	131
Hathaway v. Bennett.....	103, 214	Hawley ads. Wilcox... ..	30, 195
Hathaway v. Brayman.....	300	Haws ads. New York & Harlem R.	
Hathaway v. Cincinnatus, Town of.		Co.....	222
	12, 434, 435	Haxtun ads. Sheldon.....	449
Hathaway v. Howell.....	196	Hay ads. Humerton.....	177
Hathaway v. Johnson.....	42	Hay v. Star Fire Ins. Co.....	235
Hathaway ads. Malone.....	281	Hay ads. Whitlock... ..	458
Hathaway v. Payne.....	154	Haydock v. Coope.....	46
Hathorn ads. Bockes.....	16, 447	Hayden v. Demetz.....	389, 434
Hathorn v. Ely.....	77	Hayden v. Florence Sewing Machine	
Hathorn ads. Hayes.....	324	Co.....	35, 262
Hathorn ads. Johnson.....	111, 208, 250	Haydock v. Coope.....	46
Hathorn ads. Kilmer.....	31, 447	Haydock v. Stow.....	409
Hathorn ads. Leland.....	16	Hayes v. Ball.....	23, 263
Hathorn ads. Smith.....	453	Hayes v. Hathorn.....	324
Hathorne v. Hodges.....	211	Hayes ads. Haviland... ..	223
Hatmaker ads. Garfield... ..	445	Hayes v. Heyer.....	362
Hatters' Bank v. Phillips.....	324	Hayes ads. Humphrey.....	42, 212, 423
Hauck v. Craighead.....	345, 359	Hayes ads. Kerr.....	205
Haug ads. Ruppert.....	50, 51	Hayes v. People.....	139
Haughian ads. Hebbard.....	54, 155	Hayes ads. Second Manhattan Build-	
Haughwout v. Garrison.....	453	ing Association.....	72, 117, 406
Haughwout v. Mayor, etc.....	335	Hayes ads. Williams... ..	25, 364
Haukerson ads. Durand.....	131	Hayner v. American Popular Life Ins.	
Haukins v. Mayor, etc.....	329	Co.....	239, 434
Hauselt ads. Rust.....	28	Hayner v. James.....	99
Hauselt v. Vilmar.....	46	Haynes ads. Fowler.....	88, 254
Hausser ads. Sherwood.....	148	Haynes ads. Hill.....	194, 396
Hauser ads. Stevens.....	63, 163	Haynes ads. Mayenborg.....	170
Haven ads. Griswold.....	350	Haynes v. Rudd.....	320
Havens v. Erie Ry. Co.....	313	Hays v. Cohoes Co.....	338
Havens ads. Forrest.....	36, 129	Hays ads. Hale.....	389
Havens v. Patterson.....	456	Hays ads. Kerr.....	21, 364
Havens v. Sackett.....	467	Hays v. Miller.....	310
Havens ads. White.....	234	Hays v. Thomas.....	1
Haverly v. Becker.....	248	Hays ads. Van Rensselaer... ..	93, 255
Haviland v. Hayes.....	223	Hayt ads. Haight.....	1, 208

	Page.		Page.
Hayt ads. People.....	268, 435	Heine v. Meyer.....	112
Hayt ads. Purdy.....	425, 465, 466	Heinemann v. Heard.....	12, 174
Hayt ads. Townsend.....	155	Heinrich v. Kom.....	16
Hayward ads. Candee.....	262	Heiser v. Hatch.....	247
Hayward v. Liverpool, etc., Ins. Co.	234	Heishon v. Knickerbocker Life Ins.	
Haywood ads. Schuyler.....	283	Co.....	301
Hazard v. Caswell.....	349, 437	Heister ads. Metropolitan Board of	
Hazard v. Fiske.....	66, 202	Health.....	97
Hazard ads. Manufacturers and		Hellenberg v. Order of B'nai Berith.	
Traders' Bank.....	319		465, 468
Hazard ads. McHenry.....	212	Hellman ads. Caulkins.....	409
Hazard v. Spears.....	9	Hellmann ads. Loeb.....	12, 38
Hazard ads. Tuttle.....	116	Helmbold ads. Griffin.....	51
Hazeltine ads. Farmers and Mechan-		Helmer ads. Thorn.....	185, 210
ics' Nat. Bk.....	66	Helmer ads. N. Y. State Loan and	
Hazeltine v. Weld.....	458	Trust Co.....	116, 120
Hazewell v. Comsen.....	441	Helmeth ads. Englishbe.....	93, 167
Hazman v. Hoboken Land and Im-		Henderson ads. Dorrance.....	64, 397
provement Co.....	79, 203	Henderson v. New York Cent., etc.,	
Health Dept. of City of New York v.		R. Co.....	145, 217, 222
Knoll.....	329	Henderson v. Spofford.....	357
Health Dept. v. Knoll.....	356	Hendricks v. Stark.....	354
Heard v. City of Brooklyn.....	152, 374	Hendricks ads. Sturgis.....	184
Heard ads. Heinemann.....	12, 174	Hendrickson ads. Beers.....	52, 245, 251
Heart ads. Gardner.....	82	Hendrickson ads. Hume.....	130
Heath v. Barmore.....	358	Hendrickson v. People.....	135, 136
Heath ads. Doubleday.....	99, 129, 252, 347	Heney v. Brooklyn Benevolent So-	
Hebbard v. Haughian.....	54, 155	ciety.....	13
Hebbard ads. Hutchins.....	114	Henkel ads. Schaefer.....	10
Hebenzahl ads. Townsend, Matter of.	24	Hennequin v. Clews.....	64
Hebrew, etc., Society, Matter of Peti-		Hennequin v. Naylor.....	208
tion of.....	333	Hennessey ads. Ontario Bank.....	349
Heckman v. Pinkney.....	282, 404	Hennessey ads. Pitcher.....	285
Heckel ads. Ruger.....	278	Hennessey v. Patterson.....	470
Hedges v. Hudson R. R. Co.....	78	Hennessey v. Wheeler.....	437
Heeg v. Licht.....	338	Henry, Matter of.....	52
Heermans v. Burt.....	447	Henry v. Bank of Salina.....	33, 476
Heermans v. Clarkson.....	293, 385	Henry ads. Cushman.....	274
Heermans v. Ellsworth.....	41	Henry ads. Rodman.....	419
Heermans v. Robertson.....	445	Henry v. Root.....	221
Heermans ads. Wadsworth.....	193	Henry v. Staten Island Ry. Co.....	281
Heermans ads. Young.....	131	Henry ads. Walker.....	196, 284, 299
Hegan v. Eighth Ave. R. Co.....	217, 313	Henry v. Wilkes.....	293
Hegeman ads. Moore.....	92, 278, 467	Henry ads. Wood.....	194
Hegeman ads. Pinckney.....	167, 194	Henshaw v. Rowland.....	77
Hegeman ads. Pray.....	470, 473	Hentz v. Muller.....	171, 371
Hegeman v. Western R. Corporation.	79	Hepburn ads. Fisher.....	17, 33, 250, 371
Hegeman ads. Wetmore.....	345	Herbert ads. Hallahan.....	282
Height v. People.....	190	Hercules Mut. Life Assur. Soc. v.	
Heilman v. Westchester Fire Ins. Co.	226	Brinker.....	103
Heim ads. Kromer.....	2	Herkimer v. Rice.....	197, 225

## TABLE OF CASES.

541

	Page.		Page.
Herkimer Co. ads. Cortland Co. . . . .	181, 186	Hicks ads. Winchell . . . . .	33, 369, 414
Herkimer Co. Mutual Ins. Co. ads.		Hidden v. Waldo . . . . .	202
Wilson . . . . .	230	Hiemenz ads. Seltenreich . . . . .	108
Herkimer Mfg. Co. v. Small . . . . .	118	Hier v. Abrahams . . . . .	436
Herkimer Manuf. and Hyd. Co. ads.		Hier ads. Comstock . . . . .	318, 323, 476
Fosgate . . . . .	366	Hier v. Grant . . . . .	192, 366
Herman v. Adriatic Fire Ins. Co. . . . .	227	Hier v. Staples . . . . .	346, 360
Hernance, Matter of Application of.	432	Higbie v. Guardian Mut. Life Ins. Co.	
Hermans ads. Hill . . . . .	369		176, 238
Hermon ads. Williams . . . . .	29, 38	Higbie v. Westlake . . . . .	34, 200, 425
Hernandez ads. Scofield . . . . .	35	Higgins, Matter of . . . . .	464
Heroy v. Kerr . . . . .	120, 122	Higgins ads. Baker . . . . .	177, 390
Herrick v. Ames . . . . .	285	Higgins ads. Cozzens . . . . .	182, 438
Herrick v. Woolverton . . . . .	318	Higgins v. Delaware, etc., R. Co . . . . .	105
Herrman v. Merchants' Ins. Co. . . . .	227	Higgins v. Moore . . . . .	184
Herring v. Hoppock . . . . .	196, 391	Higgins v. Murray . . . . .	105
Herrington ads. Manchester . . . . .	2, 404	Higgins v. People . . . . .	143
Herrington v. Robertson . . . . .	26, 274, 443	Higgins v. Phoenix Mut. Life Ins. Co.	239
Hersee ads. Union, etc. . . . .	117, 119	Higgins ads. Rector, etc., of Trinity	
Hersey ads. Fisher . . . . .	24, 433	Church . . . . .	257
Herter ads. La Farge . . . . .	453	Higgins v. Reynolds . . . . .	72, 218
Hess v. Rau . . . . .	416	Higgins v. Watervliet Turnpike Co.	
Hessberg v. Reily . . . . .	95, 398		80, 279
Hetfield ads. Comins . . . . .	24, 183, 443	Highlands Chemical and Mining Co.	
Hetzel v. Barber . . . . .	369, 382, 467	v. Matthews . . . . .	105
Hewitt, Matter of . . . . .	462	High Rock Spring Co. ads. Congress	
Hewitt ads. Cromwell . . . . .	317	Spring Co. . . . .	437
Hewitt v. Northrup . . . . .	63	Hight v. Sackett . . . . .	476
Hewlett v. Wood . . . . .	16, 17, 176, 348, 439, 443	Higinbotham v. Stoddard . . . . .	155
Hexter v. Knox . . . . .	147, 260, 261	Hildebrandt v. Crawford . . . . .	474
Heyer ads. Hayes . . . . .	352	Hildebrand v. People . . . . .	142
Heydorn ads. Central Bank of Troy . . . . .	153	Hildreth v. Mills . . . . .	24
Heyne v. Blair . . . . .	266	Hill v. Beebe . . . . .	298, 355
Heyward v. Mayor, etc. . . . .	167, 305	Hill v. Berry . . . . .	87
Heywood v. Buffalo, City of . . . . .	4, 429, 430	Hill v. Board of Supervisors . . . . .	69, 428
Hibbard v. N. Y. & Erie R. Co . . . . .	80	Hill v. Burke . . . . .	448
Hibbard ads. Sisson . . . . .	204	Hill ads. Covell . . . . .	115, 150, 390, 442
Hibernia Fire Ins. Co. ads. Washoe		Hill v. Crockford . . . . .	182
Tool Manfg. Co. . . . .	231, 439	Hill v. Grant . . . . .	287
Hibernia Ins. Co. ads. Maher . . . . .	231, 385	Hill v. Haynes . . . . .	194, 396
Hibernia Nat. Bank v. Lacombe . . . . .	91, 253, 325	Hill v. Hermans . . . . .	369
Hibsher ads. Meyer . . . . .	318, 321, 367	Hill v. Miller . . . . .	8, 107
Hickok ads. Schwinger . . . . .	195, 247, 290	Hill v. Mobawk & H. R. R. Co. . . . .	167
Hicks v. Bradner . . . . .	475	Hill ads. Northrop . . . . .	412
Hicks ads. Bush . . . . .	285, 343	Hill v. Peekskill Sav. Bank . . . . .	36
Hicks v. Cleveland . . . . .	408	Hill ads. Perkins . . . . .	38
Hicks v. Dorn . . . . .	341	Hill ads. Sands . . . . .	122
Hicks ads. Rheel . . . . .	65	Hill v. Spencer . . . . .	269
Hicks ads. White . . . . .	369	Hill v. Syracuse, etc., R. Co. . . . .	74, 80
		Hill ads. Willover . . . . .	264, 363

	Page.		Page
Hill ads. Woolner .....	113, 434	Hoey ads. Tallman.....	44
Hill ads. Young.....	243	Hoffman v. <i>Ætna Fire Ins. Co.</i> .....	230
Hillenbrand ads. Dalrymple.....	63, 318	Hoffman v. Armstrong.....	371
Hiller v. Burlington, etc., R. Co. 100,	417	Hoffman v. Conner .....	398, 466
Hillman v. Stephens.....	200	Hoffman ads. Goldenberg.....	30
Hills ads. People.....	405	Hoffman v. Hoffman .....	277
Hills v. Place.....	323	Hoffman ads. McCulloch.....	174
Hills ads. Tanner .....	108	Hoffman ads. Mills.....	171, 221, 425
Hilton v. Bender.....	95, 306, 471	Hoffman v. New York Cent. R. Co... 181	
Hilton v. Fonda.....	43, 429		279
Hilton v. Vanderbilt .....	9, 202, 353	Hoffman v. People.....	428
Himrod ads. Barto.....	95	Hoffman ads. Sander.....	130, 214
Hinckley v. Kreetz.....	36	Hoffman v. Union Ferry Co. of Brook-	
Hinckley v. New York Cent., etc., R.		lyn.....	400
Co .....	76	Hoffman Fire Ins. Co. ads. Parmelee. 230	
Hinckley v. Smith.....	274, 402, 455	Hofheimer v. Campbell.....	33, 396
Hinds ads. Amsbry.....	217	Hofnagle v. New York, etc., R. Co.. 279	
Hinds v. Barton.....	370, 379	Hogan v. Brooklyn, City of.....	114
Hines v. Lockport, City of.....	303	Hogan v. Curtin.....	472
Hinman ads. Moyer .....	248	Hogan v. Hoyt .....	14, 169
Hinnemann v. Rosenback .....	107	Hogan ads. Jacobs.....	50
Hintermister v. First Nat. Bank of		Hogan ads. Lawson.....	113
Chittenango .....	452	Hogan ads. Loonie.....	282, 409
Hiscock v. Harris.....	37, 41, 246, 257	Hogan v. Mayor, etc.....	329
Hiscock v. Phelps.....	351	Hoge ads. Belmont Branch Bank. 322, 452	
Hislop ads. People .....	194	Hoge v. Lansing .....	320
Hitchcock v. North-western Ins. Co., 236		Hoguck ads. In Matter of Petition of	
Hitchcock ads. Pearce.....	343	Whittlesey .....	23
Hitchings v. Van Brunt .....	37, 53	Holahan ads. Carter....	284, 288, 356, 420
Hitchins v. People.....	141	Holbrook ads. Colvin .....	12, 397
Hoag ads. Baker.....	399	Holbrook ads. Corcoran.....	281
Hoag v. Hoag.....	259	Holbrook ads. Marsh .....	53
Hoag v. Lamont.....	71, 117, 129	Holbrook v. New Jersey Zinc Co.. 118, 237	
Hoagland ads. Shultz.....	46	Holbrook ads. Smith.....	130, 145
Hoagland v. Trask .....	343	Holbrook v. Utica & S. R. Co....	79, 174
Hoard v. Garner.....	11	Holbrook ads. Wright.....	287
Hobart v. Hobart.....	18, 31, 474	Holcomb v. Holcomb.....	176, 193, 475
Hobart College v. Fitzhugh.....	416	Holcomb ads. Wolcott.....	45, 124
Hobby ads. Coe .....	256	Holdane v. Cold Spring, Trustees of	
Hoboken Land and Improvement Co.		Village of.....	152, 219
ads. Hazman .....	79, 203	Holden v. Burnham.....	210
Hobson v. Hale.....	467, 468	Holden v. New York & Erie Bank... 61	
Hochreiter v. People .....	135	Holden v. Putnam Fire Ins. Co.. 170, 387	
Hodge v. Hoppock.....	355		435
Hodges v. Cooper .....	440	Holdredge ads. Manvel.....	104
Hodges ads. Hathorne.....	211	Holland ads. Austin.....	353
Hodges v. Shuler.....	316	Holland ads. Palmer.....	11
Hodges v. Tennessee Marine and Fire		Holland ads. Rawson .....	76
Ins. Co.....	178	Holland ads. Smith.....	178
Hoe v. Sanborn.....	15, 144, 392	Holland ads. Witbeck .....	77
Hoes v. Van Hoesen.....	470	Holland Purchase Ins. Co. ads. Owens. 230	

## TABLE OF CASES.

543

	Page.		Page.
Holland Purchase Ins. Co. ads. Red-field.....	31, 229	Home Life Ins. Co. ads. Dilleber.....	175, 239
Holland Purchase Ins. Co. ads. Sprague.....	233		241
Holland Purchase Co. ads. Train.....	228	Home Life Ins. Co. v. Sherman.....	262
	233	Homer v. Guardian Mut. Life Ins. Co.....	239
Hollenbeck v. Donnell.....	295, 381	Homer, Town of, ads. Hathaway....	435
Holley v. Mayor, etc.....	129	Homer v. Lyman.....	36
Hollingsworth v. Spaulding.....	198	Homestead Fire Ins. Co. ads. Arthur	52, 231, 362
Hollis v. Drew Theol. Sem.....	468	Homestead Fire Ins. Co. ads. Baley..	227
Hollister ads. Angel.....	206	Homestead Ins. Co. ads. Green.....	231
Hollister ads. Bailey.....	118	Homœopathic M. Life Ins. Co. ads. Christy.....	238
Hollister ads. Bank of Syracuse.....	318	Hone ads. Grymes.....	214
Hollister ads. Haines.....	345	Hone v. Kent.....	468
Hollister v. Hollister Bank.....	60	Hone ads. Mutual Safety Ins. Co.....	184, 226
Hollister ads. Leitch.....	46	Hone v. Van Schaick.....	465, 466
Hollister ads. Morehouse.....	86, 224	Honegger v. Wettstein.....	18, 192, 363, 381
Hollister Bank, Matter of.....	16, 60, 119	Honegsberger v. Second Ave R. Co.	312, 342
Hollister Bank ads. Hollister.....	60		
Hollister Bank v. Vail.....	21	Hood, Matter of.....	425
Holloway ads. Buffalo, City of.....	305, 360	Hood v. Hood.....	200
Hollywood v. People.....	132, 139	Hood v. Manhattan Ins. Co.....	236
Holmes v. Curley.....	405	Hook ads. Gray.....	109
Holmes v. Davis.....	4, 149	Hook ads. Newton.....	247
Holmes v. Holmes.....	188, 366	Hook v. Pratt.....	110, 315, 342
Holmes v. Hubbard.....	353	Hooker v. Eagle Bank of Rochester	44, 121
Holmes v. Mead.....	446, 449, 472		
Holmes ads. Regua.....	2, 348	Hooker ads. McCotter.....	73
Holmes ads. Rutherford.....	203, 253	Hooker ads. Wright.....	262, 349
Holmes ads. Smith.....	251, 363	Hooney ads. Rathbone.....	71, 288
Holmes ads. Stockwell.....	450	Hooper v. Hudson River F. Ins. Co..	225
Holsapple v. Rome, etc., R. Co.....	75, 346	Hoover v. Greenbaum.....	63
Holsman v. St. John.....	2	Hope v. Balen.....	177
Holt ads. Cook.....	56	Hope v. Doughty.....	43, 404, 440
Holt v. Ross.....	11	Hope ads. Hackley.....	18
Holton ads. Ely.....	16, 403	Hope ads. Harmon.....	248
Holyoke v. Adams.....	365	Hope ads. Nathans.....	206
Holtz v. Boppe.....	318	Hope v. People.....	133
Holtz v. Schmidt.....	105	Hope Ins. Co. ads. Clinton.....	229
Homan v. Earle.....	271	Hope Mut. Life Ins. Co. ads. Fischer.	206, 238
Home Ins. Co. ads. Beals.....	229		
Home Ins. Co. ads. Browning.....	230	Hope Mut. Life Ins. Co. of N. Y. ads. Glen.....	238
Home Ins. Co. v. Green.....	319		
Home Ins. Co. ads. Keeney.....	234	Hope Mutual Ins. Co. v. Perkins.....	235, 238
Home Ins. Co. ads. People.....	101, 429	Hopkins ads. Florence.....	347
Home Ins. Co. ads. Rann.....	227	Hopkins v. Lane.....	127
Home Ins. Co. ads. Short.....	231, 232	Hopkins v. Nelson.....	249
Home Ins. Co. ads. Wall.....	230	Hopkins ads. People.....	340
Home Ins. Co. v. Watson.....	68	Hopkins ads. Roosevelt.....	260
Home Ins. Co. v. Western Transp. Co.	30, 76	Hopkins v. Woolley.....	296

	Page.		Page.
Hopper ads. Seamen's Friend Society.		House ads. Sheridan . . . . .	155, 168
	223, 462	Houston ads. Shindler . . . . .	408
Hoppock ads. Bartlett . . . . .	392	Houston v. Wheeler . . . . .	161, 406
Hoppock ads. Braynard. . . . .	399, 449	Hovey ads. People. . . . .	27, 133
Hoppock ads. Herring . . . . .	196, 391	Hovey v. Rubber Tip Co. . . . .	145, 223, 252, 263
Hoppock ads. Hodge. . . . .	355	Hover v. Barkhoof. . . . .	218
Hoppock v. Tucker. . . . .	466	Hover ads. Post . . . . .	446, 471
Hoppough v. Struble. . . . .	164, 285	How v. Union Mutual Life Ins. Co. . . . .	241
Horan ads. Malloney. . . . .	168, 284	How's Executors ads. New York In-	
Horan ads. McCormick . . . . .	459	stitution for the Blind. . . . .	471
Horan ads. Trowbridge . . . . .	306, 430	Howard ads. Becker. . . . .	432
Horn v. Keteltas . . . . .	287	Howard ads. Bradner. . . . .	160, 170, 251
Horn v. New Lots, Town of. . . . .	44	Howard ads. Buffalo City Bank. . . . .	352
Horn ads. Palmer. . . . .	465	Howard ads. Church . . . . .	179, 190, 192
Horn v. Pullman. . . . .	462	Howard v. Daly. . . . .	104, 278
Hornbeck ads. Dunn. . . . .	7, 111, 337	Howard v. France. . . . .	4, 8
Horner v. Lyman. . . . .	448	Howard v. Johnston. . . . .	14, 127, 243
Horner v. Wood . . . . .	371, 403	Howard ads. Lent . . . . .	200, 387, 465
Horrman ads. Ellis. . . . .	337, 383	Howard v. Moot. . . . .	94, 220, 372, 437, 463
Horrobin ads. Kidder. . . . .	63, 322	Howard v. McDonough . . . . .	182
Horsfall, Matter of . . . . .	24	Howard ads. Selling. . . . .	349
Horsfall ads. McKeon . . . . .	123	Howard v. Sexton . . . . .	41, 263
Horton ads. Cushman. . . . .	464, 466	Howard ads. Voorhees. . . . .	130
Horton v. Davis. . . . .	169	Howard ads. Ward. . . . .	321
Horton ads. Duffield. . . . .	63	Howard ads. White . . . . .	471
Horton v. McCoy. . . . .	464	Howard ads. Wiggins . . . . .	445
Horton v. Morgan. . . . .	416	Howard Ins. Co. v. Halsey. . . . .	296
Horton ads. People. . . . .	29, 72	Howard Ins. Co. ads. Mathews. . . . .	236
Horton ads. Sheldon. . . . .	318	Howard Ins. Co. ads. Savage . . . . .	225, 233
Horton v. Thompson, Town of. . . . .	436	Howard Ins. Co. ads. Wolfe . . . . .	148
Horton ads. Tift. . . . .	204	Howe v. Buffalo, etc., R. Co. . . . .	12, 355
Hosford v. Ballard. . . . .	163	Howe ads. Dana . . . . .	37
Hosley v. Clack. . . . .	359	Howe ads. Garrison . . . . .	117, 268
Hosmer ads. Sprague. . . . .	67	Howe ads. Griggs. . . . .	319, 421, 453, 454
Hostetter ads. Gordon. . . . .	165	Howe ads. Salisbury. . . . .	209
Hotchkiss v. Artisans' Bank. . . . .	57, 78	Howe ads. Van Duzer . . . . .	19, 319, 450
Hotchkiss ads. Case. . . . .	3, 53	Howe Machine Co. v. Farrington. . . . .	170, 216
Hotchkiss v. Clifton Air Cure . . . . .	296		423
Hotchkiss ads. Dewey. . . . .	181	Howe Machine Co. v. Pettibone . . . . .	23
Hotchkiss ads. Farnham. . . . .	38, 188, 289, 294	Howell v. Adams. . . . .	33, 353, 412, 442
Hotchkiss ads. Mosher. . . . .	26, 57, 215, 408	Howell v. Buffalo, City of. . . . .	43, 89, 101
	439		222, 305, 406
Hotchkiss ads. Phila., etc. . . . .	270	Howell ads. Burtiss . . . . .	107
Hotchkiss ads. Van Marter. . . . .	37, 100	Howell ads. Gloversville, Village of. . . . .	97, 193
Hough v. Brown . . . . .	104	Howell v. Gould. . . . .	112, 442
Houghtaling v. Kilderhouse. . . . .	264	Howell ads. Guillander. . . . .	91
Houghton v. McAuliff. . . . .	121	Howell ads. Hathaway. . . . .	196
Houghkirk v. Delaware, etc., Can. Co. . . . .	150, 311	Howell v. Huyck. . . . .	174
House v. Jackson. . . . .	276	Howell v. Knickerbocker Life Ins. Co. . . . .	228
House v. McCormick . . . . .	156		



	Page.		Page.
Howell v. Leavitt.....	164, 290, 413	Hubbell ads. Judd Linseed and Sperm Oil Co.....	250
Howell v. Mills.....	19, 220, 347	Hubbell v. Lerch .....	346
Howell v. Ruggles .....	174	Hubbell v. Medbury .....	414
Howell ads. Stebbins .....	213, 287	Hubbell v. Meigs.. .....	38, 181, 209
Howell ads. Wilcox.....	171	Hubbell v. Moulson.....	293
Howells ads. Paine .....	109, 278	Hubbell ads. Putnam.....	47
Howes ads. Robinson .....	56, 395	Hubbell v. Sibley.....	412
Howes ads. Wolfe .....	278	Hubbell ads. Thomas .....	246, 421
Howland ads. Clarke .....	260	Hubbell v. Von Schoening.....	402
Howland v. Edmonds .....	235	Hubbell ads. Wood .....	257
Howland v. Eldredge.....	266	Hubermann ads. Bowles.....	220
Howland v. Lounds .....	388	Hudler v. Golden .....	87
Howland v. Meyer .....	228	Hudson v. Caryl .....	100
Howland ads. Shellington ..	269, 270, 441	Hudson ads. Crippen .....	130
Howland v. Taylor .....	34	Hudson ads. Larned .....	164, 260
Howland v. Union Theol. Seminary..	464	Hudson v. Swan.....	88
Howland v. Willetts...32, 438, 441,	475	Hudson Iron Co. v. Alger...108, 162,	391
Howland v. Woodruff .....	202	Hudson River Bridge Co. ads. Hart ..	187
Howlett ads. Killmore.....	409		310, 314
Howlett ads. People .....	262, 452	Hudson River Bridge Co. v. Patterson.	69, 427
Hoxie v. Allen .....	189	Hudson River F. Ins. Co. ads. Hooper.	225
Hoyle v. Plattsburgh, etc., R. Co.	119, 373	Hudson River F. Ins. Co. ads. Lamott.	177
Hoysradt v. Kingman .....	462	Hudson River F. Ins. Co. ads. West-fall. ....	230
Hoyt v. Bonnett .....	201, 412	Hudson River Co. ads. Austin.....	259
Hoyt v. Comm'rs of Taxes.....	428	Hudson River R. Co. ads. Bailey....	77
Hoyt ads. Dusenbury.....	64	Hudson River R. Co. ads. Bliven....	76
Hoyt ads. East River Bank.....	449	Hudson River R. Co. ads. Button....	314
Hoyt v. Godfrey....	210	Hudson River R. Co. ads. Clarkson ..	374
Hoyt ads. Gernon .....	174	Hudson River R. Co. ads. Cruger..41,	374
Hoyt ads. Hogan .....	14, 169		404
Hoyt v. Hoyt .....	472	Hudson River R. Co. ads. Ernst.....	377
Hoyt v. Long Island R. Co.....	175	Hudson River R. Co. ads. Gould....	459
Hoyt v. Martense .....	289	Hudson River R. Co. ads. Green...5,	308
Hoyt ads. Odell.....	294	Hudson River R. Co. ads. Hart.....	314
Hoyt v. Thompson .....	121	Hudson River R. Co. ads. Hedges....	78
Hoyt v. Thompson's Ex'r.....119,	183	Hudson River R. Co. ads. Johnson...314	380
Hoyt ads. Western Transp. Co .....	76	Hudson River R. Co. ads. Luby..179,	186
Hoyt ads. White.....106,	107		406
Huber v. People .....	95	Hudson River R. Co. ads. Nelson....	74
Hubbard, Matter of.....	252	Hudson River R. Co. ads. O'Mara..149,	377
Hubbard v. Briggs .....	208	Hudson River R. Co. ads. Owen.....	314
Hubbard ads. Fassin .....	191, 317, 319	Hudson River R. Co. ads. Pratt...11,	104
Hubbard v. Gurney .....	324	Hudson River R. Co. ads. Russell.182,	280
Hubbard ads. Holmes.....	353	Hudson River R. Co. ads. Schermer-horn .....	376
Hubbard v. Hubbard .....	464	Hudson River R. Co. ads. Sheldon...186	
Hubbard ads. Matthews .....	67, 319	Hudson River R. Co. ads. Sherman..	76
Hubbell v. Blakeslee.....	293		
Hubbell v. Carpenter.....	422		
Hubbell ads. Cazet.....	297		
Hubbell v. Great Western Ins. Co...237			

	Page.		Page.
Hudson River R. Co. ads. Staats.....	376	Hunt v. Michigan Southern, etc., R. Co.....	178
Hudson River R. Co. ads. Tilley..	148, 149	Hunt ads. Moultrie .....	464
Hudson River R. Co. ads. Tillotson..	374	Hunt ads. Mut. Life Ins. Co.....	113, 223
	404	Hunt v. People .....	138
Hudson River R. Co. ads. Webster..	308	Hunt v. Purdy.....	423
	310	Hunt v. Roberts.....	423
Hudson River R. Co. ads. Wilds.....	313	Hunt ads. Thomas .....	177
Hudson River R. Co. ads. Wills.....	377	Hunt v. Utica, City of.....	301
Hudson River Steamboat Co. ads. Wilton.....	400	Hunter ads. Crans.....	152
Huff v. Bennett.....	187, 193	Hunter ads. Leggett.....	96, 444
Huff v. Knapp.....	340	Hunter ads. McKown.....	266
Hughes, Matter of.....	92, 334	Hunter v. Wetsell..	146, 192, 390, 408, 412
Hughes ads. Cole.....	354	Hunter ads. Wright.....	28
Hughes ads. Dambney.....	272	Hunter ads. Young.....	105, 354
Hughes ads. Jutte.....	145, 459	Huntingdon v. Clafin .....	278
Hughes ads. Looney.....	255, 406, 421	Huntington ads. Benedict.....	46
Hughes v. Mercantile Mut. Ins. Co..	236	Huntington ads. Purdy.....	290
Hughes ads. Sands.....	6, 259	Huntington ads. Seward.....	152, 296
Hughes ads. Trotter.....	288	Hunting ads. Talmage.....	219
Hughes v. Vermont Copper Mining Co.....	119	Hurd v. Cook.....	371
Hughitt ads. Richardson.....	349	Hurd v. Gill.....	107
Huguenot Nat. Bank v. Studwell....	270	Hurd v. Kelly.....	68
Hulbert ads. Dusenbury .....	289	Hurd ads. McNulty....	190, 423, 425, 426
Hulbert v. N. Y. Cent. R. Co.....	379	Hurd ads. Ross.....	319
Hulburt, Matter of.....	48	Hurlbert v. Dean .....	47, 346, 370
Hulburt ads. People.....	374, 435	Hurlbert ads. Stillwell.....	343
Hulet v. Swift.....	223	Hurlburt v. Durant .....	200
Hull v. Hull.....	473	Hurst v. Litchfield.....	109, 360
Hull v. Ruggles.....	265	Hussey ads. Palmer.....	42, 64, 207
Hulse ads. Jessup.....	47	Husson ads. Drummond.....	36
Hulse ads. Ryder.....	272	Husson ads. Morris .....	19
Hume v. Hendrickson .....	130	Husted v. Craig.....	111
Hume v. Mayor, etc.....	303	Husted v. Ingraham.....	265
Humphrey ads. Baldwin.....	347	Husted v. Mathes.....	274, 275, 282, 283
Humphrey v. Chamberlain.....	20	Husted ads. Moss .....	399
Humphrey v. Hayes.....	42, 212	Hutchings v. Miner.....	114
Hun v. Cary..	12, 57, 65, 346, 438, 446, 447	Hutchings v. Munger.....	390
Hun v. Salter .....	125	Hutchins v. Hebbard.....	114
Huncke ads. Meyer.....	13, 114	Hutchinson v. Brand .....	196
Hunsicker ads. Ackerman.....	289, 383	Hutchinson ads. Williams .....	342
Hunsicker ads. Auburn City Nat. Bk.....	324	Hutson v. Mayor, etc.....	335
Hunt v. Bennett.....	264, 361	Huttemeier v. Albro....	155
Hunt v. Bloomer.....	30	Hutton v. Benkard.....	445
Hunt v. Chapman .....	22, 125, 363	Hutton ads. Fletcher....	456
Hunt v. Hunt.....	92, 277	Huwer v. Dannenhoffer .....	437
Hunt v. Johnson... 30, 69, 153, 155, 188	247, 463	Huyck ads. Howell. .	174
Hunt v. Maybee.....	318	Hyatt v. Allen .....	119
		Hyatt v. Bates....	222
		Hyatt ads. Bridges .....	474
		Hyatt ads. Rowan.....	9

# TABLE OF CASES.

547

	Page.		Page.
Hyatt v. Seeley .....	20, 221	Ingraham ads. Husted.....	265
Hyatt v. Taylor.....	223	Ingram v. Robbins.....	249
Hyatt ads. Tompkins.....	19, 205, 455	Inman ads. Lowry .....	61
Hyatt ads. Van Slyke .....	21	Innes ads. Purcell.....	26
Hyde ads. Brabin .....	408	In re Steamboat Josephine .....	97, 398
Hyde v. Goodnow.....	235	Ins. Co. ads. Conover.....	233, 454
Hyde v. Lathrop.....	388, 391	Ins. Co. of N. A. ads. First Nat. Bk.	
Hyde ads. Leggett .....	349	of Ballston Spa.....	230
Hyde v. Lynde.....	235, 381	Ins. Co. of North America ads. Hall..	227
Hyde v. People.....	394	Internat. Bk. v. Bradley .59, 99, 173,	452
Hydrostatic Paper Co. ads. People...	270	Internat. Bk. ads. Bk. of Toledo. . .	116
Hymers ads. Marvin.....	451	Internat. Life Ins. and Trust Co. v.	
Hynds ads. People .....	218	Franklin Fire Ins. and Trust Co... 232	
Hynds v. Schenectady Co. M. Ins. Co.	226	Internat. Life Ass. Soc. ads. Robinson. 9	
Hynes v. McDermott....	173, 176, 189, 271	Internat. L. I. Co. ads. Martine.9, 116,	239
Hynes v. Patterson.....	115, 151, 441	Internat. Bank v. Monteath .....	173
Ihl v. Forty-second Street, etc., R.		Ireland v. Corse .....	200
Co. ....	15, 312, 342, 406	Ireland ads. Douglass.....	269
Illius v. New York & N. H. R. Co. .	21	Ireland ads. Durgin.....	2, 30, 344
Illinois Cent. R. Co. ads. Van Alen..	119	Ireland v. Ireland.....	446
Imperial Fire Ins. Co. ads. Woodruff.		Ireland v. Nichols.....	261
230, 232, 336,	398	Ireland v. Oswego, etc., Plankroad Co.	357
Imperial Skirt Manuf. Co. ads.		Irish v. Miller .....	188
Whitaker .....	23	Irondequoit, Matter of Freeholders of.	17
Importers', etc., Bank ads. Farwell.		Irvin ads. Litchfield .....	105, 165
70,	438	Irvine v. Wood ....	258, 309, 338
Importers and Traders' Nat. Bank ads.		Irving ads. People..	137
Dutcher .....	60, 64	Irving Bank v. Wetherald.....	59
Importers and Traders' Nat. Bank ads.		Irving Nat. Bank v. Alley .....	323
Freund.....	325	Irving Fire Ins. Co. ads. Morrell ....	226
Indemnity Fire Ins. Co. ads. Kelly...	181	Irwin ads. Fearing .....	102, 329, 416
Indemnity Fire Ins. Co. ads. Waring.	232	Isbell ads. Calkins.....	123, 297
Independent Line of Teleg ads. Rit-		Isham v. Buckingham..	118
tenhouse .....	433	Isham ads. Brazill .....	41, 363
Indianapolis, etc., R. Co. ads. Risley.	105	Isham v. Davidson.....	363
Indianapolis, etc., Ry. Co. v. Tyng.	11, 209	Isham ads. Rice.....	11, 38, 355, 423
Indig v. Nat. City Bk. of Brooklyn..	60	Isaacs v. Beth Hamedrash Society....	37
Ingalls v. Morgan .....	11, 152	Isaacs v. New York Plaster Works .	108
Ingallsbee v. Wood .....	223	Isaacs v. Third Ave. R. Co.....	80, 279
Ingersoll v. Bostwick .....	34, 37	Isaacson v. N. Y. C. R. Co .....	81, 314
Ingersoll ads. Camp .....	384	Ithaca, Village of, ads. Conrad.....	303
Ingersoll ads. Cochrane's Ex'r.....	20	Ithaca, Village of, ads. Saulsbury....	304
Ingersoll ads. Lewis..11, 12, 292, 293,	355	Ives ads. Tompkins. ....	124
Ingersoll v. Mangam.....	221, 251	Jacks v. Nichols .....	190, 364, 449
Ingersoll ads. People.....	403	Jackson v. Andrews .....	37, 385
Ingersoll ads. Peck.....	260	Jackson v. Babcock .	101, 432
Ingersoll ads. Williams.....	51, 54, 91	Jackson ads. Burwell.....	456
Ingraham, Matter of .....	332	Jackson ads. Clementi, Matter of....	71
Ingraham v. Baldwin....	223, 259, 412	Jackson ads. House .....	276
Ingraham v. Disborough.....	290	Jackson v. Jackson.....	462

	Page.		Page.
Jackson v. Littell .....	284, 290	Jenkins ads. Chegary .....	340
Jackson ads. People .....	331	Jenkins ads. Cook .....	443
Jackson v. Roberts .....	228	Jenkins ads. Duaneburgh, Town of..	435
Jackson v. Second Ave. R. Co .....	80, 279	Jenkins v. Fahey .....	348, 402, 417
Jackson ads. Sheridan .....	361	Jenkins ads. Johnson .....	179
Jackson ads. Stagg .....	200	Jenkins ads. Mead .....	413, 424
Jackson v. Suydam .....	260	Jenkins v. Wheeler .....	39, 400, 401
Jackson v. Twenty-third St. Railway.	213	Jennery v. Olmstead .....	109, 420
Jackson v. Van Slyke .....	235	Jennings v. Conboy .....	284, 471
Jacobs ads. Argall .....	65, 365	Jennings v. Jennings .....	446
Jacobs ads. Garlinghouse .....	218	Jennings ads. Ogden .....	157, 162
Jacobs v. Hogan .....	50	Jermain v. Denniston .....	181
Jacobs v. Morange .....	285	Jermain v. Lake Shore, etc., R. Co..	119
Jacobs ads. People .....	216	Jerome ads. Casoni .....	197, 426
Jacobs v. Remsen .....	47	Jerome ads. Stenton .....	368
Jacobsohn ads. Fish .....	315, 321, 342	Jersey City Ins. Co. ads. Ludwig .....	235
Jacox v. Caldwell .....	275	Jervis ads. Parker .....	26, 35
Jaeger v. Kelley .....	211	Jessop v. Miller .....	115, 390, 474, 475
Jaffe v. Harteau .....	258	Jessup v. Carnegie .....	92, 118
Jaffray v. Brown .....	321	Jessup ads. Cole .....	181, 365, 413
Jagger Iron Co. v. Walker .....	269	Jessup v. Hulse .....	47
Jaines ads. Oddy .....	410	Jetter, Matter of Petition of .....	123
James ads Brumskill .....	191, 249	Jetter v. New York & Harlem R. Co .	80, 312
James v. Burchell .....	106	Jewell v. Schouten .....	54
James v. Chalmers .....	20, 324	Jewell ads. Van Steenburgh .....	394
James v. Cowing .....	39, 445	Jewell v. Wright .....	92, 449
James ads. Cox .....	155, 461	Jewett v. Banning .....	188
James ads. Doke .....	41	Jewett ads. De Forest .....	280
James ads. Ford .....	154	Jewett ads. Fuller .....	105, 270
James v. Gurley .....	396	Jewett ads. Lester .....	358
James ads. Hartley .....	456	Jewett ads. McHenry .....	18, 119, 222
James ads. Hayner .....	99	Jewett ads. McKinney .....	75
James ads. O'Neill .....	104, 441	Jewett v. Miller .....	169, 382, 444
James v. Patten .....	341, 407	Jewett ads. Slater .....	281
James v. Pope .....	260	Jewett ads. Terry .....	373
Janes ads. Casey .....	46	Jewett ads. Van Rensselaer .....	164, 243
Janssen ads. Prentice .....	153, 347, 367, 463, 467, 468	Jex ads. Harris .....	434
Jaques ads. Hancox .....	259	Joel ads. Reubens .....	48
Jarvis ads. Delaware Bank .....	321, 392	Johnson v. Albany & Susquehanna R.	
Jarvis v. Driggs .....	205, 262	Co. ....	206, 413
Jarvis ads. Garvey .....	212	Johnson ads. Baker .....	111
Jaudon ads. Markham .....	150, 368	Johnson v. Belden .....	400
Jay ads. McCotter .....	296	Johnson ads. Bliss .....	6, 43, 204
Jaycox v. Caldwell .....	47	Johnson v. Blydenburgh .....	156, 290
Jaycox v. Cameron .....	4, 30	Johnson ads. Bowers .....	298
Jaycox ads. Purcell .....	8	Johnson v. Brooks .....	402, 411
Jaycox ads. Turner .....	46	Johnson ads. Buffalo, etc., R. Co .....	28
Jayne ads. Bookstaver .....	322	Johnson v. Carnley .....	37, 87, 185
Jencks v. Smith .....	33, 38, 261, 371	Johnson v. Clark .....	316
Jenison v. Citizens' Savings Bank ...	18		

	Page.		Page.
Johnson ads. Comstock.....	157	Jones v. Barlow .....	270
Johnson ads. Dayton.....	68, 345	Jones v. Benedict .....	356
Johnson ads. Deck.....	272, 275	Jones ads. Bergmann.....	151, 263, 264
Johnson v. Dickinson. ....	64	Jones ads. Brainard.....	68, 145
Johnson v. Dodd.....	40, 369	Jones v. Brooklyn Life Ins. Co.....	241, 442
Johnson v. Donnell.....	9, 355	Jones v. Butler.....	351
Johnson ads. Elwell.....	24	Jones ads. Castellanos.....	49
Johnson v. Elwood.....	90, 222, 448	Jones ads. Clute .....	457
Johnson v. Fried.....	309	Jones ads. Cunningham .....	112
Johnson ads. Grant.....	456	Jones v. Derby.....	21
Johnson v. Hartshorne.....	243, 258, 352	Jones ads. Fillo.....	187
Johnson v. Harvey.....	421, 422	Jones v. Fireman's Fund Ins. Co....	227
Johnson ads. Hathaway.....	42	Jones v. Graham.....	299
Johnson v. Hathorn .....	111, 208, 250	Jones ads. Jones.....	24
Johnson v. Hudson River R. Co.....	314, 380	Jones v. Judd.....	112, 146, 148
Johnson ads. Hunt...30, 69, 153, 155,	188	Jones v. Kent.....	389
	274, 463	Jones ads. Knox.....	473
Johnson v. Jenkins. ....	179	Jones ads. Ledyard.....	151, 397
Johnson ads. Kilpatrick.....	472	Jones v. Ludlum.....	23
Johnson v. Lawrence.....	201, 467	Jones ads. Mason. ....	33
Johnson ads. Lynch.....	419	Jones v. Mayor of New York.....	45, 335
Johnson v. Morgan.....	108	Jones ads. McClellan.....	402
Johnson v. Morrell.....	208	Jones ads. McLellan.....	287
Johnson v. Nat. Bank of Gloversville.		Jones v. Morgan.....	145, 457
	59, 452	Jones ads. Nassau Bank.....	58
Johnson v. New York Cent. R. Co....	75	Jones ads. O'Brien.....	145, 392, 393
Johnson v. Oppenheim.....	260	Jones ads. Ombony.....	204, 256, 282
Johnson ads. Palen.....	454	Jones v. Osgood.....	32, 441
Johnson ads. Parsons.....	157, 163	Jones ads. Ousby.....	156
Johnson v. People.....	142, 206, 387	Jones ads. Paine.....	285, 292, 385
Johnson ads. Pike.....	244	Jones v. People.....	24, 86, 133, 219
Johnson ads. Powers.....	173	Jones v. Phoenix Bank.....	221, 388
Johnson ads. Roberts...78, 186, 246,	474	Jones v. Seligman.....	376
Johnson v. Stimmel.....	345, 448	Jones v. Sheldon.....	405
Johnson ads. Stokes.....	190, 457	Jones v. Smith.....	69, 156
Johnson v. Faber.....	285, 457	Jones v. Terre Haute & Richmond R.	
Johnson v. Underhill .....	270	Co.....	119
Johnson ads. Westcott.....	34	Jones ads. Vilas.....	251, 423
Johnson v. Whitlock.....	30	Jones ads. Wagner.....	441
Johnson v. Youngs.....	17	Jones v. Walker.....	274
Johnson v. Zink.....	296	Jones v. Wellwood .....	40
Johnston ads. Bleecker.....	173	Jordan v. Nat. Shoe and Leather	
Johnston v. Catlin.....	250	Bank.....	157, 365, 395
Johnston ads. Godfrey.....	26	Jordan, etc., Plankroad Co. v. Mor-	
Johnston ads. Howard.....	14, 127, 243	ley.....	358
Johnston v. Stimmel.....	244	Jordan v. Poillon.....	348
Johnstown Cheese Mfg. Co. v. Veghte.		Jordan v. Epps.....	348
	157, 460	Jordan v. Volkenning .....	222
Johnstown, etc., R. Co. ads. Abbott..	379	Josephine, In re Steamboat .....	398
Jones v. Anderson.....	34	Josephthal ads. Strause.....	291
Jones ads. Bank of Rochester.....	202	Joslin v. Cowee.....	38, 202, 212

	Page.		Page.
Joslyn ads. Champion .....	3, 434	Kalbfleisch ads. Fabbri.....	31, 108
Joslyn ads. Farmers and Mechanics' Bank ... ..	441, 452	Kalbfleisch v. Kalbfleisch.....	464
Josuez v. Conner.....	29	Kalbfleisch ads. Wade.....	1
Journey ads. Boston Carpet Co.....	13	Kamp v. Kamp.....	277, 301
Jourdan ads. People .....	330	Kane v. Astor's Ex'rs.....	464
Joyce v. Adams.....	107	Kane ads. Sherman .....	7, 329
Joyce ads. Ford.....	285	Kane ads. Troy & Lansingburgh R. Co .....	88
Joy ads. White .....	365	Karing ads. O'Brien.....	422
Judd ads. Bartlett.....	157, 177, 411	Karutz ads. Cesar.....	258
Judd ads. Jones.....	112, 146, 148	Kashan ads. Mut. Life Ins. Co .....	451
Judd ads. McKee.....	47	Kasson ads. Harris .....	389, 440
Judd v. O'Brien.....	297	Kasson ads. Ohio & Miss. R. R. Co. .....	212, 453
Judd v. Seekins.....	156	Kaufman ads. Evansville Nat. Bank.	215
Judd ads. Seymour.....	29	Kaufman ads. Keep.....	359
Judd Linseed and Sperm Oil Co. v. Hubbell .....	250	Kavanagh v. Wilson.....	190, 441
Judson ads. Allen.....	88	Kay v. Whittaker.....	345, 364, 450
Judson ads. Bennett.....	11	Kearney v. Mayor of New York ..	20, 175
Judson ads. Chemung Canal Bk. .	62, 252	Kearney v. McKeon.....	425
Judson ads. Corcoran .....	145	Kearney ads. O'Gara.....	103
Judson v. Dada. ....	288, 383	Kearney ads. Post.....	259
Judson ads. Decker.....	422	Kearney ads. Watrous.....	26, 52, 223
Judson v. Easton.....	300	Keating v. New York Cent. R. Co...	79
Judson v. Gray.....	52	Keator ads. Pierce .....	156, 294
Judson ads. Murray.....	47	Keator ads. Van Vechten .....	466
Judson ads. Rindge .....	214	Keck v. Werder.....	25
Judson ads. Veeder.....	118, 123	Keech ads. Real Estate Trust Co....	452
Judson ads. Viele.....	128, 170, 291, 383	Keefe v. People.....	138
Juliand v. Rathbone.....	48	Keegan v. Western R. Corporation ..	280
Juliand v. Watson.....	61, 351	Keeler ads. Hawley .....	408
Julien ads. Foster.....	318	Keeler ads. People.....	341
Juillard ads. Berkshire Woolen Co. .	68	Keeler v. Salisbury.....	2, 9
Juillard v. Chaffee.....	178, 209	Keeler ads. Spooner.....	263
Junction Canal Co., Prest. of., ads. Miller.....	41	Keenan ads. Manning .....	88, 115, 116
June ads. Betts.....	258, 352	Keeney v. Grand Trunk R. Co .....	77
J. Russell Manufg. Co. v. New Haven Steamboat Co .....	77, 186	Keeney v. Home Ins. Co.....	234
Justh v. Nat. Bk. of Commonwealth.	212	Keeney Settlement Cheese Association ads. Brown .....	22
Justice v. Lang .....	407	Keep v. Kaufman.....	359
Justices of Court of Special Sessions ads. People.....	99, 129	Kehn v. State .....	171, 340
Justices of Marine Court ads. People. .....	17, 129	Kehoe ads. Booth.....	210, 260
Justices of Sessions v. People.....	142	Kehr ads. Clews .....	180
Jutte v. Hughes.....	145, 459	Keiley ads. Dusenbury.....	203, 414
Kain v. Fisher.....	195, 276	Keim ads. Neusbaum.....	249
Kain v. Masterton.....	425	Keim ads. Sparman.....	221, 360
Kain v. Smith.....	280, 381	Kein v. Tupper.....	389
		Kellam v. McKinstry.....	105, 264
		Keller v. New York Cent. R. Co....	308
		Keller v. Phillips.....	272
		Keller v. Strasberger.....	440

	Page.		Page.
Keller ads. Turner.....	8	Kelly v. Tilton.....	14, 438
Kelley v. Downing.....	144	Kelly ads. Walsh.....	30
Kelley ads. Jaeger.....	211	Kelly v. Waterbury.....	365
Kelley v. People.....	253	Kelly ads. Wellington.....	110
Kelley ads. Skinnion.....	253	Kelly v. West.....	426
Kelley ads. Starkey.....	150	Kelsey v. Barney.....	400
Kellinger v. Forty-second Street, etc., R. Co.....	163, 374, 416	Kelsey ads. Cook.....	417
Kellogg v. Ames.....	284, 292	Kelsey v. Northern Light Oil Co....	4, 211
Kellogg v. Adams.....	452		371
Kellogg ads. Bissell.....	206, 450	Kelsey ads. O'Donnell.....	169
Kellogg ads. Hall.....	224	Kelsey ads. Rowan.....	171, 259, 261
Kellogg v. N. Y. C. & H. R. R. Co.	187, 313	Kelsey ads. Van Dewater.....	20
Kellogg v. Olmstead.....	106	Kelsey v. Ward.....	257
Kellogg v. Slauson.....	46	Kelsey ads. Wells.....	184
Kellogg v. Smith.....	291	Kelsey v. Western.....	29, 471
Kellogg v. Sweeney.....	250	Kelso v. Lorillard.....	469
Kellogg v. Thompson.....	219	Kemp v. Knickerbocker Ice Co....	108, 149
Kellogg ads. Trustees, etc.....	466	Kendall ads. Freeman.....	19
Kellogg Bridge Co. ads. Priebe.....	440	Kendall v. Stone.....	263
Kellogg's Ex'rs ads. Wall.....	199	Kendall v. Woodruff.....	288
Kellum, Matter of Will of.....	463	Kenney v. Apgar.....	281
Kellum v. Durfoo.....	19, 24	Kennedy ads. East River Bank....	36, 324
Kelly, Matter of.....	28, 52, 123	Kennedy v. Goss.....	321, 421
Kelly v. Babcock.....	443	Kennedy ads. Hand....	292
Kelly v. Campbell.....	274	Kennedy ads. Kennedy.....	17, 277
Kelly ads. Christal.....	40, 50, 222	Kennedy ads. Lynch.....	321
Kelly v. Crapo.....	91	Kennedy v. Mayor, etc.....	303, 310, 330, 340
Kelly ads. Davenport.....	131	Kennedy v. People.....	136, 141
Kelly ads. Downing.....	27, 365	Kennedy v. Ryall.....	310, 331, 424
Kelly v. Falconer.....	196	Kennedy v. Thorp.....	48
Kelly ads. First Nat. Bank of Cincin- nati.....	66	Kennedy v. Troy, City of.....	44, 85
Kelly ads. Hurd.....	68	Kennedy ads. Whitehead.....	37, 53
Kelly v. Indemnity Fire Ins. Co....	181	Kenny v. People.....	132, 253
Kelly v. Kelly.....	464	Kent ads. Hone.....	466, 468
Kelly v. Manhattan Beach R. Co....	124	Kent ads. Jones.....	389
Kelly v. Mayor, etc.....	304	Kent v. Kent.....	410, 413
Kelly v. McCormick.....	50, 103	Kent v. New York Cent. R. Co....	376
Kelly ads. Mittnacht.....	299, 300	Kent v. Quicksilver Mining Co.....	119
Kelly ads. Noble.....	196	Kent ads. Youngs.....	14, 363, 367
Kelly ads. People.....	26, 69, 96, 103, 134, 139, 140, 439, 475	Kenworthy ads. Baker.....	195
Kelly v. Roberts.....	104	Kenyon v. Lee.....	470
Kelly ads. Rogers' Locomotive, etc....	443	Kenyon v. N. Y. Cent., etc., R. Co..	31
Kelly v. Scott.....	353	Kenyon v. People.....	142
Kelly v. Sheehan.....	31	Kenzel v. Kirk.....	401
Kelly ads. Sisters of Charity.....	462	Keokuk Coal Co. ads. Thorp....	154, 367
Kelly ads. Starin.....	179, 182, 211, 476	Kermit ads. Poole.....	97, 399
Kelly ads. Starkey.....	271	Kernochan v. New York Bowery F. Ins. Co.....	231
		Kerr v. Blodgett.....	47
		Kerr v. Dougherty.....	117, 328, 404, 469, 471, 472

	Page.		Page.
Kerr v. Hayes.....	21, 205, 364	Killip ads. Stettheimer...	286
Kerr ads. Heroy.....	120, 122	Kilmer v. Bradley.....	24
Kerr v. Kerr.....	277	Kilmer ads. Ferris.....	11
Kerr v. McGuire.....	27, 439, 474	Kilmer v. Hathorn.....	31, 447
Kerr v. Mount.....	49, 397	Kilmer ads. McMichael....	209, 285, 360
Kerr ads. Nelson.....	396	Kilmer v. N. Y. Cent., etc., R. Co..	34
Kerr ads. People.....	166, 329	Kilmer v. Smith.....	385
Kerr ads. Sixth Ave. R. Co.....	98, 166	Kilmore v. Howlett.....	409
Kerr ads. Smith.....	130, 350, 361	Kilpatrick v. Johnson.....	472
Kerrains v. People.....	135, 278	Kilpatrick ads. Rutter.....	117
Kerrigan v. Force.....	94	Kilpatrick ads. Ward.....	204, 283
Kessel ads. Thompson.....	14, 363	Kimball, Matter of Petition of.....	333
Kessler v. New York Cent., etc., R. Co.....	81	Kimball v. Connolly.....	128
Ketchum ads. Bloomfield.....	416	Kimball ads. Reeves.....	456
Ketchum v. Buffalo, City of.....	305	Kimbark ads. Sands.....	100, 185
Ketchum ads. New York & N. H. R. Co.....	20, 36, 121	Kimbel ads. Crane.....	112
Ketchum v. Stevens.....	368	Kimberly v. Patchin.....	391
Ketchum ads. Tobias.....	467	Kime ads. Robinson.....	7, 155, 458
Keteltas ads. Bulkeley.....	266	Kincaid v. Archibald.....	415
Keteltas ads. Greason.....	253, 444	Kincaid v. Dwinelle.....	122
Keteltas ads. Harrington.....	199, 412	King ads. Boese.....	46
Keteltas ads. Horn.....	287	King ads. Conkling.....	3
Keteltas v. Keteltas.....	464, 466	King v. Dennis.....	19
Keteltas v. Myers.....	360	King v. Fitch.....	212
Keteltas ads. Stewart.....	112	King v. Galvin.....	29
Keyes ads. Davis.....	352	King v. Greenway.....	399
Keyes ads. Olmstead.....	240	King v. Harris.....	248
Keyes ads. Price.....	10, 209	King v. Knapp.....	456
Keyser ads. People.....	293	King v. Leighton.....	7, 476
Keyser ads. Van Derlip.....	442	King v. Mackellar.....	115, 189
Kiah v. Grenier.....	464	King ads. Marks.....	190
Kidd ads. Dempsey.....	178	King v. Mayor, etc.....	21
Kidd ads. Fox.....	283	King v. Merchants' Exchange Co.....	20, 443
Kidd v. McCormick.....	114, 146	King ads. Morgan.....	459
Kidd ads. Smith.....	293	King v. New York Cent. R. Co.....	190, 307
Kidd ads. Van Rensselaer.....	340	King v. People.....	139
Kidder v. Butler.....	260	King v. Platt.....	16, 251, 405
Kidder ads. Dows.....	244, 391	King ads. Saratoga Co. Bank.....	110
Kidder v. Horribin.....	63, 322	King v. Sarria.....	92, 352
Kiefer ads. Brown.....	299	King ads. Stanton.....	34, 248, 345
Kiernan, Matter of Petition of.....	70	King v. Talbot.....	444
Kiernan ads. Kinney.....	392	King ads. Truscott.....	249, 356
Kiersted v. Orange, etc., R. Co.....	12, 260	King ads. Vrooman.....	180
Kiff v. Youmans.....	151	Kingdom Iron Ore Co. ads. Nichols..	178
Kilbourn ads. People.....	306	Kingman ads. Hoysradt.....	462
Kilbourne v. St. John.....	222, 435	Kingman ads. People.....	219
Kilderhouse ads. Houghtaling.....	264	Kingman ads. Sparrow.....	276
Kilderhouse ads. Western Trans. Co.....	449	Kingsbury v. Kirwan.....	111
Kileen ads. Bodine.....	274	Kingsbury ads. Porter.....	205, 361
		Kingsbury v. Westfall.....	215, 258
		Kings Co., etc., R. Co., Matter of...	26



	Page.		Page.
Kings Co. El. R. Co.; Matter of..	128, 166	Knapp v. Knapp.....	174
Kings Co. F. Ins. Co. v. Stevens....	155	Knapp ads. Robertson....	474
Kings Co. Ins. Co. ads. Pindar.....	227	Knapp v. Roche.....	60, 145, 250
Kingsland ads. People.....	103, 419	Knapp v. Simon.....	385
Kingsland ads. Spaulding.....	37	Knapp ads. Smith..	43, 167, 194, 273, 396
Kingsley ads. Bradley.....	110	Knapp ads. Thorn.....	147
Kingsley v. Brooklyn, City of....	72	Knapp v. Wallace.....	10
Kingston Bank v. Eltinge....	285	Knapp v. Warner.....	177
Kingston Board of Health ads. Has-		Kneetle v. Newcomb.....	109, 195
brouck.....	20	Knickerbocker v. People.....	143
Kingston Mutual Ins. Co. ads. Tillon.	233	Knickerbocker Ice Co. ads. Crocker..	310
Kinne v. Ford.....	107	Knickerbocker Ice Co. ads. Kemp.	
Kinne v. City of Syracuse.....	95, 96		108, 149
Kinne v. Kiernan.....	392	Knickerbocker Ice Co. ads. Knupfle..	310
Kinney v. Nash.....	262, 263	Knickerbocker and N. Y. Ice Cos.	
Kinney ads. People.....	32	ads. Parrott.....	145, 243, 400
Kinney ads. Winter.....	340	Knickerbocker Life Ins. Co. ads.	
Kinnier v. Kinnier.....	277, 366	Davidsburgh.....	71, 251
Kinnier v. Rogers.....	467	Knickerbocker Life Ins. Co. ads. De-	
Kinsey v. Leggett.....	171, 202	Gogorza.....	240
Kip v. Merwin .....	260	Knickerbocker Life Ins. Co. ads.	
Kip ads. New York & Harlem R. Co.		Dilleber.....	239
	374, 375	Knickerbocker Life Ins. Co. ads.	
Kipp ads. Dempsey.....	260, 461	Douglas.....	238
Kirby v. Fitzgerald.....	249, 297	Knickerbocker Life Ins. Co. ads.	
Kirby v. Fitzpatrick....	15	Heishon.....	301
Kirk ads. Kenzel.....	401	Knickerbocker Life Ins. Co. ads.	
Kirk ads. Trustees, etc., East Hamp-		Howell.....	228
ton.....	6, 7, 69, 441	Knickerbocker Life Ins. Co. ads.	
Kirkland v. Dinsmore.....	75	Leslie.....	239
Kirkpatrick v. N. Y. Cent. & H. R.		Knickerbocker Life Ins. Co. ads.	
Co.....	192, 280, 310, 476	Meyer.....	239
Kirwan ads. Kingsbury.....	111	Knickerbocker Life Ins. Co. v. Nelson.	
Kissan v. Dierkes.....	443		294, 452
Kisselburgh ads. Pugsley.....	20, 358	Knickerbocker Life Ins. Co. ads.	
Kissenger v. N. Y., etc., R. Co..	377, 440	Prentice.....	241
Kitchel v. Schenck.....	451	Knickerbocker Life Ins. Co. ads.	
Klein v. People.....	142	Roebner.....	239, 319
Klinck v. Colby.....	264	Knickerbocker Life Ins. Co. ads.	
Klink ads. Mendenhall.....	265	Rohrschneider.....	209
Kline ads. Stanton.....	297	Knickerbocker Life Ins. Co. ads.	
Kluender v. Lynch.....	273	Smyth.....	169, 242, 291, 383
Knap ads. Coon.....	3, 380, 385	Kniffen v. McConnell.....	186, 271
Knapp, Matter of Application of....	54	Knight ads. Rexford .....	72, 93
Knapp v. Anderson.....	36, 65	Knight ads. Seneca Nation.....	16, 69
Knapp v. Brown.....	39	Knight v. Wilcox.....	394
Knapp ads. Brown.....	91, 221, 243, 472	Kniskern ads. People.....	219
Knapp ads. Cobb.....	11	Knoll ads. Health Dept. of City of	
Knapp ads. Coon.....	178	New York .....	329, 356
Knapp ads. Huff.....	340	Knolls v. Barnhart.....	154, 461
Knapp ads. King.....	456	Knowles ads. People .....	436

	Page.		Page.
Knowlton v. Congress and Empire Spring Co.....	111, 268	Kursch ads. Farmers' Loan and Trust Co.....	124
Knowlton v. Fitch .....	415	Kurzman ads. Brookman.....	156, 401
Knowlton v. Providence, etc., Steam- boat Co.....	400	Kyle ads. Cayuga Lake R. Co.....	373
Knox v. Baldwin.....	270	Kyle v. Kyle.....	201, 276
Knox ads. Fagnan.....	266	Labar v. Koplin.....	43, 442
Knox ads. Gilbert.....	462	La Beau v. People.....	136
Knox ads. Hexter.....	147, 260, 261	Lacey ads. Excelsior Petroleum Co....	268
Knox v. Jones .....	473	Lachenmeyer ads. Pepin.....	246
Knox ads. Melick.....	215	Lacombe ads. Hibernia Nat. Bk....	91, 253
Knox ads. Miller.....	199		325
Knox ads. Sudlow.....	16, 103	Lacoste ads. People.....	386
Knupfle v. Knickerbocker Ice Co....	310	Lacustrine, etc., Co. v. Lake Guano, etc., Co.....	153, 205, 371
Kobbe ads. Ayer.....	258	Ladue v. Griffith.....	73
Kobbe ads. Barnard .....	10, 202	La Farge v. Exchange F. Ins. Co....	476
Koehler v. Adler.....	190	La Farge v. Herter.....	453
Koehler ads. Prime .....	410	La Farge ads. Ogsbury .....	206
Koelges v. Guard. Life Ins. Co .....	439	Lafayette ads. Wood.....	69, 188, 438
Koenig v. Steckel.....	42	La Fayette Fire Ins. Co. ads. Church.	228
Kohlberg ads. Neudecker.....	187, 367	La Fayette Fire Ins. Co. ads. Stein- bach .....	227
Kohler v. Matlage.....	68	Lafond v. Deems.....	48
Kohler ads. Norris .....	279	Lagrange ads. Adriance.....	201
Kohner ads. Chemical Nat. Bk. of New York.....	90	Lahens ads. Fielden. 18, 34, 249, 317,	349
Koll ads. People .....	356		474
Kone ads. Heinrich .....	16	Laidler ads. Whitford.....	10, 120, 160
Konitzky v. Meyer .....	389, 420	Lake v. Artisans' Bank.....	32, 317, 355
Koon ads. Frost.....	168, 249, 297	Lake ads. Bennett.....	14
Koop ads. Bunge .....	2, 90	Lake v. Gibson.....	18
Koplin ads. Labar.....	43, 442	Lake ads. People.....	176
Kortright v. Cady.....	294	Lake v. Tysen.....	324
Kowing v. Manly.....	56, 272	Lake Guano, etc., Co. ads. Lacustrine, etc., Co.....	153, 205, 371
Kraft v. Freeman Printing, etc., Ass'n.....	117	Lake Ontario, etc., R. Co. v. Curtis..	113
Kraushaar v. Meyer.....	475	Lake Ontario, etc., R. Co. v. Mar- vine.....	30
Kreitz ads. Hinckley .....	36	Lake Ontario, etc., R. Co. v. Mason..	373
Krekeler v. Ritter .....	29, 247, 363	Lake Shore, etc., R. Co., Matter of.	32, 375
Krekeler v. Thaulé.....	31, 266	Lake Shore Ry. Co. ads. Babcock....	75
Kress ads. Doubleday.....	8, 322	Lake Shore, etc., R. Co. ads. Board- man. 97, 119, 184, 243, 255, 373, 402,	413
Kretz ads. Von Sachs.....	64, 181, 412	Lake Shore, etc., R. Co. ads. Clark..	41
Krom v. Levy.....	31	Lake Shore, etc., R. Co. ads. Jermain.	119
Kromer v. Heim .....	2	Lake Shore, etc., R. Co. ads. Onthank.	163
Krulder v. Ellison.....	5, 390	Lake Shore, etc., R. Co. ads. Prouty. 347, 359, 373	
Krum ads. Canaday.....	185	Lake Shore, etc., R. Co. v. Roach.	88, 306
Kuhn ads. Proestler.....	38		431
Kuhn ads. Wehrum.....	90	Lake Shore, etc., R. Co. ads. Sanders.	243
Kundolf v. Thalheimer.....	99		
Kunzmuller ads. Martin .....	395		
Kunzze v. American Ex. Fire Ins. Co.	227		
Kupper ads. Union Nat. Bk.....	416		

	Page.		Page.
Lake Shore, etc., R. Co. ads. Vosburgh.....	280	Langworthy v. Oswego, etc., Ins. Co.	227
Lake Superior Iron Co. v. Drexel.....	120	Lanier ads. Frank.....	204, 325
Lahey ads. Coman.....	269	Lanigan v. Mayor, etc.....	331
Lahey ads. Rundell.....	455	Lanigan v. New York Gas-light Co..	314
Lakin ads. Hardenburgh.....	382, 403	Lanman v. Lewiston R. Co.....	28
Lamatt v. Hudson River Fire Ins. Co.	177	Lanman ads. Troy City Bank.....	326
Lamb v. Camden & Amboy R. Co....	74	Lannen v. Albany Gas-light Co.....	279
Lamb ads. First Nat. Bk. of Whitehall.....	59, 452	Lanning v. Carpenter.....	98, 106, 248
Lamb ads. People.....	141	Lanning v. New York Cent. R. Co....	280
Lamb ads. Shattuck.....	154	Lansing ads. Ackert.....	308
Lambert v. People.....	143	Lansing v. Blair.....	415
Lambert v. Staten Island R. Co.....	400	Lansing ads. Bd. of Water Comm'rs..	339
Lamont v. Cheshire.....	51, 337	Lansing ads. Bockes.....	4, 88, 361, 384
Lamont ads. Hoag.....	71, 117, 129	Lansing ads. Cagger.....	164, 216, 410
Lamoreaux v. O'Rourke.....	394, 430	Lansing v. Carpenter.....	249, 458
L'Amoreux ads. Astor.....	36	Lansing ads. Hoge.....	320
L'Amoreux v. Gould.....	113	Lansing ads. Mott.....	399
L'Amoreux v. Vischer.....	169	Lansing ads. People.....	196
Lampman v. Cochran.....	149	Lansing v. Russell.....	28
Lampman v. Milks.....	162, 458	Lansing ads. Smith.....	444
Lampman ads. Rawson.....	447	Lansing ads. Western Transportation Co. of Buffalo.....	259
Lancaster City and County Fire Ins. Co. ads. Bicknell.....	225	Lapham v. Rice.....	219, 254, 357
Lancaster F. Ins. Co. ads. Reid.....	236	Laraway v. Perkins.....	146, 366
Lance ads. Flower.....	287, 355	Larkin v. Hardenbrook.....	315, 355
Lancey v. Clark.....	323	Larned v. Hudson.....	164, 260
Landers v. Staten Island R. Co....	71, 99	Larned ads. People.....	139, 253, 440
Landers v. Watertown Fire Ins. Co..	233	Lasher ads. Cookingham.....	344, 349
Landon ads. Gildersleeve.....	190, 300	Lasher ads. Hatfield.....	264
Landon ads. Nat. Bk. of Watertown.	350	Lasher v. St. Joseph, etc., Ins. Co..	231
Landon ads. Scoville.....	28, 317, 321	Lasher v. Williamson.....	420
Lane ads. Hopkins.....	127	Lathrop v. Bramhall.....	178, 442
Lane v. Lane.....	462, 475	Lathrop ads. Bush.....	45, 291
Lane v. Lets.....	211	Lathrop v. Clapp.....	476
Lane v. Lutz.....	298	Lathrop ads. Foote.....	21
Lane ads. Oxley.....	464	Lathrop ads. Hyde.....	388, 391
Lane ads. People.....	267, 339	Lathrop ads. Meyer.....	285
Lane v. Salter.....	244	Lathrop ads. Ogden.....	368
Lanergan v. People.....	129, 137	Lathrop v. Smith.....	197
Laney ads. Parker.....	124, 441	Latimer v. Wheeler.....	87, 371
Lang ads. Farmers' Nat. Bank....	215, 457	Lattimer v. Livermore.....	156, 162
Lang ads. Justice.....	407	Lattin v. McCarty.....	5
Langdon v. Astor's Ex'rs.....	465	Laub v. Buckmiller.....	155
Langdon v. Mayor of New York....	166	Lauderdale ads. Hall.....	10
	329, 330, 459, 460	Laughran v. Smith.....	258
Lange, Matter of.....	333	Lavalle v. Skelly.....	14, 32
Lange v. Benedict.....	245, 366	Lavery v. Moore.....	69, 294
Langhaar ads. Schmitz.....	127	Lavery v. Snethen.....	12
Langley v. Warner.....	14, 36, 245, 421, 442	Law ads. Secor.....	14, 343, 384
		Law ads. Simmons.....	67, 73
		Law ads. Smith.....	119

	Page.		Page.
Lawrence v. American Nat. Bk. . . . .	285, 310	Leavitt ads. Nicholson . . . . .	46
Lawrence ads. Ayres. . . . .	303, 436	Leavitt v. Palmer . . . . .	57, 385
Lawrence v. Ball. . . . .	411	Leavitt v. Pell. . . . .	273
Lawrence v. Bank of Republic . . . . .	130, 344	Leavitt v. Putnam. . . . .	317
Lawrence ads. Bliss . . . . .	340	Leavitt v. Thompson. . . . .	15, 171, 406
Lawrence v. Brown . . . . .	277	Leavitt v. Walcott . . . . .	206
Lawrence v. Campbell. . . . .	167, 169, 396	Leavy v. Gardner. . . . .	1, 283
Lawrence v. Clark. . . . .	109, 320	Le Count ads. Carpenter. . . . .	55
Lawrence ads. Colwell. . . . .	27, 149	Le Couteulx v. City of Buffalo. . . . .	305, 427
Lawrence ads. Delaplaine. . . . .	426	Ledyard ads. Acker . . . . .	194, 397
Lawrence v. Ely . . . . .	28	Ledyard v. Jones. . . . .	151, 397
Lawrence v. Farley. . . . .	26	Ledwich v. McKim. . . . .	392
Lawrence v. Farmers' Loan and Trust Co. . . . .	287	Lee v. Adsit . . . . .	12
Lawrence v. Fox. . . . .	113	Lee ads. Brush. . . . .	103, 251, 419
Lawrence ads. Goodale. . . . .	272	Lee ads. Butler. . . . .	18, 250
Lawrence ads. Hawes. . . . .	392	Lee v. Chadsey. . . . .	191, 192, 451
Lawrence ads. Johnson . . . . .	201, 467	Lee v. Decker. . . . .	113
Lawrence v. Lindsay. . . . .	35, 126, 465, 466	Lee ads. Derham. . . . .	247
Lawrence v. Maxwell. . . . .	368	Lee ads. Diven. . . . .	117
Lawrence v. Miller. . . . .	276, 319, 434, 456	Lee v. Sandy Hill, Village of. . . . .	11, 152, 303
Lawrence v. Nelson . . . . .	237	Lee ads. Wall. . . . .	386
Lawrence ads. Palmer. . . . .	33, 245, 253	Lee ads. Warner. . . . .	317
Lawrence ads. Poillon . . . . .	65	Lee ads. Wheelock. . . . .	64, 251
Lawrence ads. Prevot. . . . .	259, 274	Lee ads. Youngs. . . . .	319
Lawrence v. Townsend. . . . .	54	Leeds, Matter of. . . . .	70
Lawrence ads. Williams. . . . .	401	Leeds v. Dunn. . . . .	215
Lawrence ads. Wilson. . . . .	399	Leeds v. Mechanics' Ins. Co. . . . .	223
Lawson v. Bachman. . . . .	174	Leeds v. Metropolitan Gas-light Co. 148, 311	
Lawson v. Hogan . . . . .	113	Lefever v. Lefever. . . . .	169, 208
Lawton ads. Angell. . . . .	345	Le Fevre ads. Cassidy. . . . .	149, 151, 389
Lawton ads. Boreel. . . . .	127, 259	Lefevre v. Lefevre. . . . .	472
Lawton v. Green. . . . .	222	Le Fevre v. Toole. . . . .	472
Laytin v. Davidson. . . . .	468	Lefferts ads. Sanborn. . . . .	270
Laytin ads. Osgood. . . . .	235	Lefler v. Field . . . . .	21, 363, 370
Laytin ads. Rogers. . . . .	33	Leggett v. Bank of Sing Sing. . . . .	61
Lazier v. Westcott . . . . .	186	Leggett ads. Bell. . . . .	65
Leach ads. First Nat. Bank of Jersey City . . . . .	323	Leggett ads. Des Arts. . . . .	5, 324, 434
Leaird v. Smith. . . . .	402	Leggett ads. Fort Stanwix . . . . .	131
Leake, etc., Orphan Home, Matter of. . . . .	334	Leggett v. Hunter. . . . .	96, 444
Leake ads. Ulster Co. Sav. Inst. . . . .	233, 290	Leggett v. Hyde . . . . .	349
Leary v. Miller . . . . .	317, 451	Leggett ads. Kinsey. . . . .	171, 202
Leask ads. People. . . . .	331	Leggett v. Mutual Life Ins. Co. . . . .	456
Leavitt ads. Atlantic Dock Co. . . . .	154, 394	Leggett v. Perkins. . . . .	446
Leavitt v. Blatchford. . . . .	56	Legrand v. Manhattan Mercantile Assn . . . . .	120
Leavitt ads. Brown. . . . .	320	Lehman v. Roberts. . . . .	89, 283
Leavitt ads. Curtis. . . . .	58, 91, 111, 210	Leigh ads. Brown. . . . .	28, 33, 126, 367
Leavitt v. DeLauny. . . . .	450	Leighton ads. King. . . . .	7, 476
Leavitt ads. Dunning . . . . .	292	Leighton v. People. . . . .	32, 133, 142, 328, 439
Leavitt ads. Howell . . . . .	164, 290, 413	Leitch v. Atlantic Mut. Ins. Co. . . . .	237

	Page.		Page.
Leitch v. Hollister .....	46	Levy v. Brush. ....	409
Leitch v. Wells. ....61, 273, 337, 443,	473	Levy v. Burgess. ....	112, 434
Leland ads. Adams. ....	318	Levy ads. Krom. ....	31
Leland v. Cameron. ....	174	Levy v. Levy. ....	92, 448, 449
Leland ads. Cushman. ....	365, 369	Levy v. Loeb. ....	9, 70
Leland v. Hathorn. ....	16	Levy v. People. ....	134
Leland ads. Ramaley. ....	223	Lewes v. Woodworth. ....	179
Leland ads. Tucker. ....	24	Lewin ads. Crowe. ....	285
Lemmon v. People. ....	94	Lewis, Matter of. ....	47
Lemon ads. Anderson. ....	350	Lewis ads. Carr. ....	317
Lenane ads. Gibson. ....	282, 356	Lewis ads. Castle. ....	44
Lenheim ads. Claffin. ....	9	Lewis ads. Chambers. ....	115, 195, 367
Lenihan v. Hamann. ....	63	Lewis v. Chapman. ....	264
Lennon v. Mayor, etc. ....	99, 332	Lewis ads. Churchman. ....	453
Lenox Fire Ins. Co. ads. Van Valken-		Lewis v. Greider. ....	30, 147, 349
burgh. ....	230	Lewis v. Ingersoll. ....	11, 12, 292, 293, 355
Lent v. Howard. ....	200, 387, 465	Lewis v. Lewis. ....	462
Leonard ads. Allis. ....	363, 440	Lewis ads. Mackey. ....	31
Leonard v. City of Brooklyn. ....	283, 306	Lewis ads. McElvey. ....	353
Leonard v. Burr. ....	471	Lewis ads. Miller. ....	245, 339
Leonard ads. Carpenter. ....	422	Lewis v. Mott. ....	368
Leonard v. Collins. ....	279	Lewis ads. National Bank of Auburn.	
Leonard v. Columbia Steam Nav. Co.	308		59, 365
Leonard v. Fowler. ....	339	Lewis v. Palmer. ....	422
Leonard v. Mulry. ....	25, 385	Lewis v. Park Bank. ....	5
Leonard v. New York, etc., Tel. Co.		Lewis ads. People. ....	135, 267
	146, 314, 432	Lewis ads. Rouse. ....	390, 440
Leonard ads. People. ....	267	Lewis v. Seabury. ....	214, 256
Leonard ads. Pickett. ....	414	Lewis ads. Siegel. ....	184
Leonardsville Bank v. Willard. ....	56	Lewis ads. Silliman. ....	400
Leopold ads. Davis. ....	27, 211	Lewis v. Smith. ....	246, 277, 467
Lerch ads. Hubbell. ....	346	Lewis v. Stevens. ....	42
Le Roy v. Market Fire Ins. Co. ....	229, 230	Lewiston R. Co. ads. Cott. ....	374, 460
Le Roy v. Park Fire Ins. Co. ....	442	Lewiston R. Co. ads. Lauman. ....	28
Le Roy ads. Pollen. ....	149, 393	Libbey ads. Babcock. ....	174, 209
Le Roy ads. Van Kleeck. ....	208, 212	Libbey ads. Mason. ....	174
Lesley ads. Stevenson. ....	473	Libby ads. Atlantic Dock Co. ....	125, 236
Leslie v. Knickerbocker Life Ins. Co.	239	Licht ads. Heeg. ....	338
Leslie v. Wiley. ....	9	Liddell v. Paton. ....	23
Lesser v. People. ....	140	Liddle v. Market Ins. Co. ....	229
Lester ads. Duryee. ....	33, 441	Lidgerwood ads. Thursby. ....	351
Lester v. Jewett. ....	105, 358	Lightstone ads. Neftel. ....	360
Lester ads. Power. ....	273, 287	Like v. McKinstry. ....	262, 371
Lester ads. White. ....	60, 265	Lilienthal ads. Harland. ....	53, 176
Lets ads. Lane. ....	211	Lilienthal ads. Sands. ....	228, 411
Leupp ads. Clarke. ....	472	Lima, Matter of Petition of. ....	333
Lever ads. Baker. ....	212, 382	Lincks ads. Haswell. ....	130, 418
Levi ads. Miller. ....	261	Linden ads. Graham. ....	17, 288
Levin v. Russell. ....	189, 199	Linden ads. Sheridan. ....	164, 250
Levinus ads. Smith. ....	359	Lindsay v. Lawrence. ....	35, 126
Levinus ads. State. ....	93	Lindsay ads. Lawrence. ....	465, 466

	Page.		Page.
Lindsay v. People.....	137, 177	Liverpool & London Ins. Co. ads.	
Lindsley v. Ferguson.....	212	Marco.....	38
Liney ads. Ball.....	56	Livingston, Matter of Petition of..	15, 446
Lingke v. Wilkinson.....	342	Livingston Street, Matter of....	101, 404
Linkert ads. Roosevelt.....	29	Livingston v. Arnoux.....	196
Linneman ads. Hammett.....	391	Livingston ads. Croghan .....	348
Liye v. Eisenlerd.....	151, 394	Livingston v. Gordon.....	472
Liscomb ads. People.....	138, 216	Livingston v. Greene.....	464
Litchfield ads. Barbour.....	10	Livingston ads. Lynch....	3, 153, 154, 271
Litchfield ads. Cook.....	91, 319, 322	Livingston ads. Merchants' Bank of	
Litchfield ads. Hurst.....	109, 360	Canada.....	118, 368
Litchfield v. Irvin.....	105, 165	Livingston v. Mildrum.....	283
Litchfield ads. Loop.....	309	Livingston v. Miller.....	243, 255, 258
Litchfield v. Vernon.....	95	Livingston ads. Moss.....	316
Litchfield v. White.....	46	Livingston v. Murray.....	470
Lithauer ads. Barmon.....	146, 355	Livingston ads. People...72, 98, 165, 174	
Littauer v. Goldman.....	321, 452	182, 255, 341, 372, 387, 441	
Littell ads. Jackson.....	284, 290	Livingston v. Radcliff.....	19
Littel ads. Moore.....	154	Livingston ads. Russell.....	77
Little, Matter of.....	352	Livingston v. Sage.....	41, 257
Little v. Banks.....	109, 387	Livingston v. Tanner.....	260
Little v. Denn.....	217, 254	Livingston v. Vassear.....	262
Little ads. Stitt.....	211	Llamosas v. Llamosas.....	22
Little ads. Weeks.....	109	Lloyd v. Matthews.....	10
Little ads. Wilson.....	150, 368	Lloyd v. Mayor, etc.....	304
Littlefield v. Littlefield.....	323, 414	Lloyd ads. Metropolitan Nat. Bank..	191
Littlefield ads. Smith.....	260	Lloyd ads. O'Bierne.....	90, 205
Littlejohn v. Atrill.....	438	Lloyd ads. Quin.....	189, 366
Little Valley, Town of, ads. Marsh.		Loan Fund Assurance Soc. ads. Valton.	185
435, 436		Lobdell v. Lobdell.....	403
Little Valley, Town Auditors of, ads.		Lobdell v. Stowell.....	150, 433
People.....	219	Locke v. Mabbett.....	37, 419
Littlewood v. Mayor of New York..	308	Locklin v. Moore.....	160
Livermore v. Bainbridge.....	1, 22	Lockman ads. Nesbit.....	207
Livermore ads. Lattimer.....	156, 162	Lockman v. Reilly.....	198, 295
Livermore v. Northrup.....	46	Lockport, City of, ads. Hines ..	303
Liverpool, etc., Ins Co. ads. Dakin..	227	Lockport, Trustees of Village of, ads.	
Liverpool, etc., Ins. Co. ads. Hay-		Buel.....	168, 205, 305, 406, 430
ward.....	234	Lockport & Buffalo R. Co., Matter of.	375
Liverpool, etc., Steamship Co. ads.		Lockwood ads. Elmendorf.....	276
Baldwin.....	74, 162	Lockwood ads. Ellsworth.....	291, 296
Liverpool, etc., Steamship Co. ads.		Lockwood ads. Miller.....	298
Guiterman.....	175, 357	Lockwood v. Quackenbush....	31
Liverpool, etc., Steamboat Co. ads.		Lockwood ads. Stanford....	48
Redmond.....	77	Lockwood v. Thorne.....	3
Liverpool, etc., Steamship Co. ads.		Lockwood ads. Wylie.....	469
Steers.....	81	Loder v. Hatfield.....	413, 472
Liverpool & Great West. St. Co. ads.		Loder ads. Waring.....	249
Fowler.....	109	Loeb v. Hellman.....	12, 38
Liverpool & London Fire and Life		Loeb ads. Levy.....	9, 70
Ins. Co. ads. Fairchild.....	227	Loeschick v. Baldwin.....	19

	Page.		Page.
Loeschigk v. Bridge.....	210	Lord ads. Doyle.....	163, 261
Loeschigk v. Hatfield.....	153, 352	Lord ads. Mali.....	279
Loftus v. Union Ferry Co. of Brook-		Lord ads. Mason.....	452
lyn.....	79, 203	Lord ads. Nourry.....	42, 170, 176
Logan ads. Farmers & Mechanics' Nat.		Lord ads. Secor.....	4, 190
Bank.....	67	Lord ads. Steele.....	189
Lohman v. People.....	133, 253, 475	Lord ads. Stone.....	153, 402
Lohnes ads. Bulson.....	41	Lord v. Thomas.....	102, 403
Lomer v. Meeker.....	439	Lord ads. Tiffany.....	50, 149
Long ads. Andrews.....	35	Lorenz ads. Britton.....	48, 178, 189, 193
Long v. Mayor, etc.....	102, 331, 341	Lorillard ads. Baker.....	469
Long v. New York Cent. R. Co.....	74	Lorillard v. Clyde.....	111
Long ads. Pollett.....	308	Lorillard ads. Erben.....	148, 179, 327, 409
Long v. Warren.....	209	Lorillard ads. Kelso.....	469
Long Island City v. Long Island R.		Lorillard v. Monroe, Town of.....	305, 435
Co.....	302, 378	Lorillard v. Silver.....	106
Long Island City, Common Council		Lorrillard Fire Ins. Co. ads. Perry.....	234
of, ads. People.....	306	Lorrillard Ins. Co. ads. Bryce.....	230, 285
Long Island Ferry Co. v. Terbell.....	339	Losee v. Buchanan.....	5, 437
Long Island R. Co., Matter of.....	374	Losee v. Bullard.....	270
Long Island R. Co. ads. Bedell.....	379	Losee v. Clute.....	309
Long Island R. Co. v. Conklin.....	154	Lott ads. Platt.....	46
Long Island R. Co. ads. Eckert.....	311	Lott ads. Sweezey.....	398
Long Island R. Co. ads. Hoyt.....	175	Lott v. Wykoff.....	470
Long Island R. Co. ads. Long Island		Lottich ads. Davis.....	433
City.....	302, 378	Loucks ads. Parsons.....	408
Long Island R. Co. ads. McCosker.....	281	Loughlin ads. Randolph.....	176
Long Island R. Co. ads. Miller.....	188	Loughran v. Ross.....	154, 259
Long Island R. Co. ads. Pacific Iron		Lounds ads. Howland.....	388
Works.....	390	Lounsbery v. Snyder.....	262, 409
Long Island R. Co. v. Verree.....	113	Lounsberry ads. Hasbrouck.....	391
Long Island R. Co. ads. Willis.....	312	Lounsberry v. Purdy.....	19, 89, 444
Longyor ads. Fellows.....	216, 450	Lounsberry ads. Union Mfg. Co.....	354
Loomis ads. Ball.....	38, 47	Lourie ads. Clark.....	25
Loomis ads. Great Western T. Co.....	189	Love ads. Weeks.....	343
Loomis ads. Miles.....	176	Loveless ads. Pierrepont, Town of.	
Loomis ads. McGarry.....	312, 342		110, 279
Loomis v. People.....	142	Lovell ads. Cragin.....	357, 363
Loomis ads. Olmstead.....	156, 251, 458	Lovell v. Quitman.....	463
Loomis v. Ruck.....	162, 276, 325	Loveridge ads. Children's Aid Soc.....	463
Loomis ads. Susquehanna Valley Bk.		Lovett v. Gillender.....	466
	318, 322	Low v. Archer.....	145
Looney v. Hughes.....	255, 406, 421	Low v. Austin.....	401
Loonie v. Hogan.....	282, 409	Low v. Hall.....	38, 405
Loop v. Litchfield.....	309	Low v. Harmony.....	465, 466
Loper ads. Erwin.....	199	Low v. Hart.....	123, 179, 222, 437
Lord, Matter of.....	333	Low v. Payne.....	38, 181
Lord ads. Amory.....	467	Low ads. Simpkins.....	150
Lord ads. Brague.....	192	Low ads. Wayne Co. Sav. Bk.....	92, 449
Lord ads. Candee.....	20, 172, 365	Lowden, Matter of.....	334
Lord ads. Chase.....	2, 229	Lowe ads. Burdett.....	126

	Page.		Page.
Lowell Manuf., etc., v. Safeguard Fire		Lynch v. Livingston.....	3, 153, 154, 271
Ins. Co.....	177, 233	Lynch v. Mayor, etc .....	304
Lowenbein ads. Agate.....	261	Lynch v. McNally.....	14
Lowenberg v. People.....	137	Lynch v. Metropolitan, etc., R. Co.	81, 203
Lowenstein v. Flaurand .....	45	Lynch ads. People.....	196, 205
Lowenstein ads. Martine.....	23, 388	Lynch ads. Wheelan.....	146, 184
Lower v. Meeker.....	453	Lynde ads. Bowne.....	288
Lowery v. Brooklyn City, etc., R. Co.	378	Lynde ads. Hyde... ..	235, 381
Lowery v. Steward.....	40	Lynes ads. Smith.....	36, 390
Lowery v. W. U. Tel. Co .....	150, 433	Lynes v. Townsend .....	468
Lowman v. Gates .....	423	Lyon ads. Brown.....	470
Lowry ads. Cook.....	201, 473	Lyons, Town of, v. Chamberlain .....	435
Lowry v. Inman .....	61	Lyon v. Clark.....	68, 243
Loyd ads. Metropolitan Nat. Bk .....	57, 371	Lyon ads. Daniel.....	124
Luby v. Hudson R. R. Co.....	179, 186, 406	Lyon ads. Hart.....	354
Lucas ads. Fielding.....	129	Lyon ads. Lyon....	216, 250, 291, 404, 464
Lucas ads. People.....	68		466
Lucas ads. Burkle ....	1, 88, 126, 174, 251	Lyon v. Mitchell.....	109
Luce v. Dunham .....	464, 465, 466	Lyon ads. Mount.....	104
Lucksinger ads. Wiseman.....	161, 163	Lyon ads. Newlin .....	180
Luddington v. Bell.....	353	Lyon v. Odell.....	173
Ludlam v. Ludlam .....	13	Lyon ads. Strong.....	214
Ludlow ads. Dole .....	148	Lyon ads. Wadsworth.....	288
Ludlow ads. Small .....	48	Lyon ads. Yates.....	46, 220, 370
Ludlum ads. Jones. ....	23	Lyons Bank ads. Price.....	450
Ludwig v. Jersey City Ins. Co.....	235	Lyons & Fellows' Mfg Co. ads. Blake.	36, 384
Luhrs v. Eimer .....	13		
Luling v. Atlantic Mutual Ins. Co....	235	Lyons v. Erie Ry. Co.....	311
Luling ads. Nelson.....	120	Lyons ads. Van Loon.....	129
Lumbard v. Syracuse, etc., Ry. Co.....	281, 283	Lytle v. Beveridge.....	198, 464, 466
Lundy ads. Haddow .....	181, 201		
Lutes v. Briggs.....	306	Maas v. Chatfield.....	315, 451
Lutz ads. Lane.....	298	Maas v. Missouri, etc., R. Co.....	68, 374
Luyster ads. Eten .....	147, 257	Maass ads. Gillig.....	209
Lycoming Co. Mut. Ins. Co. ads. Ben-		Mabbett ads. Locke.....	37, 419
nett.....	232	Mabbett ads. Dutchess & Columbia R.	
Lycoming Fire Ins. Co. ads. Blossom.	232	Co .....	373
Lyke ads. Van Leuven.....	14	Mabbett v. White.....	32, 349
Lyman ads. Horner.....	36, 448	Mabie v. Bailey.....	443
Lyman ads. Parsons.....	200	Mabie ads. Mayor ...	257
Lymburner ads. Bernhardt.....	296	Macaulay, Matter of.....	201, 424
Lyme v. Ward .....	33, 123	Macauley v. Mayor, etc.....	310
Lynch ads. Bensel.....	396	Macauley v. Porter.....	287, 383
Lynch ads. Cambridge Valley Nat.		Mack v. Austin.....	130, 290
Bank .....	22	Mack v. Patchin .....	147
Lynch ads. Columbia College, Trus-		Mack v. Phelan ...	170, 300
tees of.....	130, 402	Mack v. People.....	132, 252
Lynch v. Crary .....	50	Mack ads. Rector of Christ Church.	162, 296
Lynch v. Johnson.....	419		
Lynch v. Kennedy.....	321	Mackay v. New York Cent. R. Co ...	377
Lynch ads. Kluender.....	273		



## TABLE OF CASES.

561

	Page.		Page.
Mackey v. Lewis.....	31	Mallory v. Gillett...	410
Mackey ads. Maples.....	248, 411	Mallory ads. McDonald.....	401
Mackellar ads. King.....	115	Mallory ads. Norton.....	130
Mackellar ads. Phillips.....	451	Mallory v. Tioga R. Co. .39, 121, 258,	413
Mackin ads. Clark.....	295		442
Macy ads. McMahon.....	373	Mallory v. Travelers' Ins. Co.....	242
Macy v. Wheeler.....	37, 401	Mallory ads. Vanderheyden ....	63, 275
Madan v. Sherard.....	75	Mallory v. Willis.....	55
Madge v. Ping.....	42	Malloy ads. Church.....	451
Madison ads. White....	177, 225, 262, 397	Malone v. Hathaway.....	281
Madison Ave. Baptist Church v. Oli- ver Street Baptist Church.....	386	Maltby v. Greene.....	26, 283, 370
Madison Co. Mut. Ins. Co. ads. Gates. .....	226, 229	Maltby ads. Wilson.....	288
Magee v. Badger.....	320	Manchester v. Herrington.....	2, 404
Magee v. Osborn.....	37, 441	Mandeville ads. Bowen.....	206, 213
Maghee v. Camden & Amboy R. Co..	74	Mandeville v. Reynolds....	52, 174, 186
Magie v. Baker.....	34	Mangam v. Brooklyn R. Co. ....	312
Maginnis v. N. Y. Cent., etc., R. Co..	377	Mangam ads. Ingersoll.....	221, 251
Magnin v. Dinsmore.....	74, 75, 147	Manhattan, etc., Assoc. ads. Mairs. .....	243, 308, 460
Magoun v. Sinclair.....	66, 326	Manhattan, etc., Co. ads. Coleman..	6, 69
Maguire ads. Osgood.....	121		87
Maguire ads. Van Dyke.....	363	Manhattan Beach R. Co. ads. Kelly..	124
Mahady v. Bushwick R. Co.....	217, 375	Manhattan Brass and Manfg. Co. v. Sears.....	349
Mahaiwe Bank v. Culver.....	130, 214	Manhattan Brass and Manfg. Co. v. Thompson... ..	276
Maher v. Carman.....	40	Manhattan Ins. Co. ads. Hood.....	236
Maher v. Central Park, etc., R. Co. .....	19, 313	Manhattan L. Ins. Co. ads. Carpenter.	127
Maher v. Hibernia Ins. Co.....	231, 385	Manhattan Mercantile Assn. ads. Le- grand .....	120
Mahler v. Transportation Co.....	253	Manhattan Oil Co. ads. Calkin .....	20
Mahon v. N. Y. Cent. R. Co..	4, 166, 338	Manhattan Oil Co. v. Camden & Am boy R. and Transp. Co.....	75
Mailler ads. Brown.....	179	Manhattan Sav. Bank, Matter of.	333, 406
Mailler v. Express Propeller Line. .....	145, 400		430
Main v. Cooper.....	254	Manice v. Manice.....	464
Main ads. Minturn.....	55	Manice v. Mayor, etc.....	332
Main ads. People.....	96	Manke v. People.....	138
Mairs v. Manhattan, etc., Assoc..	243, 308	Manley v. People.....	132
	460	Manley ads. Rice.....	407, 152, 209
Majone ads. People.....	136	Manley ads. Thayer.....	115, 150
Malcolm v. Allen.....	288	Manly ads. Kowing.....	56, 272
Malcolm ads. Cole.....	417	Mann ads. Cole.....	195
Malcom v. O'Reilly.....	116	Mann v. Delaware, etc., Canal Co. ...	281
Mali ads. Bruff.....	208	Mann ads. Demainville.....	256
Mali ads. De Peyster.....	336	Mann ads. Dodge.....	28
Mali v. Lord.....	279	Mann ads. Dunham.....	389
Malins v. Brown.....	402	Mann v. Fairchild.....	382, 414
Mallams ads. Peck.....	154, 344	Mann v. Palmer.....	106, 114, 413
Mallon ads. Atcheson.....	109	Mann v. Pentz... ..	374, 381, 382
Malloney v. Horan.....	168, 284	Mann ads. People.....	141
Mallory ads. Farnham.....	169, 250, 293		

	Page.		Page.
Mann ads. Wells. ....	420	Markham v. Stowe .....	163
Manning ads. Dodge .....	471	Marks v. King .....	190
Manning v. Gould.....	36, 421, 423	Marlow ads. Cutting.....	61
Manning v. Keenan.....	88, 115, 116	Marnig ads. People.....	101, 432
Manning v. Monaghan. .	150, 298, 300, 370	Marquardt ads. Griffin.....	27, 185
Manning v. Port Henry Iron Ore Co.		Marquat v. Marquat.....	47, 249
	244, 311	Marsden v. Cornell.....	299
Manning v. Tyler.....	363, 453	Marsh, Matter of Application of. .	161
Manrow ads. Durham... .	215, 322, 408	Marsh, Matter of Petition of.....	334
Mansfield v. Beard.....	127	Marsh v. Avery.....	425
Mansfield ads. Sharkey.....	286	Marsh v. Brooklyn, City of.....	88
Mansert ads. Moore.....	404	Marsh v. Benson.....	252
Manufacturers and Builders' Bank		Marsh v. Dodge .....	354, 366
ads. Rosenback.....	61	Marsh v. Ellsworth.....	264
Manufacturers and Traders' Bank ads.		Marsh v. Falker.....	208
Bank of Attica.....	61	Marsh ads. Foot.....	389
Manufacturers and Traders' Bank v.		Marsh ads. Forman.....	221
Hazard .....	319	Marsh v. Holbrook .....	53
Manvel v. Holdredge. ....	104	Marsh v. Little Valley, Town of....	436
Mapes v. Snyder .....	1, 288	Marsh ads. McCarthy.. .	13, 247
Maples v. Mackey... ..	248, 411	Marsh ads. Montgomery Co. Bank...	319
Maplesden ads. Cartwright.....	163		474
Marble v. Whitney.....	218	Marsh ads. N. Y. & Harlem R. Co... .	432
March v. Ellsworth .....	264	Marsh v. Rouse .....	408
March ads. McCarthy.....	186	Marsh v. Russell.....	110, 349
March ads. Wells.....	350	Marsh v. Trimm.....	290
Marchay ads. Gibney.....	180	Marshall ads. Ashley.....	39, 363
Marclay v. Schults.....	458	Marshall v. Davies.....	292, 439
Marclay v. Shults .....	182, 327	Marshall ads. Downing..	126, 369, 446, 449
Marco v. Liverpool & London Ins. Co.	38		469
Marcus v. St. Louis Mut. Life Ins. Co.		Marshall v. Guion.....	329
	214, 240	Marshall ads. Moseley.....	40, 469
Marfield v. Goodhue.....	202	Marshall v. Much ..	53
Margraf v. Muir.....	148	Marshall ads. Murray.....	290
Marie v. Garrison.....	110	Marshall ads. Ogden.....	146
Marine Bank ads. Commercial Bank		Marshall v. Smith.....	30
of Clyde.....	56	Marshall ads. Western Trans. Co. .	66, 391
Marine Nat Bank v. Nat. City Bank.		Marston v. Gould.....	3
	33, 59	Marston v. Swett.....	354, 360, 366
Marine Nat. Bank ads. Wylie.....	10	Martense ads. Hoyt.....	289
Marine Bank of Buffalo v. Fiske. .	115	Marti ads. De Herques .....	171
Marine Bank of Chicago v. Van Brunt.	194	Martin ads. Benton.....	315, 326
Marine Bank of Chicago v. Wright..	66	Martin ads. Catlin.....	272
Marine Bank of New York v. Clements	324	Martin v. Cope.....	107, 388
Mark v. Buffalo, City of.....	124, 415	Martin v. Dry Dock, etc., R. Co.....	198
Market Bank v. Hartshorne.....	319, 331	Martin v. Farnsworth.....	9
Market Fire Ins. Co. ads. Le Roy..	229, 230	Martin ads. Faure .....	285, 456
Market Ins. Co. ads. Piddle.....	227	Martin v. Funk .....	213
Market Nat. Bk. v. Pacific Nat. Bk..	417	Martin v. Gage.....	200, 413, 414
Markham v. Jaudon.....	150, 368	Martin ads. Garr.....	420
Markham ads. Shakespeare.....	110, 424	Martin v. Greene Co., Supervisors of.	128

## TABLE OF CASES.

563

	Page.		Page.
Martin v. Kunzmuller.....	395	Masterton v. Village of Mount Ver-	
Martin v. Martin.....	274	non.....	148, 304
Martin v. McCormick.....	285	Mather ads. Anderson.....	221, 444
Martin ads. People.....	434	Mather ads. Eldridge.....	183
Martin v. Silliman.....	10, 244	Mather ads. Goss.....	4
Martin v. Windsor Hotel Co.....	23	Mather ads. Ross.....	360
Martine v. International Life Ins. Co.		Mathes ads. Husted....	274, 275, 282, 283
	9, 116, 239	Mathes v. Neidig.....	269
Martine v. Lowenstein.....	23, 388	Mathews v. Aikin.....	289, 416
Martine v. Whitney.....	9, 12, 39	Mathews ads. Decker.....	150, 319, 361
Martinhoff v. Martinhoff.....	27	Mathews v. Duryee.....	276
Marvin v. Brewster Iron Mining Co..	285	Mathews v. Howard Ins. Co.....	236
	387	Matlage ads. Kohler.....	68
Marvin v. Brooks.....	3, 13, 174	Matsell ads. People.....	331
Marvin v. Marvin.....	34, 124, 424, 463	Matson v. Farm Buildings Ins. Co...	226
Marvin ads. New York Cent. R. Co..	20	Matteson ads. Bain.....	198
Marvin v. Prentice.....	147	Matteson ads. Bliss.....	110
Marvin ads. Roche.....	357	Matteson v. Moulton.....	315, 410
Marvin v. Seymour.....	20	Matteson v. New York Cent. R. Co.	
Marvin v. Smith.....	276, 288, 446, 450		77, 87, 186
Marvin v. Universal Life Ins. Co....	241	Matteson ads. Purchase.....	442
Marvin v. Wilber.....	8	Matthews ads. Bank of New Orleans.	
Marvine v. Hymers.....	451		168, 353
Marvine ads. Lake Ontario, etc., R. Co.	30	Matthews v. Beach.....	365
Marx v. McGlynn....	13, 27, 443, 462, 463	Matthews ads. Burnside.....	363, 457
	471	Matthews v. Coe.....	38, 150, 202, 451
Mase ads. Nichols.....	92, 174, 256, 300	Matthews ads. Decker.....	115
Mason v. Anthony.....	171, 453	Matthews ads. Highland Chemical &	
Mason v. Decker.....	389	Mining Co.....	105
Mason ads. Grierson...	178	Matthews ads. Hubbard.....	67, 319
Mason v. Jones.....	33	Matthews ads. Lloyd.....	10
Mason ads. Lake Ontario, etc., R. Co.	373	Matthews ads. McStea.....	353
Mason v. Libbey.....	174	Matthews v. Meyberg.....	28
Mason v. Lord.....	452	Matthews ads. Morehouse.....	175
Mason ads. McWilliams.....	322	Matthews ads. People.....	261
Mason v. People.....	140	Matthews v. Rice.....	210
Mason ads. Post.....	200, 464, 472	Matthews v. Sheehan.....	178
Mason v. Ring.....	53	Matthews ads. Speers.....	221
Mason's Executors v. Alston.....	246	Matthews v. Tufts.....	417
Massachusetts Mut. Life Ins. Co. ads.		Matthews ads. Weberly.....	41
Goodwin.....	241, 363	Matthews ads. Witty.....	261
Massachusetts Mut. Life Ins. Co. ads.		Matthewson ads. Goetchins.....	165
Greenfield.....	238, 364	Mattice v. Allen...	408
Massachusetts Life Ins. Co. ads. Swift.	241	Mattison v. Baucus.....	298, 300
Massoth v. Delaware & Hudson Canal		Mattison v. New York Cent., etc., R.	
Co.....	313	Co.....	81
Masterson ads. Duffy.....	18, 444	Mattisons ads. Metcalf.....	39
Masterson v. Kain.....	425	Mattoon v. Young.....	180, 476
Masterson v. N. Y. C., etc., R. Co....	378	Maurer v. People.....	134
Masterson, etc., Stone Dressing Co.		Maverick v. Eighth Avenue R. Co	
ads. Townsend.....	30		79, 474

	Page.		Page.
Maximilian v. Mayor, etc.....	304, 335	Mayor, etc., ads. Demarest.....	.97, 328
Maxon v. Scott.....	276	Mayor, etc., ads. Devlin.....	.94, 149, 302
Maxwell ads. Farmers' Bank.....	316	Mayor, etc., ads. Devoy.....	98
Maxwell ads. Lawrence.....	368	Mayor, etc., ads. Dickinson.....	335, 413
Maxwell ads. Stevenson.....	243, 402, 455	Mayor, etc., ads. Dolan.....	332, 341
May v. Walter.....	211	Mayor, etc., ads. Donovan.....	301
Maybee ads. Hunt.....	318	Mayor, etc., ads. Dowdney.....	332
Mayenborg v. Haynes.....	170	Mayor, etc., v. Duncliff.....	303
Mayer, Matter of Petition of.....	98, 332	Mayor, etc., ads. Duryea.....	156
Mayer v. Mayor, etc.....	286	Mayor, etc., ads. Dyckman.....	166
Mayer v. People.....	140	Mayor, etc., ads. Eno.....	332
Mayer ads. Potts.....	193	Mayor, etc., v. Erben.....	305, 335
Mayhew ads. Dudley.....	116, 354	Mayor, etc., v. Exchange Fire Ins. Co.	229, 303, 331
Maynard v. Anderson.....	170	Mayor, etc., ads. Fagan.....	330
Maynard v. Syracuse, etc., R. Co....	75	Mayor, etc., ads. Field.....	.45, 331
Mayor, etc., Matter of.....	166, 336	Mayor, etc., ads. Fisher.....	335, 413
Mayor, etc., ads. Argus Co.....	301, 408	Mayor, etc., ads. Fitch.....	.14, 183, 331
Mayor, etc., ads. Astor.....	.94, 102, 332	Mayor, etc., ads. Ford.....	329
Mayor, etc., ads. Atlantic Dock Co..	247	Mayor, etc., ads. Furman.....	329
Mayor, etc., ads. Baird.....	.27, 335, 384	Mayor, etc., v. Genet.....	50
Mayor, etc., ads. Baldwin.....	20, 331	Mayor, etc., ads. Goillotel.....	411
Mayor, etc., ads. Bank of Common-		Mayor, etc., ads. Greene.....	334
wealth.....	305, 430	Mayor, etc., ads. Gregory.....	328
Mayor, etc., ads. Billings.....	.94, 331	Mayor, etc., ads. Griffin.....	303, 314, 335
Mayor, etc., ads. Bonesteel.....	334	Mayor, etc., ads. Griscom.....	26
Mayor, etc., ads. Bowery Nat. Bank.	105	Mayor, etc., ads. Hadley.....	302
Mayor, etc., ads. Brady.....	301	Mayor, etc., ads. Halstead.....	302
Mayor, etc., ads. Brennan.....	129, 363	Mayor, etc., ads. Ham.....	335
Mayor, etc., v. Brooklyn Fire Ins. Co.	180, 234	Mayor, etc., ads. Hamersley.....	335
Mayor, etc., ads. Brown.....	262, 302, 328	Mayor, etc., v. Hamilton Fire Ins. Co.	227
Mayor, etc., ads. Callahan.....	129	Mayor, etc., ads. Hawkins.....	329
Mayor, etc., ads. Callmeyer.....	108	Mayor, etc., ads. Harlem Gas-light Co	301
Mayor, etc., ads. Camen.....	44, 170, 302, 383	Mayor, etc., v. Hart.....	.90, 336
Mayor, etc., ads. Chegary.....	428	Mayor, etc., ads. Haswell.....	303, 340
Mayor, etc., v. Clark.....	105, 109, 148, 434	Mayor, etc., ads. Hatch.....	336
Mayor, etc., v. Coffin.....	348	Mayor, etc., ads. Haughwout.....	335
Mayor, etc., v. Colgate.....	332	Mayor, etc., ads. Heyward.....	167, 305
Mayor, etc., ads. Comer.....	.96, 98, 339	Mayor, etc., ads. Hogan.....	329
Mayor, etc., ads. Costello.....	330	Mayor, etc., ads. Holley.....	129
Mayor, etc., ads. Coster.....	.4, 145	Mayor, etc., ads. Hume.....	303
Mayor, etc., v. Cunliff.....	309	Mayor, etc., ads. Hutson.....	335
Mayor, etc., ads. Cutter.....	243, 336	Mayor, etc., ads. Jones.....	.45, 335
Mayor, etc., ads. Dannat.....	334	Mayor, etc., ads. Kearney.....	20, 175
Mayor, etc., ads. Darlington.....	94	Mayor, etc., ads. Kelly.....	304
Mayor, etc., v. Davenport.....	330, 331, 431	Mayor, etc., ads. Kennedy.....	303, 310, 330
Mayor, etc., ads. Davies.....	249, 302, 303		340
	335	Mayor, etc., ads. King.....	21
Mayor, etc., ads. Davis.....	.14, 16, 328, 338	Mayor, etc., ads. Langdon.....	166, 329, 330
Mayor, etc., ads. Day.....	129, 330		459, 460
		Mayor, etc., ads. Lanigan.....	331

## TABLE OF CASES.

565

	Page.		Page.
Mayor, etc., ads. Lennon .....	99, 332	Mayor, etc., ads. Terhune.....	330, 341
Mayor, etc., ads. Littlewood. ....	308	Mayor, etc., v Third Ave R. Co.....	222, 302
Mayor, etc., ads. Lloyd.....	304	Mayor, etc., ads. Thompson.....	7, 328
Mayor, etc., ads. Long.....102, 331,	341	Mayor, etc., ads. Tomlinson.....	34
Mayor, etc., ads. Lynch.....	304	Mayor, etc., ads. Tone .....	333
Mayor, etc., v. Mabie .....	257	Mayor, etc., ads. Townsend ..	89
Mayor, etc., ads. Macauley.....	310	Mayor, etc., v. Troy & Lans R. Co.....	247
Mayor, etc., ads. Manice.....	332		264, 305
Mayor, etc., ads. Mayer.....	286	Mayor, etc., ads. Vogel....	304, 338, 460
Mayor, etc., ads. Maxmilian.....	304, 335	Mayor, etc., ads. Voorhis .....	108
Mayor, etc., ads. McCotter.....	104	Mayor, etc., ads. Wendell.....	304
Mayor, etc., ads. McDonald .....	302, 334	Mayor, etc., ads. Whiting ....	365
Mayor, etc., ads. McMahan.....	308, 406	Mayor, etc., ads. Whitmore.....	330
Mayor, etc., ads. McVeany.....	329, 341	Mayor, etc., v. Williams.....	302
Mayor, etc., ads. Miller. ....	335	Mayor, etc., ads. Wood.....	303
Mayor, etc., ads. Moore.....167, 277,	336	McAllister v. Albion Plankroad Co..	19
Mayor, etc., ads. Muller .....	330	McAlpin ads. Donovan.....	341
Mayor, etc., v Mutual Bank. ....	429	McAlpin v. Powell.....	258
Mayor, etc., ads. Nelson .....	334	McAndrew ads. Dustan.....	149
Mayor, etc., ads. Nims.....	304	McAndrew v. Radway.....173, 319,	337
Mayor, etc., ads. O'Gorman .....	331	McAndrew v. Whitlock.....	77
Mayor, etc., ads. Pack .....	304, 474	McAuliff ads. Houghton .....	121
Mayor, etc., ads. People..43, 100, 307,	330	McBratney v. Rome, etc., R. Co.....	54
Mayor, etc., ads. Peterson .....	334	McBride v. Farmers' Bank .....	45, 57
Mayor, etc., ads. Peyser.....	44, 355	McCabe v. Brayton .....	211
Mayor, etc., ads. Phillips.....	330	McCabe v. Fowler.....	199
Mayor, etc., ads. Poillon.....	282	McCafferty v. Spuyten Duyvil, etc.,	
Mayor, etc., ads. Purssell.....	44	R. Co.....	379
Mayor, etc., ads. Radcliff's Ex'rs ....	303	McCaffrey v. Woodin.....	261
Mayor, etc., ads. Rehberg.....	304	McCall v. McCall.....	301
Mayor, etc., ads. Roosevelt Hospital.		McCall ads. People.....	381
	43, 333	McCall v. Sun Mut. Ins. Co.....	237
Mayor, etc., ads. Rowland .....	331	McCann ads. O'Brien....	398
Mayor, etc., v. Ryan.....	421, 422	McCann ads. People.....98, 132, 242,	361
Mayor, etc., ads. Schanck....37, 301,	328	McCarney v. People .....	133
Mayor, etc., ads. Schenck.....	329	McCarter, Matter of.....	3, 126
Mayor, etc., ads. Schuchardt....	335	McCarthy ads. Gould.....	161
Mayor, etc., ads. Seaman. ....	335	McCarthy v. March.....	186
Mayor, etc., v. Second ave. R. Co ...	302	McCarthy v. Marsh.....13, 247	
Mayor, etc., ads. Sheridan .....	346	McCarthy v. City of Syracuse.....	304
Mayor, etc., ads. Sherman.....107, 178		McCarthy v. Whalen .....	180
Mayor, etc., v. Sibberns .....	448	McCarthy ads. Lattin.....	5
Mayor, etc., ads. Smith.304, 334, 339,	427	McCartney v. Bostwick.....	252, 443
Mayor, etc., ads. Spears.....	23, 336	McCartney ads. Cuyler..	47, 180
Mayor, etc., ads. Stevens .....	262	McCartney ads. Voorhees....	52, 123
Mayor, etc., ads. Strusburgh .....	44	McCaughey v. Smith .....	324
Mayor, etc., v. Stuyvesant.....	5, 154	McCauley ads. Button.....	271, 366
Mayor, etc., ads. Sullivan.....	96, 330	McChesney ads. City Bk. of Brooklyn.	
Mayor, etc., v. Sun Mut. Ins. Co.404,	427		179, 353, 370
Mayor, etc., ads. Swift .....	335	McChesney ads. Davenport..	298
Mayor, etc., ads. Taylor ....243, 262,	331	McChesney ads. Halsted ....198, 271,	273

	Page.		Page.
McClare v. Paine....	10	McCracken v. Valentine's Ex'rs.....	296
McClaghry ads. McNaught.....	321	McCready ads. Davis.....	315
McCleary ads. Wiggins.....	163	McCready ads. Thorn. . . . .	400
McClellan ads. Burkhardt . . .50, 327,	396	McCrum ads. Reid. ....	225, 292
McClellan v. Jones. ....	402	McCue ads. Farrar . . . . .	369
McClelland v. Remsen. . . . .	349	McCulloch v. Hoffman.....	174
McCloskey ads. Frazier . . . . .	264	McCulloch v. Norwood.....	1, 122, 230
McCluer ads. Parker.....	6	McCullom ads. Dowdney.....	282
McClune v. Cain.....	7, 211	McCullough ads. Corning.....	117, 412
McClure ads. Cook. . . . .	69	McCumber ads. People . . . . .	364, 369
McClure v. Super's of Niagara . . .28,	126	McCurdy ads. Fullerton . . . . .	287
McCluskey v. Cromwell.....	5, 68	McDermott ads. Hynes.173, 176, 189,	271
McColl v. Sun Mut. Ins. Co.....	90	McDermott v. Palmer.....	282
McCollum v. Seward.....	176, 243	McDevitt ads. Garvey.....	467
McComber v. Granite Ins. Co.....	366	McDevitt ads. McLaughlin.....	463
McCombs v. Allen.....	50, 65	McDivitt ads. Moses.....	53, 206
McCombs ads. Phillips.....	179, 463	McDonald v. Mallory.....	401
McConihe v. N. Y. & Erie R. Co....	112	McDonald v. Mayor, etc.....	302, 334
McConnell ads. Farley.....	424	McDonald ads. People.....	97, 142, 217
McConnell ads. Kniffen.....	186, 271	McDonald ads. Phelps.....	38
McConnell ads. Rathbone.....	123	McDonald ads. Richmondville Union	
McConnell v. Sherwood....	47	Seminary.....	417
McConochie v. Sun Mutual Ins. Co..	237	McDonald ads. Townsend.....	458
McCoon ads. Silsbury. ....	2, 371	McDonald ads. Walter.....	442
McCord v. People.....	140	McDonald v. Western R. Co.....	75
McCormack ads. Delaney.....	473	McDonald ads. Winne.....	114
McCormick ads. Chapman.....	440	McDonnell ads. Page.....	455
McCormick ads. Halsey.....	69, 459	McDonnell ads. People.....	142
McCormick v. Horan.....	459	McDonough ads. Howard.....	182
McCormick ads. House.....	156	McDougall v. Cooper.....	285, 359
McCormick ads. Kelly.....	50, 103	McElvey v. Lewis.....	353
McCormick ads. Kidd.....	114, 146	McEntee v. Harrison.....	204
McCormick ads. Martin.....	285	McEntee v. New Jersey Steamboat Co.	77
McCormick v. Pickering.....	64, 364	McEwan ads. Nichols.....	46
McCormick v. Penn. Cent. R. Co..	81, 145	McEwen ads. Gardner... ..	299
	182, 251, 272	McFarlan v. Watson.....	260
McCormick v. Sarson.....	393	McFarland ads. Schneider . . . . .	253, 426
McCosker ads. Brady.....	2, 251, 343, 359	McGaffin v. City of Cohoes.....	406
McCosker v. Long Island R. Co.....	281	McGarry v. Loomis.....	312, 342
McCotter v. Hooker... ..	73	McGary v. People.....	133
McCotter v. Jay.....	296	McGiffin v. Baird.....	393
McCotter v. Mayor, etc.....	104	McGinley v. U. S. Life Ins. Co.....	440
McCotter ads. Wenzlich.....	338	McGinnis ads. Voorhees.....	204
McCoun v. New York Cent., etc., R.		McGloin ads. People.....	135, 137
Co.....	22, 418	McGlynn ads. Gormerly . . . . .	388
McCoun ads. Ring.....	447	McGlynn ads. Mary . . . . .	13
McCourt v. People.....	140	McGlynn ads. Marx.....	27, 443, 462, 463
McCourt ads. Reed.....	69, 156		471
McCoy ads. Dickson.....	15	McGoldrick v. Traphagen.....	181
McCoy ads. Horton.....	464	McGoldrick v. Willits.....	7, 392
McCracken v. Cholwell.....	19	McGovern v. N. Y. Cent., etc., R. Co.	378

## TABLE OF CASES.

567

	Page.		Page.
McGovern ads. Rockwell. . . . .	224	McKie ads. Schwerin . . . . .	458
McGovern v. Sternberger . . . . .	402	McKim ads. Ledwich. . . . .	392
McGown ads. Price. . . . .	103	McKinney v. Collins. . . . .	248
McGrath v. Clark. . . . .	325	McKinney v. Jewett. . . . .	75
McGrath v. N. Y. Cent., etc., R. Co. 313, 377, 379		McKinney ads. People. . . . .	89, 97
McGrath ads. Woodruff. . . . .	27	McKinnon v. Bliss. . . . .	188
McGraw v. Godfrey. . . . .	282	McKinster v. Babcock. . . . .	177, 298
McGraw ads. Van Pelt. . . . .	458	McKinstry ads. Kellam . . . . .	105, 264
McGregor v. Brown. . . . .	175, 458	McKinstry ads. Like. . . . .	262, 371
McGregor v. Buel . . 18, 27, 34, 126, 197		McKnight v. Devlin . . . . .	114, 177
McGregor v. Comstock. . . 13, 16, 53, 161		McKnight v. Dunlop. . . . .	146, 408, 439
McGregor v. McGregor. . . . .	2, 18, 197	McKown v. Hunter. . . . .	266
McGregor ads. Thomson . . . . .	421	McKyring v. Bull. . . . .	366
McGuire ads. Kerr. . . . .	27, 439, 474	McLallan v. Jones. . . . .	287
McGuire v. Spence. . . . .	310	McLane v. Hartford Fire Ins. Co. . . . .	225
McHenry v. Hazard . . . . .	212	McLane ads. Schneider. . . . .	284
McHenry v. Jewett. . . . .	18, 119, 223	McLaren v. McMartin . . . . .	414
McIncrow ads. Carman. . . . .	282	McLarty ads. Moran. . . . .	190, 385
McIntosh v. Ensign . . . . .	246	McLaughlin v. McDevitt. . . . .	463
McIntosh ads. Van Wyck. . . . .	176, 187	McLaughlin ads. Sammis. . . . .	272
McIntyre v. Clapp. . . . .	189	McLaury ads. Cruger. . . . .	164
McIntyre v. N. Y. Cent. R. Co. . . 149, 312		McLean v. Cary. . . . .	250
McIntyre v. People. . . . .	475	McLean ads. Coffin . . . . .	395
McIntyre v. Sanford. . . . .	396	McLean v. Freeman . . . . .	126, 471
McIntyre v. Warren. . . . .	3, 29	McLean ads. People. . . . .	429
McKay v. Draper. . . . .	56	McLean ads. Rogers. . . . .	348
McKay ads. Fettretch . . . . .	362	McLean v. Swanton . . . . .	13
McKay ads. National Fire Ins. Co. . . 296		McLean ads. White . . . . .	190
McKeage v. Hanover Fire Ins. Co. 45, 204		McLoud ads. Edmondston. . . . .	30, 131
McKechnie ads. Trustees Can. Acad. 3, 120, 192, 287		McMahon v. Allen . . . . .	48
McKechnie ads. New. . . . .	87	McMahon v. Harrison . . . . .	15, 173, 197
McKechnie v. Ward . . . . .	423	McMahon v. Macy. . . . .	373
McKee ads. Brown. . . . .	354	McMahon v. Mayor, etc. . . . .	308, 406
McKee ads. Gates. . . . .	214, 215	McMahon v. N. Y. & Erie R. Co. . 107, 243	
McKee v. Judd. . . . .	47	McMahon ads. People . . . . .	135
McKee v. People. . . . .	136, 137, 138	McMahon v. Rauhr. . . . .	35, 49
McKellar ads. King. . . . .	189	McMahon v. Second Ave. R. Co. . . . .	378
McKenna v. Edmundstone. . . . .	282, 336	McManus v. Gavin . . . . .	426
McKenna v. People . . . . .	135	McManus ads. Tracy. . . . .	187, 353
McKenzie ads. Miller. . . . .	315	McMartin ads. McLaren. . . . .	414
McKenzie v. Smith . . . . .	42	McMaster v. President, etc., of Ins. Co. of North America. . . . .	233
McKeon v. Horsfall. . . . .	123	McMichael v. Kilmer. . . . .	209, 285, 360
McKeon v. See. . . . .	338, 488	McMillan v. Cronin. . . . .	43, 461
McKeon ads. Sherman. . . . .	163	McMillan ads. Scott . . . . .	354
McKeon v. Tillotson. . . . .	220	McMullen v. Rafferty. . . . .	412
McKernan v. Robinson . . . . .	295	McMullen v. Shepard. . . . .	98
McKesson ads. Muller. . . . .	14, 279	McMullin ads. Millard . . . . .	258, 433
McKibbin v. Peck. . . . .	78	McMurray v. McMurray. . . . .	221, 294
		McMurray v. Noyes. . . . .	215
		McNair ads. Curtis. . . . .	128

	Page.		Page.
McNally ads. Lynch.....	14	Mechanics' Ins. Co. ads. Leeds.....	228
McNamee ads. Gill.....	184	Mechanics' Nat. Bank ads. National	
McNamee ads. Yenni.....	458	Shoe and Leather Bank.. 25, 49, 51,	62
McNaught v. McClaughry.....	321	Mechanics, etc., Sav. Institution ads.	
McNaughton v. McNaughton.....	467	People.....	62
McNeil ads. Cardell.....	215	Mechanics and Traders' Nat. Bk. v.	
McNeil v. Tenth Nat. Bank.....	368	Crow.....	320
McNiel ads. Bartlett.....	22	Mechanics and Traders' Bk. v. Dakin.	49
McNiel ads. Cardell.....	410	Mechanics and Traders' Bank v.	
McNeily v. Continental Life Ins. Co.	239	Farmers and Mechanics' Nat. Bank.	
McNulty v. Hurd.....190, 423, 425, 426			66, 202
McNulty v. Solley.....41, 161		Mechanics and Traders' Fire Ins. Co.	
McPadden v. N. Y. C. R. Co..79, 187, 379		ads. Williams.....	439
McPherson v. Cox.....8, 399		Mechanics and Traders' Ins. Co. ads.	
McPherson ads. Hamilton.....	146	Devens.....	237
McQuade ads. Van Dyck.....60, 62		Mechanics and Traders' Ins. Co. ads.	
McQueen v. Babcock.....14, 367		Smith.....	229
McRea v. Cent. Nat. Bank.....	204	Medbury ads. Hubbell.....	414
McReynolds v. Munn.....	20	Medbury ads. Savage.....	381
McSpedon v. Troy City Bank.....	322	Medbury v. Swan.....	21
McStea v. Matthews.....	353	Medical Society ads. People....266, 356	
McVeany v. Mayor, etc.....329, 341		Meech v. Allen.....	352
McVey v. Cantrell.....	276	Meech v. Buffalo, City of.....43, 305	
McWilliams v. Mason.....	322	Meech ads. Marshall.....	53
Meacham v. Burke.....	39	Meech v. Patchin.....	298
Meacham ads. More.....	181	Meech v. Stoner.....45, 66	
Mead, Matter of.....71, 97		Meehan v. Forrester.....	12
Mead ads. Beebe.....18, 202		Meek ads. Gaskin.....	98
Mead v. Bunn.....	367	Meeker ads. Belden.....188, 405	
Mead ads. Genesee River, etc., Bank.	211	Meeker v. Cleghorn.....10, 346	
Mead ads. Guy.....	182	Meeker ads. Conley.....	192
Mead ads. Holmes.....446, 449, 472		Meeker ads. Cooke.....243, 472	
Mead v. Jenkins.....413, 424		Meeker ads. Hancox.....201, 465	
Mead v. Mitchell.....	348	Meeker ads. Lower.....439, 453	
Mead v. North-western Ins. Co..175, 230		Meeker ads. Metropolitan Life Ins. Co.	162
	232	Mehan v. Syracuse, etc., R. Co.....	280
Mead ads. People...67, 103, 134, 182, 266		Mehl v. Vonderwulbeke.....	21
	306, 357	Mehrbach ads. Eberly.....	418
Mead v. Shea.....192, 439		Meigs ads. Bruner.....456, 468	
Mead v. Stratton.....	87	Meigs ads. Hubbell.....38, 181, 209	
Mead v. Westchester Fire Ins. Co....	385	Meigs ads. Morange.....	384
Mead v. York.....	293	Mellen v. Hamilton Fire Ins. Co....	229
Meads v. Merchants' Bank of Albany.	59	Melick v. Knox.....	215
Meakings v. Cromwell....33, 467, 473		Meltzer v. Doll....92, 126, 192, 205, 315	
Mechanics' Bank v. N. Y. & N. H. R.		Melvin v. Wood.....14, 67, 367, 384	
Co.....11, 121		Member ads. Verplanck.....	38
Mechanics' Bank v. Straiton....316, 321		Memphis, etc., R. Co. ads. Germania	
Mechanics' Banking Ass. ads. Case..	319	Fire Ins. Co.....	74
Mechanics' Banking Association v.		Menagh v. Whitwell.....	350
New York and Saugerties White		Menck ads. Bostwick.....48, 381	
Lead Co.....121, 322,		Menck ads. Thompson..29, 210, 390, 407	



	Page.		Page.
Mendenhall v. Klinck.....	265	Meriden Britannia Co. v. Zingsen.....	107, 410
Meneely v. Meneely.....	437	Merriam, Matter of.....	333
Menges v. City of Albany.....	95, 166	Merrick v. Gordon.....	106, 348
Mentz v. Second Ave. R. Co.....	378	Merrick v. Van Santvoord ...	118
Mercantile Mut. Ins. Co. ads. Allen..	237	Merrill v. Agricultural Ins. Co.....	230
Mercantile Mut. Ins. Co. ads. Auden- reid .....	237	Merrill v. Calkins.....	157
Mercantile Mut. Ins. Co. v. Calebs...	225	Merrill ads. Craft.....	89, 245, 398
Mercantile Mut. Ins. Co. ads. Hughes.	236	Merrill v. Green .....	353
Mercantile Mut. Ins. Co. ads. Sher- wood.....	237	Merrill v. Grinnell.....	81
Mercantile Mut. Ins. Co. ads. Snow..	237	Merrill ads. People .....	19
Mercer v. Vose.....	38, 176	Merritt v. Bartholick .....	290
Merchant v. Bunnell.....	271, 273	Merritt v. Campbell .....	193
Merchant ads. Munro.....	6, 13	Merritt v. Carpenter.....	194
Merchants' Bank v. Bliss.....	412	Merritt v. Earle .....	78, 418
Merchants' Bank ads. Clark.....	326	Merritt v. Millard .....	111, 445
Merchants' Bank v. Elderkin.....	318	Merritt v. Port Chester, Village of...	44
Merchants' Bank ads. Goddard.....	326	Merritt v. Seaman.....	175, 201, 220, 440
Merchants' Bank v. Griswold..	8, 92, 449	Merritt ads. Slater.....	52
	451	Merritt v. Thompson ...	40, 125
Merchants' Bank ads. Middlebrook...	119	Merritt v. Todd .....	318
Merchants' Bank ads. Potter..	60, 150, 188	Merritt v. Walsh .....	246, 400
Merchants' Bank v. Spalding..	91	Merritt ads. White.....	168, 209, 247
Merchants' Bank v. Thompson ..	295, 403	Merry ads. Sturgis.....	19
Merchants' Bank of Albany ads.		Mersereau v. Pearsall.....	246
Meads.....	59	Mersereau v. Phoenix Mut. Life Ins.	
Merchants' Bank of Canada v. Liv- ingston .....	118, 368	Co .....	229
Merchants' Bank of Canada v. Union R., etc., Co.....	66, 343	Mersereau v. Ryers .....	217
Merchants' Bank of N. Y. ads. Middle- brook .....	199	Mersereau ads. Slater.....	310
Merchants' Exchange Co. ads. King.	20, 443	Merwin ads. Kip.....	260
Merchants' Ex. Nat. Bk. v Commer- cial Warehouse Co.....	452	Merwin ads. Rockwell.....	358, 381
Merchants' Nat. Bank ads. Bank of British N. Amer. ...	58, 204, 325, 412	Meserole ads. Clapp.....	198, 200
Merchants' Nat. Bk. of Syracuse v. Comstock.....	64, 322	Mesick v. New.....	470
Merchants' Nat. Bk. of Whitehall v. Hall .....	44, 172	Messenger v. Buffalo, City of.....	301
Merchants' Dispatch Trans. Co. v. Skelton .....	9, 74, 418	Messenger ads. Hart.....	68
Merchants' Ins. Co. ads. Herrman....	227	Messerve v. Sutton.....	16
Merchants' M. Ins. Co. ads. Deraismes.	228	Messmore v. New York Shot and Lead Co. ....	148, 149
Merchants and Mechanics' Bk. ads. People .....	58, 382	Messenger v. People.....	134, 135
Merchants and Traders' Fire Ins. Co. ads. O'Brien .....	51	Metcalf ads. Dering .....	36
		Metcalf v. Baker.....	150
		Metcalf v. Barker.....	22
		Metcalf ads. Brookman.....	235, 316
		Metcalf ads. Deering .....	108, 190
		Metcalf v. Mattisons.....	39
		Metcalf ads. Patrick....	4, 5, 446
		Metcalf v. Stryker .....	184
		Metcalf v. Van Benthuyssen.....	174
		Methodist Churches v. Barker. ....	369
		Meth. Epis. Union Church v. Pickett.	386
		Metropolitan Bank v. Van Dyck. ....	58, 94

	Page.		Page.
Metropolitan Board of Excise v. Barrie.....	97	Michael ads. De Peyster.....	255
Metropolitan Board of Health v. Heister.....	97	Michael ads. Nichols.....	208, 347
Metropolitan Gas-light Co., Matter of.....	333	Michaels v. N. Y. Cent. R. Co.....	75
Metropolitan Gas-light Co. ads. In Matter of Petition of N. Y. Cent., etc., R. Co.....	213, 375	Michigan, State of, v. Phoenix Bank..	41
Metropolitan Gas-light Co. ads. Leeds.	148, 311	Michigan Cent. R. Co. ads. Armour.	11, 247
Metropolitan Ins. Co. ads. De Grove.	228, 231	Michigan Cent. R. Co. ads. Mills....	75
Metropolitan Life Ins. Co. ads Grat-tan....	14, 177, 182, 185, 193, 239, 240, 384	Michigan Southern and Northern Indiana R. Cos. ads. Bissell.....	121
Metropolitan Life Ins. Co. v. Meeker.	162	Michigan Southern, etc., R. Co. ads. Hunt.....	178
Metropolitan Life Ins. Co. ads. Robertson.....	239	Mickler v. Townsend.....	293
Metropolitan Nat. Bank ads. Bank of Attica.....	32	Mickles v. Dillaye.....	297
Metropolitan Nat. Bank v. Lloyd.....	57, 191, 371	Middlebrook v. Broadbent.....	252, 354
Metropolitan Nat. Bank ads. Moore.	44, 439	Middlebrook v. Merchants' Bank.....	119, 199
Metropolitan Police Board ads. People.	339	Middleton, Matter of.....	99, 102, 406
Metropolitan, etc., R. Co. ads. Lynch.	81, 203	Middleton ads. American Union Tel. Co.....	42, 437
Metropolitan Sav. Bank ads. Schoenwald.....	61	Middleton ads. Walter.....	397
Metz v. Buffalo, Corry & Pittsburgh R. Co.....	63	Middletown ads. Richmond County Gas-light Co.....	406, 435
Metzger v. Attica.....	436	Middletown, etc., R. Co. ads. Scott..	376
Meyberg ads. Matthews.....	28	Milbank ads. Brookman.....	439
Meyer ads. Allen.....	23, 50	Milbank v. Dennistown.....	202
Meyer v. Amidar.....	208	Milburn v. Belloni.....	147
Meyer ads. Clafin.....	457	Mildrum ads. Livingston.....	283
Meyer v. Clark.....	170, 440	Miles v. Hoffman.....	425
Meyer v. Cullen.....	439	Miles v. Loomis.....	176
Meyer ads. Heine.....	112	Milhau v. Sharp.....	328
Meyer v. Hibsher.....	318, 321, 367	Military Parade Ground, Matter of...	335
Meyer ads. Howland.....	228	Milks ads. Lampman.....	162, 458
Meyer v. Huncke.....	13, 114	Milks v. Rich.....	410
Meyer ads. Konitzky.....	389, 430	Millard v. Brown.....	190
Meyer v. Knickerbocker Life Ins. Co.	239	Millard ads. Cooke.....	392, 409
Meyer ads. Kraushaar.....	475	Millard ads. Evans.....	21
Meyer v. Lathrop.....	285	Millard v. McMullin.....	258, 433
Meyer v. Peck.....	66	Millard ads. Merritt.....	111, 445
Meyer ads. Segelken.....	42, 52, 220, 343	Millard v. Missouri, etc., R. Co....	79, 206
Meyers ads. Wyckoff.....	111	Millard ads. Richards.....	7
Mexican Nat. Constr. Co. ads. Brooks.	26	Millard v. Thorn.....	353, 438
Miannay v. Blogg.....	21, 28	Millard ads. Walker.....	104, 395
		Miller v. Adams.....	49, 203
		Miller v. Ball.....	410
		Miller v. Barber.....	209, 360, 443
		Miller v. Bowles.....	63
		Miller v. Brenham.....	92, 246, 413
		Miller v. Brown.....	219
		Miller v. Burke.....	184
		Miller ads. Butler.....	37, 211, 284
		Miller ads. Clark.....	102, 341
		Miller v. Coates.....	380

	Page.		Page.
Miller v. Cook.....	215, 408	Mills v. City of Brooklyn.....	304
Miller v. Earle.....	249	Mills v. Davis.....	22
Miller v. Emans.....	469	Mills ads. Disbrow.....	424
Miller ads. Gale.....	315, 853	Mills v. Garrison.....	206
Miller ads. Guernsey.....	35	Mills v. Hildreth.....	24
Miller v. Hall.....	344, 365, 457	Mills v. Hoffmann.....	171, 221
Miller v. Hannibal & St. Joseph R. Co.....	74, 107	Mills ads. Howell.....	19, 220, 347
Miller ads. Hays.....	310	Mills v. Mich. Cent. R. Co.....	75
Miller ads. Hentz.....	171, 371	Mills v. Mills.....	109
Miller ads. Hill.....	8, 107	Mills v. Stewart.....	373
Miller v. Irish.....	188	Mills v. Van Voorhies.....	277
Miller ads. Jessop.....	115, 390, 474, 475	Minlor v. New York & New Haven R. Co.....	81
Miller ads. Jewett.....	169, 382, 444	Millward ads. Mulverhall.....	394
Miller v. Knox.....	199	Milton v. Hudson River Steamboat Co.	400
Miller ads. Lawrence.....	276, 319, 434, 456	Minard ads. Onondaga Co. M. Ins. Co.	32, 441
Miller ads. Leary.....	317, 451	Minch ads. Nat. Life Ins. Co.....	11, 285
Miller v. Levi.....	261	Minck v. People.....	182
Miller v. Lewis.....	245, 339	Miner v. Beekman.....	414
Miller ads. Livingston.....	243, 255, 258	Miner ads. Hutchings.....	114
Miller v. Lockwood.....	298	Miner v. Prest., etc., of Fredonia...	428
Miller v. Long Island R. Co.....	188	Minick v. Troy, City of.....	314, 406
Miller v. Mayor, etc.....	335	Minister, etc., ads. Attorney-General.	87, 468
Miller v. McKenzie.....	315	Minster ads. Place.....	93, 454
Miller v. Miller.....	92, 272, 342	Mink ads. Thompson.....	38
Miller v. Montgomery.....	475	Minot ads. Peck.....	292, 354
Miller v. People.....	141, 242	Minturn v. Farmers' Loan and Trust Co.....	453
Miller v. Prest. of Junction Canal Co.	41	Minturn v. Main.....	55
Miller ads. Rider.....	176, 207	Mirick ads. Bradley.....	175
Miller ads. Seacord.....	317	Misland v. Boynton.....	191, 475, 476
Miller ads. Second Nat. Bk. of Wat- kins.....	275	Missell v. Globe Mut. Life Ins. Co...	241
Miller v. Scherder.....	123, 224	Missionary Society ads. Owens.....	449
Miller v. Schuyler.....	37	Missouri, etc., Ry. Co. ads. Maas.....	68, 374
Miller ads. Smith.....	248, 323, 326	Missouri, etc., R. Co. ads. Millard.....	79, 206
Miller ads. Sperry.....	257	Mitcham ads. Wood.....	465
Miller ads. Stanton.....	154, 402	Mitchell v. Bartlett.....	153
Miller v. Steam Nav. Co.....	76	Mitchell v. Cook.....	90
Miller v. Talcott.....	414	Mitchell ads. Flood.....	183
Miller ads. Tomlinson.....	179, 407	Mitchell ads. Lyon.....	109
Miller v. Tyler.....	26	Mitchell ads. Mead.....	348
Miller ads. Wells.....	422	Mitchell v. Mitchell.....	361
Miller ads. Wheeler.....	118	Mitchell ads. Mount.....	27
Miller ads. White.....	147, 179, 183, 247, 396	Mitchell ads. Nash.....	275
Miller v. Winchell.....	106, 293	Mitchell ads. People.....	306
Miller ads. Wright.....	212, 443	Mitchell ads. People's Bank.....	261
Milliken v. Dehon.....	107	Mitchell v. Reed.....	350
Milliman v. N. Y. Cent., etc., R. Co..	80	Mitchell v. Smith.....	336
Mills ads. Adams.....	268	Mitchell v. Van Buren.....	14
Mills v. Bliss.....	357		

	Page.		Page.
Mitchell v. Vermont Copper Mining Co.....	121, 434	Mooney v. Elder .....	10
Mitchell v. West.....	409	Moore, Matter of.....	23
Mittnacht v. Kelly.....	299, 300	Moore ads. Bodine.....	196
Mix v. Andes Ins. Co.....	387	Moore v. Cross.....	322
Mix ads. Morange.....	43, 310	Moore v. Des Arts.....	4
Mix ads. Watertown Bank and Loan Co.....	17	Moore v. Gadsden.....	220, 309, 338
Moak v. Groat.....	157, 338, 459, 460	Moore v. Goedel.....	308
Moett v. People.....	135	Moore v. Hamilton .....	2, 180
Moffatt v. Smith.....	256, 259, 261	Moore v. Hegeman .....	92, 278, 467
Moffett ads. Baldwin.....	454	Moore ads. Higgins.....	184
Moffet v. Sackett.....	27, 367	Moore ads. Lavery.....	69, 294
Mohawk & H. R. R. Co. ads. Hill....	167	Moore v. Littel .....	154
Mojarrieta v. Saenz.....	24, 50	Moore ads. Locklin.....	160
Moller v. Tuska.....	64	Moore v. Mausert .....	404
Molyneux ads. People .....	284	Moore v. Mayor, etc.....	167, 277, 336
Monaghan ads. Manning....	150, 298, 300, 370	Moore v. Meacham .....	181
Monarque v. Monarque....	207, 348, 469	Moore v. Metropolitan Nat. Bk....	44, 439
Moncrief v. Ross.....	468	Moore v. Moore....	8, 99, 153, 275, 288, 347
Monnot ads. Barnard.....	70	Moore v. Pitts .....	248, 433
Monroe v. Douglass.....	395	Moore ads. Quin .....	4, 45, 474
Monroe v. Guillaume.....	65	Moore v. Ryder.....	316
Monroe, Town of, ads. Lorillard....	305, 435	Moore v. Shaw.....	24
Monroe v. Upton.....	65	Moore ads. Van Nostrand.....	466
Monroe Savings Bank v. City of Rochester.....	60, 427	Moore v. Westervelt.....	183, 396, 397
Monteath ads. Exchange Bank....	11, 325	Moot ads. Howard.....	94, 220, 372, 463
Monteath ads. International Bank....	173	Moran v. Chase .....	31, 281
Monterey Plankroad Co. v. Chamberlain .....	358	Moran v. McLarty.....	190, 385
Montgomery ads. Brown .....	208	Morange ads. Jacobs .....	285
Montgomery ads. Bullis.....	88, 397	Morange v. Meigs .....	384
Montgomery ads. Chipman.....	125, 464	Morange ads. Morris....	250, 455
Montgomery ads. Miller .....	475	Morange v. Mix .....	43, 310
Montgomery ads. Rochester, City of.	305	Morch ads. Pierson .....	105
Montgomery ads. Seymour.....	398, 399	More v. Bennett.....	263
Montgomery County Bank v. Albany City Bk.....	12, 58, 126, 439	More v. Rand.....	127
Montgomery County Bank v. Marsh.....	319, 474	Morehouse ads. Darnall .....	355
Montgomery Co. Mutual Ins. Co. ads. Babcock.....	226	Morehouse ads. Graff.....	297
Monticello, etc., R. Co. ads. Union Trust Co. of N. Y.....	373	Morehouse v. Matthews .....	175
Montross ads. Odell.....	157, 407	Morehouse ads. Wood.....	173, 195
Moody ads. Gillet.....	60	Morehouse v. Yeager.....	209
Moody ads. Harris.....	398	Morewood v. Hollister.....	86, 224
Moody v. Osgood .....	441	Morey v. Farmers' Loan and Trust Co.....	411
Moody v. Smith.....	8, 410	Morey v. Tracey.....	4, 244
		Morey v. Webb .....	12
		Morford v. Davis.....	453
		Morgan, Matter of....	48
		Morgan v. Bank of State of New York .....	58
		Morgan ads. Bigler .....	147, 457
		Morgan v. Congdon....	56
		Morgan ads. Congreve.....	338

# TABLE OF CASES.

573

	Page.		Page.
Morgan ads. Darrow.....	283	Morrison v. Erie Ry. Co.....	221, 312
Morgan ads. Diossy.....	88, 168	Morrison v. New York Cent., etc., R. Co .....	314
Morgan ads. First Nat. Bk. of Chit- tenango.....	286, 323, 352	Morrison ads. People.....	193, 329
Morgan ads. Haggart.....	5, 41, 50, 363	Morrow v. Freeman.....	224
Morgan v. Hannas.....	216	Morrow ads. Preston.....	384
Morgan ads. Horton .....	416	Mors v. Stanton.....	283
Morgan ads. Ingalls.....	11, 152	Morse ads. Bogert.....	172
Morgan ads. Johnson.....	108	Morse v. Crofoot.....	475
Morgan ads. Jones.....	145, 457	Morse v. Gould.....	93, 254
Morgan v. King.....	459	Morse ads. Grant.....	38
Morgan ads. Supervisors of Onondaga Co.....	223	Morse v. Morse .....	443, 473
Morgan ads. People.....	436	Morse v. Pesant.....	105, 399
Morgan ads. Sanderson.....	5, 343	Morss ads. Crippen.....	179, 433
Morgan ads. Seacord.....	448	Morss v. Gleason.....	350
Morgan v. Schuyler.....	349	Morss v. Purvis.....	196
Morgan ads. Scott.....	39, 196	Morss ads. Ritchmyer.....	204, 371
Morgan v. Skiddy.....	208	Morss v. Salisbury.....	108, 123, 180
Morgan v. Smith.....	256, 422	Morss ads. Stewart.....	18, 442
Moring ads. People.....	70, 427	Morton ads. Colburn.....	47, 48, 444, 445
Morley ads. Jordan, etc., Plankroad Co.....	358	Morton ads. Oakley.....	107
Morrell v. Irving Fire Ins. Co. ....	226	Morton ads. Produce Bank.....	17, 29, 48, 130 250
Morrell ads. Johnson.....	208	Morton ads. Teed. ....	470
Morrell v. Peck.....	26, 186, 218, 314	Morton v. Thurber .....	259, 438, 451
Morrell ads. Page.....	324	Morton v. Wier.....	258
Morris v. Beyea.....	473	Mosely ads. Marshall.....	40, 469
Morris ads. Blodget.....	475	Mosely v. Mosely .....	164, 168
Morris v. Budlong.....	287, 414	Moses v. Bierling.....	10
Morris ads. Cummings.....	346	Moses v. McDivitt.....	53, 206
Morris ads. Davis .....	256, 359	Moshier ads. Godfrey .....	38
Morris v. First Nat. Bk. of New York.	63	Moshier ads. Happy.....	97, 399
Morris ads. Grover .....	265	Moshier v. Hotchkiss.....	26, 57, 215, 408, 439
Morris v. Husson .....	19	Mosier ads. Ellicott.....	276
Morris ads. Morange.....	455	Moss v. Averill .....	120
Morris v. Morange.....	250	Moss ads. Boon.....	207, 214, 390
Morris v. Patchin.....	186	Moss v. Husted.....	399
Morris v. Rexford.....	363, 389	Moss v. Livingston.....	316
Morris ads. Sanford.....	444	Mott v. Ackerman.....	198, 369, 465, 471
Morris ads. Thacher.....	360	Mott ads. Barnes .....	248, 291, 421
Morris ads. Tuthill.....	293, 294, 434	Mott ads. Crafts .....	65, 422
Morris v. Ward.....	160	Mott v. Consumers' Ice.....	180, 279
Morris v. Wheeler.....	17, 344	Mott ads. Frost.....	115, 195, 287, 301
Morris v. Whicher .....	153, 284	Mott v. Lansing.....	399
Morris Axe and Tool Co. ads. Parks. .....	147, 392	Mott ads. Lewis.....	368
Morris Run Coal Co. ads. German- American Bank.....	24, 398	Mott v. Mott.....	69, 155
Morris Run Coal Co. v. Salt Co. of Onondaga.....	41	Mott v. Palmer... ..	154, 204
		Mott ads. People .....	219
		Mott v. Richtmyer.....	155
		Mott ads. Striker.....	468
		Mott ads. Union Bank.....	21, 42, 250

	Page.		Page.
Mott ads. Willis .....	462	Munger ads. Hutchings.....	390
Moulson ads. Hubbell .....	293	Munger ads. Paul.....	20
Moulton ads. Matteson.....	315, 410	Munger v. Shannon .....	316, 364
Moultrie v. Hunt .....	464	Munger v. Tonawanda R. Co.....	377
Mount ads. Kerr.....	49, 397	Munn ads. Collier.....	200
Mount v. Lyon .....	104	Munn ads. McReynolds.....	20
Mount v. Mitchell.....	27	Munn ads. Worrall.....	8, 10, 147, 154 157, 401, 456
Mount Vernon, Village of, ads. Mas- terton.....	148, 304	Munro ads. Austin .....	197
Mowers v. Fethers .....	223	Munro v. Merchant.....	6, 13
Mowry v. Peet.....	127	Munroe v. Guilleaume.....	29
Mowry v. Rosendale.....	229	Munroe ads. Smyth.....	169, 242
Mowry v. Sanborn... ..	289, 298	Munson ads. Dana.. ..	235
Moyer ads. Dewey .....	65, 365	Munson ads. Field.....	30, 177
Moyer ads. Fox.....	210, 442	Munson ads. Harpending.....	374
Moyer v. Hinman .....	248	Munson ads. Pratt.....	374
Moyer v. N. Y. Cent. & H. R. R. Co..	460	Munson ads. Tefft.....	290
Mudgett ads. Bank of Commonwealth.		Murdock v. Chenango Co. M. Ins. Co.	
	319, 353		226, 229, 230, 231, 233
Mudgett ads. Veeder.....	270	Murdock v. Gifford.....	204
Muir ads. Margraf.....	148	Murdock v. Gilchrist.....	156
Mulcahey v. Emigrant.....	62	Murdock v. Prospect Park, etc., R. Co.	
Muldoon v. Blackwell .....	33		222, 265
Muldoon v. Pitt.....	38, 282	Murdock v. Ward .....	464, 466
Mulford v. Muller.....	45, 54, 178	Murphy ads. Ayrault.....	290
Mulford ads. Van Schuyver.....	473	Murphy v. Boston & Albany.....	281
Mulhado v. Brooklyn City R. Co..		Murphy v. Briggs .....	210, 407
	186, 312	Murphy v. Buckman .....	282
Mulholland ads. People....	303	Murphy ads. Caldwell .....	32, 181
Mullaly v. People .....	14, 142	Murphy v. Comm'rs of Emigration ..	165
Mullams ads. Peck.....	290	Murphy ads. De Peyster . ..	156, 332
Mulledy ads. Willy.....	259, 309	Murphy v. New York Cent. R. Co...	145
Mullen ads. Baum.....	275, 345	Murphy v. People .....	141
Mullen v. St. John .....	186	Murphy ads. Savage.....	210
Muller ads. Cockroft.....	55, 380	Murphy v. Spaulding.....	39
Muller v. Eno.. ..	147, 392	Murray ads. Butler.....	400
Muller v. Mayor, etc .....	330	Murray v. Bininger .....	9
Muller v. McKesson....	14, 279	Murray ads. Harris.....	352
Muller ads. Mulford.....	45, 54, 178	Murray v. Harway .....	256
Muller v. Pondir.....	320	Murray ads. Higgins .....	105
Muller ads. Struffman.....	34	Murray v. Judson.....	47
Mullins v. People .....	86, 405	Murray ads. Livingston.....	470
Mulry ads. Leonard.....	25, 385	Murray v. Marshall .....	290
Mulverhall v. Millward.....	394	Murray ads. Ogden .....	445
Mumford v. America Life, etc., Co ..	449	Murray ads. People .....	193, 330, 339
Mumford ads. Scholey .....	162, 188	Murray ads. Noel .....	355
Mumper v. Rushmore...	48, 196, 392, 393	Murray v. New York Cent. R. Co...	377
Mungeon v. People.....	404	Murray v. New York Life Ins. Co ...	362
Munger v. Albany City National Bk.		Murray ads. Taggart. ....	469
	57, 64, 395	Murray ads. Thomas .....	450
Munger ads. Flagg.....	90, 106, 294	Murray v. Walker.....	291

	Page.		Page.
Murtaugh ads. Verona Cent. Cheese Co. ....	356, 405	Myers ads. People. ....	194
Murtha v. Curley. ....	123, 250	Myers ads. Travis. ....	23
Musgrave v. Sherwood. ....	222	Mygatt v. N. Y. Protection Ins. Co. .	235
Mushlitt v. Silverman. ....	281	Mygatt v. Washburn. ....	43, 340, 430
Muskingum Branch of Bank of State of Ohio ads. Bank of State of N. Y. .	326	Mygatt v. Wilcox. ....	199, 243, 411
Musliner ads. Bartlett. ....	32	Myles ads. White's Bank of Buffalo. .	214, 215
Mussey v. Atlas Mut. Ins. Co. ....	236	Mynard v. Syracuse, etc., R. Co. ....	76
Mutual Bank ads. Mayor, etc. ....	429	Myrick ads. Ferrin. ....	199
Mutual Benefit Life Ins. Co. ads. Bradley. ....	238	Nash ads. Kinney. ....	262, 263
Mutual Benefit Life Ins. Co. v. Davis. .	235, 237	Nash v. Mitchell. ....	275
Mutual Benefit Life Ins. Co. ads. Newton. ....	240	Nash ads. People. ....	128, 252, 418
Mutual Benefit Life Ins. Co. ads. Reese. ....	238, 241	Nash v. Pike. ....	106, 112
Mutual Benefit Life Ins. Co. v. Supervisors of New York. ....	85, 222	Nash v. White's Bank of Buffalo. .	59, 451
Mutual Benefit Life Ins. Co. ads. Van Zandt. ....	175, 240	Nassau Bank ads. Corn Exch. Bank. .	59, 145, 170, 184, 204, 244
Mutual Benefit Life Ins. Co. ads. Weed. ....	240	Nassau Bank v. Jones. ....	58
Mutual Benefit Life Ins. Co. ads. Winch. ....	243	Nassau Gas-light Co. v. City of Brooklyn. ....	213, 429
Mutual Endowment Association ads. People. ....	117, 416	Nathans v. Hope. ....	206
Mutual Gas-light Co. ads. People. ....	476	Nat. Bank ads. Bruce. ....	130, 260
Mutual Ins. Co. ads. Conover. ....	234	National Bank ads. Pollock. ....	61
Mutual Ins. Co. ads. Ogden. ....	236	National Bank v. Wells. ....	323, 355
Mutual Ins. Co. v. Supervisors of Erie. ....	427	National Bank ads. Yerks. ....	62
Mutual Life v. Bigler. ....	295	National Bank of Auburn v. Lewis. .	59, 365
Mutual Life Ins. Co., Matter of. ....	334	Nat. Bk. of Chemung v. Elmira, City of. ....	4, 430
Mutual Life Ins. Co. ads. Barry. ....	22	Nat. Bk. of Gloversville v. Place. ....	318
Mutual Life Ins. Co. v. Bigler. ....	295, 458	Nat. Bk. of Newberne ads. Robinson. .	49, 62, 117, 252
Mutual Life Ins. Co. v. Dake. ....	383	Nat. Bk. of Newburgh v. Bigler. ....	289
Mutual Life Ins. Co. ads. Edington. .	241		352, 355, 423
Mutual Life Ins. Co. v. Hunt. ....	113, 223	Nat. Bk. of Newburgh v. Smith. .	57, 318
Mutual Life Ins. Co. v. Kashard. ....	451	Nat. Bk. of Newport ads. Evertson. .	316
Mutual Life Ins. Co. ads. Leggett. .	456	Nat. Bk. of Port Jervis ads. Yerkes. .	62
Mutual Life Ins. Co. ads. Stillwell. .	162	Nat. Bk. of Potsdam ads. Whitney. .	145
Mutual Life Ins. Co. v. Supervisors. .	431	Nat. Bk. of the Republicads. Security Bank of New York. ....	59
Mutual Safety Ins. Co. v. Hone. .	184, 226	Nat. Bk. of Salem v. Thomas. ....	350
Myers v. Becker. ....	48, 250	Nat. Bk. of Schuylerville v. Van Derwerker. ....	245
Myers v. Burns. ....	261	Nat. Bk. of Watertown v. Landon. .	350
Myers ads. Clinton. ....	459	Nat. City Bk. ads. Marine Nat. Bk. .	33, 59
Myers v. Davis. ....	395	Nat. City Bk. of Brooklyn ads. Indig. .	60
Myers v. De Mier. ....	112	Nat. City Bk. of N. Y. ads. Oddie. .	58
Myers ads. Keteltas. ....	360	Nat. Com. Bk. ads. Van Alstyne. .	324, 325
		Nat. Currency Bk. ads. Seybel. ....	320
		Nat. Exchange Bk. v. Silliman. ....	368
		Nat. Mech. Bank. Ass'n v. Conkling. .	420

	Page.		Page.
Nat. Mech. Bank. Ass'n ads. Strong..	58	Nelson v. Hudson R. R. Co .....	74
Nat. Mech. Bank. Ass'n in New York		Nelson v. Kerr .....	396
ads. Nat. Bk. of Com. in N. Y. ....	59	Nelson ads. Knickerbocker Life Ins.	
Nat. Park Bk. ads. Bills .....	49	Co. ....	294, 452
Nat. Park Bk. v. Ninth Nat. Bk. ....	316	Nelson ads. Lawrence .....	237
Nat. Shoe & Leather Bk. ads. Jordan.		Nelson v. Luling .....	120
57, 365, 395		Nelson v. Mayor, etc .....	334
Nat. Shoe & Leather Bk. v. Mech.		Nelson v. Odiorne .....	399
Nat. Bk. ....	25, 49, 51, 62	Nelson v. People .....	99, 268
Nat. Fire Ins. Co. v. McKay .....	296	Nelson v. Plimpton Fireproof Elevat-	
Nat. Fire Ins. Co. ads. Sargent .....	229	ing Co. ....	112
Nat. Fund Life Assur. Co. ads. Valton.		Nelson ads. Smith .....	247
238, 239, 241, 370		Nelson v. Sun Mut. Ins. Co .....	236
Nat. Life Ins. Co. v. Minch. ....	11, 285	Nelson ads. Watson, Matter of. ....	27, 102
Nat. Prot. Ins. Co. ads. N. Y. Cent.			425
Ins. Co. ....	13, 30	Nelson ads. Thomas .....	258
Nat. Steamship Co. ads. Tugman. ....	108, 387	Nesbit v. Lockman .....	207
Nat. Trust Co. v. Gleason .....	204, 475	Nett ads. White .....	273
Nat. Trust Co. ads. People .....	122	Neudecker v. Kohlberg .....	189, 367
Nat. Bk. of Com. in New York v. Nat.		Neuendorff v. Duryea .....	96, 328, 418
Mech. Bank. Ass'n in New York ...	59	Neuendorff v. World Mut. Life Ins.	
Nat. Bk. of Commonwealth ads. Con-		Co. ....	12
tinental Nat. Bk. ....	59, 170	Neusbaum v. Keim .....	249
Nat. Bk. of Commonwealth ads. Justh.	212	Neversink Steamboat Co. ads. Erwin.	401
Nat. Bk. of Fishkill ads. Fishkill Sav.		Nevin ads. Packer .....	222
Inst. ....	61, 127	Nevius v. Dunlap .....	285, 344, 385
Nat. Bk. of Fishkill v. Speight ..	201, 317	New ads. French .....	40, 41
Nat. Bk. of Gloversville ads. Johnson.		New v. McKechnie .....	87
59, 452		New ads. Mesick .....	470
Naylor ads. Hall ...	185	New v. Nicoll .....	444
Naylor ads. Hennequin .....	208	Newark, etc., Co. ads. Driscoll. ....	309, 460
Nearing ads. People .....	86, 94	Newberry v. Wall .....	407, 408
Nearing ads. Rockwell .....	100	Newbould ads. Wheeler .....	184, 368
Neass ads. Seneca County Bank. ....	318, 322	Newburgh ads. Foster .....	178
Nebelhoer ads. Harris .....	401	Newburgh, City of, ads. Gillespie. ....	314
Neftel v. Lightstone .....	360	Newburgh, City of, ads. Smith .....	306
Nehrboss v. Bliss .....	352	Newburgh, etc., Plankroad Co. ads.	
Neidig ads. Mathes .....	269	People .....	357
Neil v. Thorn .....	359, 439, 476	Newbury ads. Burch .....	352
Neilly, Matter of .....	412	Newcomb ads. Andrew .....	389
Neilley v. Neilley .....	424	Newcomb ads. Barnes .....	53, 381
Neilson ads. Dodd .....	295, 297, 344	Newcomb v. Griswold .....	191
Nelin ads. Goodwin .....	455, 456	Newcomb v. Hale .....	215
Nellis ads. Cook .....	5	Newcomb ads. Kneetle .....	109, 195
Nellis v. New York Cent. R. Co. ....	356, 361	Newcomb v. Newcomb .....	96, 393
	379	Newcomb ads. Woolley .....	262
Nellis ads. White .....	394	Newell ads. Bowen .....	184, 319
Nelliston ads. People .....	34, 123	Newell ads. Cowen .....	319
Nelson v. Belmont .....	236	Newell v. Doty .....	364, 450
Nelson v. Eaton .....	229	Newell ads. Dwight .....	265
Nelson ads. Hopkins .....	249	Newell v. Nichols .....	173, 426, 473



## TABLE OF CASES.

577

	Page.		Page.
Newell v. People.....	95	Newton v. Stanley.....	472
Newell v. Warren.....	299	Newton ads. Vanderslice....	107, 148, 434
Newell v. Wheeler.....	43, 107	Nexon v. Nexon.....	462
New Eng. Iron Co. v. Gilbert, etc., R. Co.....	114, 120, 224	New York, etc., Assoc. v. Remington Ag. Works.....	14
New England Mut. Life Ins. Co. ads. People.....	428	New York Bowery F. Ins. Co. ads. Kernochan.....	231
New Haven R. Co. ads. Chapman....	79	New York Catholic Protectory, Matter of.....	432
New Haven Steamboat Co. ads. J. Russell Manufg. Co.....	77, 186	New York Cent., etc., R. Co., Matter of.....	16, 18, 23, 102, 374, 375, 428
New Hope and Delaware Bridge Co. v. Phoenix Bank.....	60	New York Cent. R. Co. ads. Alden...	79
Newhouse ads. Vincent.....	468	New York Cent. R. Co. ads. Auerbach.	80
New Jersey Steamboat Co. ads. Austin.	400	New York Cent. R. Co. ads. Barker..	182, 314
New Jersey Steamboat Co. ads. Blanchard.....	152, 400	New York Cent., etc., R. Co. ads. Barry.....	312, 378
New Jersey Steamboat Co. ads. Cald- well.....	30, 79, 151, 188, 438	New York Cent. R. Co. ads. Beisiegel.	184, 313, 377
New Jersey Steamboat Co. ads. Cleve- land.....	79, 80, 313	New York Cent. R. Co. ads. Bellingier.	460
New Jersey Steamboat Co. ads. Mc- Entee.....	77	New York Cent. R. Co. ads. Bennett.	80
New Jersey Steamboat Co. ads. Onta- rio Bank.....	78	New York Cent., etc., R. Co. ads. Besel.....	281
New Jersey Steamboat Co. ads. Swart- hout.....	415	New York Cent. Ins. Co. ads. Bigler.	230, 233
New Jersey Steamboat Co. ads. White- hall Transfer Co.....	150, 400	New York Cent. R. Co. ads. Bills....	77
New Jersey Steamboat Co. ads. Zinn.	76	New York Cent. R. Co. ads. Bissell..	68
New Jersey Steam Nav. Co. ads. Dow.	74		79, 152
New Jersey Zinc Co. ads. Holbrook..	118	New York Cent. R. Co. ads. Boldt...	280
	337	New York Cent. R. Co. ads. Bowen...	79
Newkirk ads. Clute.....	211	New York Cent. R. Co. ads. Brace...	376
Newkirk v. New York & H. R. Co...	174	New York Cent. R. Co. ads. Bradley.	279, 314
New Lamp-Chimney Co. ads. Anson		New York Cent. R. Co. ads. Brown...	104
Brass and Copper Co.....	65		377, 379
Newlin v. Lyon.....	180	New York Cent., etc., R. Co. ads. Briggs.....	379
New Lots, Town of, ads. Horn.....	44	New York Cent. R. Co. ads. Buel....	312
Newman v. Alvord.....	437	New York Cent. & H. R. R. Co. ads. Burnell.....	77, 81
Newman v. Beckwith.....	396	New York Cent., etc., R. Co. ads. Byrne.....	221, 312, 378
Newman v. Frost.....	326	New York Cent., etc., R. Co. ads. Calligan.....	377
Newman v. Supervisors of Livingston.	428	New York Cent., etc., R. Co. ads. Casey.....	187, 378
Newson v. New York Cent. R. Co....	311	New York Cent. R. Co. ads. Chase...	379
Newton v. Bronson.....	27, 198, 402, 409	New York Cent., etc., R. Co. ads. Cleghorn.....	151, 281
Newton ads. Buffalo Savings Bank...	20	New York Cent., etc., R. Co. ads. Connelly.....	311
Newton ads. Hand.....	204, 435, 459		
Newton v. Harris.....	191		
Newton v. Hook.....	247		
Newton v. Mut. Ben. Life Ins. Co....	240		
Newton v. Porter.....	191, 320, 439		
Newton v. Russell.....	145		

	Page.		Page.
New York Cent. R. Co. ads. Cook....	311	New York Cent. R. Co. ads. Keller ..	308
	315, 379	New York Cent. & H. R. R. Co. ads.	
New York Cent., etc., R. Co. ads.		Kellogg.....	187, 313
Cordell.....	313, 378	New York Cent. R. Co. ads. Kent....	376
New York Cent. R. Co. ads. Coughlin.	54	New York Cent., etc., R. Co. ads.	
New York Cent., etc., R. Co. ads.		Kenyon .....	31
Cox .....	2, 415	New York Cent., etc., R. Co. ads.	
New York Cent. R. Co. ads. Cragin..	77	Kessler. ....	81
New York Cent., etc., R. Co. ads. Cul-		New York Cent., etc., R. Co. ads.	
hane .....	378	Kilmer.....	34
New York Cent., etc., R. Co. ads.		New York Cent. R. Co. ads. King.	
Davis.....	313		190, 309
New York Cent. R. Co. ads. Day ....	410	New York Cent. & H. R. R. Co. ads.	
New York Cent., etc., R. Co. ads. De		Kirkpatrick.....	192, 280, 310, 476
Graff.....	279	New York Cent. R. Co. ads. Lanning.	280
New York Cent. R. Co. ads. Deyo.	187, 309	New York Cent. R. Co. ads. Long....	74
New York Cent. R. Co. ads. Dickins.		New York Cent. R. Co. ads. Mackay..	377
	145, 311	New York Cent., etc., R. Co. ads.	
New York Cent. R. Co. ads. Downs.		Maginnis .....	377
	188, 312	New York Cent. R. Co. ads. Mahon.	4, 166
New York & H. R. Co. ads. Edgerton.	79		338
New York Cent., etc., R. Co. ads.		New York Cent. R. Co. v. Marvin....	20
Fairfax.....	81	New York Cent., etc., R. Co. ads.	
New York Cent. R. Co. ads. Field...	379	Masterson ....	378
New York Cent. R. Co. ads. Filer...	148	New York Cent. R. Co. ads. Matteson.	
	175, 176, 274, 312, 313		77, 81, 186
New York Cent., etc., R. Co. ads.		New York Cent., etc., R. Co. ads.	
Fisher.....	373, 379	McCoun .....	22, 418
New York Cent., etc., R. Co. ads.		New York Cent., etc., R. Co. ads.	
Gale .....	24, 192, 378	McGovern.....	378
New York Cent. R. Co. ads. Garwood.	460	New York Cent., etc., R. Co. ads. Mc-	
New York & H. R. Co. ads. Gonzales.	313	Grath.....	313, 377, 379
New York Cent. R. Co. ads. Grippen.	377	New York Cent. R. Co. ads. McIntyre.	
New York Cent. R. Co. ads. Gros-			149, 312
venor .....	78	New York Cent. R. Co. ads. McPad-	
New York Cent., etc., R. Co. ads.		den.....	79, 187, 379
Hackford.....	19, 310	New York Cent., etc., R. Co. v. Met-	
New York Cent. R. Co. ads. Hamil-		ropolitan Gas-light Co .....	213
ton.....	181	New York Cent. R. Co. ads. Michaels.	75
New York Cent. R. Co. ads. Harvey .	281	New York Cent., etc., R. Co. ads. Mil-	
New York Cent., etc., R. Co. ads.		leman.....	80
Henderson ..	145, 217, 222	New York Cent., etc., R. Co. ads. Mor-	
New York Cent., etc., R. Co. ads.		rison.....	314
Hinckley .....	76	New York Cent. & H. R. R. Co. ads.	
New York Cent. R. Co. ads. Hoffman.		Moyer.....	460
	181, 279	New York Cent. R. Co. ads. Murphy.	145
New York Cent. R. Co. ads. Hulbert.	379	New York Cent. R. Co. ads. Murray..	377
New York Cent., etc., R. Co. ads.		New York Cent. Ins. Co. v. Nat. Prot.	
Isaacson .....	81, 314	Ins. Co .....	13, 30
New York Cent. R. Co. ads. Johnson.	75	New York Cent. R. Co. ads. Nellis.	
New York Cent. R. Co. ads. Keating.	79		356, 361, 379

## TABLE OF CASES.

579

	Page.		Page.
New York & H. R. Co. ads. Newkirk.	174	N. Y. Cent., etc., R. Co. ads. Sutton.	379
New York Cent. R. Co. ads. Newson.	311	N. Y. Cent. R. Co. ads. Thorpe.	80
New York Cent. R. Co. ads. Nichols.	75	N. Y. Cent., etc., R. Co. ads. Tierney.	76
New York & H. R. Co. ads. Oldfield.	308	N. Y. Cent., etc., R. Co. ads. Town-	
New York Cent., etc., R. Co., ads.		send.	80, 151
O'Brien	80	N. Y. Cent. & H. R. R. Co. ads.	
New York Cent. & H. R. R. Co. ads.		Uline.	17
O'Neill	78	N. Y. Cent., etc., R. Co. ads. Viçk.	79
New York Cent., etc., R. Co. ads.		N. Y. Central Ins. Co. ads. Vilas.	226
Pakalinsky	378, 440	N. Y. Cent. R. Co. ads. Waffle.	359
New York Cent., etc., R. Co. ads.		N. Y. Cent., etc., R. Co. ads. Waldele.	181
Peck	23, 80	N. Y. Cent. R. Co. ads. Ward.	147
New York Cent. R. Co. ads. People.		N. Y. Cent. R. Co. ads. Warner.	377, 442
28, 94, 143, 376,	379	N. Y. Cent. R. Co. ads. Watson.	248, 405
New York Cent., etc., R. Co. ads. Per-		N. Y. Cent., etc., R. Co. ads. Weber.	377
ley.	81	N. Y. Cent., etc., R. Co. ads. Weeks.	81
New York Cent. R. Co. ads. Perrin.	155	N. Y. Cent. R. Co. ads. Welch.	174
New York Cent. R. Co. ads. Plate.	205	N. Y. Cent. R. Co. ads. Wells.	79, 309
New York Cent. R. Co. ads. Poler.	376	N. Y. Cent., etc., R. Co. ads. Wen-	
New York Cent. R. Co. ads. Poucher.	79	dell.	221, 312
New York Cent. Ins. Co. ads. Pratt.		N. Y. Cent. R. Co. ads. Williams.	
233, 234		102, 166,	217
New York Cent. R. Co. ads. Reed.	186	N. Y. Cent. R. Co. ads. Wilson.	109, 146
New York Cent. R. Co. ads. Ren-		190	
wick.	377	N. Y. Cent., etc., R. Co. ads. Wood.	378
New York Cent. R. Co. ads. Rey-		N. Y. Cent. R. Co. ads. Wright.	280
nolds.	313	N. Y. Cent., etc., R. Co. ads. Yates.	188
New York Cent., etc., R. Co. ads.		N. Y., etc., Ferry Co. ads. People.	354
Rich.	111, 189	N. Y., etc., Lime, etc., Co. ads.	
New York Cent. R. Co. ads. Richard-		Denike.	270
son.	377	N. Y., etc., R. Co., Matter of.	18, 25, 123
New York Cent. R. Co. ads. Robin-		166, 375	
son.	312	N. Y., etc., R. Co. ads. Brassell.	313
New York Cent. R. Co. ads. Ryan.	149	N. Y., etc., R. Co. v. Brooklyn, City	
New York & Hudson R. Co. ads. Saun-		of.	70, 305
non.	281	N. Y., etc., R. Co. ads. Brown.	186
N. Y. Cent., etc., R. Co. ads. Sauter.		N. Y., etc., R. Co. ads. Cosgrove.	378
80, 185,	314	N. Y., etc., R. Co. ads. Duncomb.	120
N. Y. Cent., etc., R. Co. ads. Schvier.	311	N. Y., etc., R. Co. ads. Edgerton.	186
N. Y. Cent., etc., R. Co. ads. Sheehan.	378	N. Y., etc., R. Co. ads. Fairfax.	457
N. Y. Cent. R. Co. ads. Sloan.	192	N. Y., etc., R. Co. ads. Hofnagle.	279
N. Y. Cent. R. Co. ads. Smith.	79, 183	N. Y., etc., R. Co. v. Ketchum.	36, 121
189, 408, 409,	440	N. Y., etc., R. Co. ads. Kissenger.	377
N. Y. Cent., etc., R. Co. ads. Spinner.	377	N. Y., etc., Ry. Co. ads. People.	5, 164
N. Y. Cent., etc., R. Co. v. Standard		338, 435	
Oil Co.	78	N. Y. & Erie Ins. Co. ads. Roach.	232
N. Y. Cent. & H. R. R. Co. ads.		N. Y., etc., R. Co. ads. Seybolt.	79, 379
Stackus.	310, 314, 440	N. Y., etc., R. Co. ads. Weeks.	439
N. Y. Cent. R. Co. ads. Stillwell.	186	N. Y., etc., Dock Co. ads. People.	268, 328
N. Y. Cent. R. Co. ads. Stinson.	379	N. Y., etc., Tel. Co. ads. Leonard.	
N. Y. & H. R. Co. ads. Story.	30, 146	146, 314,	432

	Page.		Page.
N. Y. and Brooklyn Bridge, Matter of Petition of Trustees of.....	94, 406	New York & Saugerties White Lead Co. ads. Mechanics' Banking Ass'n.	121, 322
N. Y. & Can. R. Co. ads. Town of Wellsborough .....	436	New York City ads. Baldwin.....	90
N. Y. & Erie Bank ads. Holden.....	61	New York, City of, ads. Taylor..	173, 395
N. Y. & Erie R. Co. ads. Corwin.....	376		406
N. Y. & Erie R. Co. ads. Blackstock.	76	New York, Comptroller of City of, ads. People.....	44
N. Y. & Erie R. Co. ads. Hibbard ...	80	New York City Ins. Co. ads. Harper..	230
N. Y. & Erie R. Co. ads. McConihe..	112	New York Dry Dock Co. v. Stillman.	446
N. Y. & Erie R. Co. ads. McMahon.	107, 243	New York Elevated R. Co., Matter of Petition of.....	96, 375
N. Y. & Erie R. Co. ads. Nicoll.	120, 156	New York Elevated R. Co. ads. Patten.	23
N. Y. & Erie R. Co. ads. Ransom....	145	New York Elevated R. Co. ads. Story.	102, 166, 375
N. Y. & Erie R. Co. ads. Wibert.....	76	New York Elevated R. Co. ads.	
N. Y. & Harlem R. Co. ads. Baulec..	379	Weston.....	379
N. Y. & Harlem R. Co. ads. Brainerd.	216	New York Exchange Co. v. DeWolf..	417
N. Y. & Harlem R. Co. ads. Cockcroft.	147	New York Ferry Co. ads. City of Brooklyn .....	71
N. Y. & Harlem R. Co. ads. Cromme- lin .....	78, 380	New York Fire Dept. v. Buhler.....	327
N. Y. & Harlem R. Co. v. Haws.....	222	New York Floating Dry Dock Co. ads.	
N. Y. & Harlem R. Co. ads. Jetter..	80, 312	Cook ....	15
N. Y. & Harlem R. Co. v. Kip...374,	375	New York Floating Dry Dock Co. ads.	
New York & Harlem R. Co. ads. Kis- senger.....	440	Walsh .....	329
New York & Harlem R. Co. v. Marsh.	432	New York Gas-light Co. ads. Lanigan.	314
New York & Harlem R. Co. ads.		New York Gold Ex. Bank ads. Fowler.	9
Smith.....	280	New York Guaranty and Indemnity Co. v. Flynn.....	150
New York & Harlem R. Co. ads. Weed.	19	New York Guar. & Indemnity Co. v.	
New York & New Jersey Ry. Co. ads.		Gleason.....	8, 185, 204
Peck .....	25	New York Guaranty & Indemnity Co.	
New York & N. H. R. Co. ads. Bronk.	27	v. Rogers.....	23
New York & N. H. and N. Y. & H. R. Cos. ads. Colegrove....	379	New York, Housatonic, etc., R. Co. ads. Huncomb .....	62, 368, 373
New York & New Haven R. Co. ads.		New York Ice Co. v. N. W. Ins. Co..	21, 370
Dinenny .....	81		
New York & N. H. R. Co. ads. Illius.	21	New York Indemnity Ins. Co. ads.	
New York & N. H. R. Co. v. Ketchum.	20	Fowler.....	361
New York & N. H. R. Co. ads. Me- chanics' Bank.....	11, 121	New York Institution for the Blind v.	
New York & New Haven R. Co. ads.		How's Executors.....	471
Milnor....	81	New York Ins. Co. ads. Ames....	232, 233
New York & N. H. R. Co. ads. Purdy.	376	New York, Kingston & Syracuse R. Co. ads. Caylus.....	206
New York & N. H. R. Co. v. Schuyler.	11, 28, 89, 121, 346	New York, Lackawanna, etc., R. Co., Matter of... ..	166
New York & Oswego Midland R. Co. ads. Balch.....	376	New York, Lake Erie, etc., R. Co. ads. Ellis.....	280
New York & Oswego Midland R. Co. ads. Smith....	375	New York, Lake Erie & Western R. Co. ads. Seybolt.....	75
New York & Oswego Midland R. Co. v. Van Horn.....	373	New York Life v. Universal Life, etc..	241

	Page.		Page.
New York Life Ins. Co. ads. Murray.	362	Nichols v. Drew.....	343, 365
New York Life Ins. Co. ads. Peacock.	238	Nichols v. Dusenbury.....	255, 257, 262
New York Life Ins. Co. ads. Sands..	239		362, 364, 365, 366, 440
New York Life Ins. Co. v. White....	265	Nichols ads. Eimer.....	261
New York Life Ins. and Trust Co. v.		Nichols ads. Fawcett.....	223
Beebe.....	7, 449	Nichols ads. Gallagher.....	112, 410
New York Life Ins. and Trust Co. ads.		Nichols ads. Jacks.....	190, 364, 449
Clark.....	108	Nichols v. Kingdom Iron Ore Co....	178
New York Life Ins. and Trust Co. ads.		Nichols v. Mase.....	92, 174, 256, 300
Covert.....	246	Nichols v. McEwan.....	46
New York Loan & Trust Co. ads. Up-		Nichols v. Michael.....	208, 347
ham.....	63	Nichols ads. Newell.....	173, 426, 473
New York Plaster Works ads. Isaacs.	108	Nichols v. N. Y. Cent. R. Co.....	75
New York Protection Ins. Co. ads.		Nichols ads. People.....	85, 86, 128, 142
Mygatt.....	235		218, 245, 341, 371, 388
New York Protestant Public School,		Nichols v. Pinner.....	207
Matter of.....	17	Nichols ads. Rauson.....	272
New York Protestant Episcopal Pub-		Nichols v. Sixth Ave. R. Co.....	312
lic School, Matter of Trustees of..	101	Nichols v. Voorhis.....	29
	328, 333, 432	Nichols ads. White's Bk. of Buffalo.	
New York Rubber Co. ads. Rothery..			157, 162, 163
	125, 460	Nicholson v. Erie Ry. Co.....	308
New York Shot and Lead Co. ads.		Nicholson v. Leavitt ..	46
Messmore.....	148, 149	Nickelson v. Wilson.....	710
New York State Loan and Trust Co.		Nickerson v. Ruger.....	320
v. Helmer.....	111, 120	Nicolay ads. Baltzen.....	10, 55
New York State Loan and Trust Co.		Nicolay v. Unger.....	190
ads. Black River Ins. Co.....	229	Nicoll v. Boyd.....	26, 382
New York, etc., Steamship Co. ads.		Nicoll v. Burke.....	257
Viner.....	78	Nicoll ads. New.....	444
Niagara, etc., Bridge Co. v. Bachman.	152	Nicoll v. N. Y. & Erie R. Co....	120, 156
Niagara, etc., Ins. Co. ads. Winne...	233	Nims v. Mayor, etc.....	304
Niagara Falls Ins. Co. ads. Cone.....	225, 233	Ninth Ave. and Fifteenth Street,	
	343	Matter of.....	167
Niagara Fire Ins. Co. ads. Richmond.		Ninth Nat. Bk. ads. Nat. Park Bk...	316
	32, 225, 232, 458	Nixon ads. Beach.....	261
Niagara Fire Ins. Co. ads. Shearman.	231	Nixon v. Palmer.....	8, 9
Niagara Fire Ins. Co. ads. Steen.....	227, 231	Noah Widows and Orphans' Society	
	232	ads. Wachtel.....	49
Niagara Fire Ins. Co. ads. Van Schoick.		Noakes v. People.....	132, 135, 141
	229, 232	Noble v. Cromwell.....	251, 348
Niagara Fire Ins. Co. ads. Wynkoop.		Noble v. Haliday.....	253
	176, 232	Noble v. Kelly.....	196
Niblo v. Binsse.....	106, 112	Noe v. Christie.....	3, 325, 343
Nicholas ads. Anderson.....	393	Noel v. Murray.....	355
Nichols, Matter of.....	428	Noelke ads. People.....	95, 135, 265
Nichols ads. Arnold.....	353	Nolan v. Brooklyn City, etc., R. Co..	313
Nichols ads. Brown.....	1, 247	Nolan ads. Western R. Co.....	222, 430, 444
Nichols ads. Burke.....	154	Nolan v. Whitney.....	111
Nichols ads. Conaughty.....	360	Nolton v. Western R. Co.....	79
Nichols ads. Dorsheimer.....	45, 189	Noonan v. Albany.....	304, 459

	Page.		Page.
Norris v. Kohler .....	279	Norton ads. Ely .....	3
Norris ads. Sandford.....	171, 411, 443	Norton v. Mallory.....	130
North ads. People.....	306	Norton ads. Norton.....	445
North v. Bloss .....	285, 353	Norton v. Pattee.....	291
North ads. Yates.....	51	Norton ads. People.....	443
N. A. Life Ins. Co. ads. Att'y-Gen'l.		Norton v. Woodruff.....	55, 179, 388
15, 16, 53, 54, 94, 100, 123, 241, 242,	381	Norwood ads. McCulloch... .	1, 122, 230
North American, etc., Ins. Co. ads.		Nostrand ads. People. ....	268
Briggs .....	234	Nostrand ads. Wright. .	185, 213, 381, 419
North American Steamship Co. ads.		Nourry v. Lord.....	42, 170, 176
Dent.....	9, 389	Nowlen ads. Phelps.....	459
North British, etc., Ins. Co. ads. Ben-		Noxon ads. Farmers and Citizens' Nat.	
nett.....	231	Bk.....	320
Northern Cent. Ry. Co. ads. Hawley.		Noyes v. Blakeman.....	447
280, 310		Noyes ads. Castle.....	246
Northern Cent. Ry. Co. ads. Painton.	280	Noyes v. Children's Aid Society.	27, 35, 336
Northern Cent. Ry. Co. ads. Rathbun.	413	Noyes ads. Edwards.....	174, 438
Northern Cent. Ry. Co. ads. Voak ...	378	Noyes ads. McMurray .....	215
Northern Indiana R. Co. ads. Harris..	76	Noyes v. Phillips.....	113, 149
Northern Ins. Co. v. Wright.....	215	Nunan ads. Bertles.....	271
Northern Light Oil Co. ads. Kelsey.		Nye ads. Barber.....	460
4, 211, 371		Oakley v. Aspinwall.37, 91, 100, 244,	245
Northern R. Co. ads. Duane... .	28	Oakley v. Morton.....	107
Northern R. Co. ads. People.....	121, 367	Oatman v. Taylor.....	317
Northern R. Co. of New Jersey ads.		O'Bierne v. Lloyd.....	90, 205
Wylde.....	311	Oberlander v. Speiss.....	208
Northrop v. Hill.....	412	O'Blenis v. Karing.....	422
Northrop v. Syracuse, etc., R. Co....	77	O'Brien v. Belmont.....	412, 444, 445
Northrup ads. Fellows.....	11	O'Brien v. Butterworth.....	452
Northrup ads. Hewitt.....	63	O'Brien v. Commercial Fire Ins. Co..	227
Northrup ads. Livermore.....	46	O'Brien v. Glenville Woolen Co.....	49
Northrup v. People.....	128	O'Brien ads. Haas.....	63
Northrup v. Railway Pass. Ass. Co..	242	O'Brien v. Jones.....	145, 392, 393
North-western Ins. Co. ads. Bidwell.		O'Brien ads. Judd.....	297
286, 237		O'Brien v. McCann.....	398
North-western Ins. Co. ads. Buffalo		O'Brien v. Merchants and Traders'	
City Bank.....	237	Fire Ins. Co.....	51
North-western Ins. Co. v. Ferward..	399	O'Brien v. New York Cent., etc., R.	
North-western Ins. Co. ads. Hitch-		Co.....	80
cock.....	236	O'Brien ads. People.....	98, 134, 224
North-western Ins. Co. ads. Mead.		O'Brien v. Phoenix Ins. Co.....	227
175, 230, 232		O'Brien ads. Renaud.....	130
N. W. Ins. Co. ads. New York Ice Co.		O'Brein ads. Tuska.....	205
21, 370		O'Brien v. Young.....	244, 250
North-western Ins. Co. ads. Town-		Occumpaugh ads. Wisner.....	258
send .....	230	Ocean Ins. Co. ads. Benedict.....	231
North-western Ins. Co. ads. Wood.		Ocean Nat. Bank of New York City v.	
172, 227		Carll.....	181
Norton ads. Clark.....	241, 430	Ocean Nat. Bank ads. Dunning..	198, 297
Norton v. Coons.....	422		412
Norton ads. Dexter.....	5, 145		

	Page.		Page.
Ocean Nat. Bank v. Faut .....	318	O'Hara, Matter of .....	472
Ocean Nat. Bank ads. First Nat. Bk. .	62	O'Hara ads. Pope .....	168, 461
Ocean Nat. Bank v. Olcott .....	65, 449	Ohio & Miss. R. R. Co. v. Kasson ..	212, 453
Ocean Bank ads. Scott .....	57	O'Keefe ads. People .....	71, 267
Ochsenbein v. Shapley .....	310, 314	Olcott ads. Bishop .....	399
Ockerman v. Cross .....	46, 91	Olcott v. Carroll .....	358
O'Connell v. People .....	132	Olcott v. Maclean .....	63
O'Connell ads. Stern .....	295	Olcott ads. Maclean .....	63
O'Conner ads. Sacia .....	164, 327	Olcott ads. Ocean Nat. Bk .....	65, 449
Odell v. Dewitt .....	94	Olcott ads. Ormiston .....	198
Odell v. Durant .....	95, 99	Olcott v. Robinson .....	195
Odell v. Hoyt .....	294	Olcott ads. Sutherland .....	269
Odell ads. Lyon .....	173	Olcott v. Tioga R. Co. ....	119, 319, 326, 413
Odell v. Montross .....	157, 407	Olcott v. Wood .....	41
Odell ads. Webb .....	322, 439, 454	Oldfield v. N. Y. & H. R. Co. ....	308
Oddie v. Nat. City Bank of N. Y. ....	58	O'Leary v. Board of Education of New York .....	171, 331, 340
Oddy v. James .....	410	Oliver ads. Briggs .....	130, 294, 300
Odiorne ads. Nelson .....	399	Oliver Lee & Co.'s Bank, Matter of. .....	61, 96
O'Donnell ads. Cross .....	409	Oliver Lee & Co.'s Bank v. Walbridge.	451
O'Donnell v. Kelsey .....	169	Oliver Street Baptist Church ads. Mad- ison Ave. Baptist Church .....	386
O'Donovan ads. Duffy .....	402, 434	Olmstead ads. Harvey .....	466
O'Dougherty ads. Remington Paper Co. ....	89, 176, 206, 294	Olmstead ads. Jennery .....	109, 420
O'Gara v. Clearkin .....	197	Olmstead ads. Kellogg .....	106
O'Gara v. Eisenlohr .....	271	Olmstead v. Keyes .....	240
O'Gara v. Kearney .....	103	Olmstead v. Loomis .....	156, 251, 458
Ogden ads. Cropsey .....	278	Olmstead v. Olmstead .....	470
Ogden ads. Cosgrove .....	279, 312	Olmstead ads. Voorhis .....	368
Ogden v. East River Ins. Co. ....	233	Olmstead v. Webster .....	249, 353
Ogden ads. Freeman .....	86, 255	Olmstead ads. Yates .....	54, 299
Ogden ads. Gardner .....	252, 445	Olmsted v. Dennis .....	161
Ogden v. Jennings .....	157, 162	Olmsted v. Elder .....	265
Ogden v. Lathrop .....	368	Omaha National Bank ads. Hale ..	298, 358
Ogden v. Marshall .....	146	.....	365
Ogden v. Murray .....	445	O'Mahoney v. Belmont .....	186, 381
Ogden v. Mut. Ins. Co. ....	236	O'Mara v. Hudson R. R. Co. ....	149, 377
Ogden ads. Osgood .....	235, 381	Ombony v. Jones .....	204, 256, 282
Ogden ads. Pratt .....	455	Onderdonk ads. Burnham .....	371
Ogden v. Peters .....	46	Onderdonk ads. Churchill .....	371
Ogden v. Raymond .....	121	Onderdonk ads. Scott .....	89
Ogdensburgh, City of, ads. Urquhart.	305	Onderdonk v. Voorhis .....	399
Ogdensburgh, Trustees of, ads. Peo- ple .....	429	Oneida Bank v. Ontario Bank .....	59
Ogdensburgh, etc., R. Co. ads. Fair- child .....	316	O'Neil, Matter of .....	13, 52, 462
Ogdensburgh, etc., R. Co. v. Ver- mont, etc., R. Co. ....	39, 125	O'Neill v. N. Y. Cent. & H. R. R. Co. .....	77, 78
Ogdensburgh, etc., R. Co. v. Wolley.	373	O'Neil v. Buffalo Fire Ins. Co. ....	226, 229
O'Gorman v. Mayor, etc. ....	331	.....	281
O'Hagan v. Dillon .....	193	O'Neil ads. Savage .....	92, 274
O'Hara v. Dever .....	276, 466, 467	O'Neill ads. Fay .....	266

	Page.		Page.
O'Neill v. James .....	104, 441	Osgood v. De Groot.....	237
Oneonta, Town of, ads. Gould.....	436	Osgood ads. Jones.....	32, 441
Onondaga Co. M. Ins. Co. v. Minard.		Osgood v. Laytin.....	235
	32, 441	Osgood v. Maguire.....	121
Onondaga Co. Sav. Bk. ads. Griswold.	356	Osgood ads. Moody.....	441
Onondaga Trust and Deposit Co. v.		Osgood v. Ogden.....	235, 381
Price .....	467	Osgood v. People.....	133
Ontario Bank ads. Barnes .....	57	Osgood v. Toole.....	33, 228
Ontario Bank v. Hennessey.....	349	Ostrander v. Fay.....	299
Ontario Bank v. New Jersey Steam-		Ostrom ads. Claffin.....	130, 216
boat Co. ....	78	Oswego, City of, ads. Baldwin.	43, 302, 306
Ontario Bank ads. Oneida Bank.....	59	Oswego, City of, v. Oswego Canal Co.	217
Ontario Iron Co. ads. Gilmore ..	109, 257	Oswego Canal Co. ads. City of Oswego.	217
Onthank v. Lake Shore, etc., R. Co..	163	Oswego ads. Parmelee.....	354
Open Board, etc., Co. ads. People.		Oswego, etc., Ins. Co. ads. Lang-	
	199, 382, 393	worthy.....	227
Opdyke ads. Roberts .....	399	Oswego, etc., Plankroad Co. ads.	
Oppenheim ads. Johnson.....	260	Ireland.....	357
Oppold ads. Schwarz .....	190, 366	Oswego Starch Factory v. Dolloway..	429
Orange, etc., R. Co. ads. Kiersted.	12, 260	Oswego & Syracuse R. Co. ads. Car-	
Orchard v. Binninger.....	108	penter.....	164
Orcutt v. Cahill.....	38	Oswego & Syracuse R. Co. ads. Par-	
Order of B'nai Berith ads. Hellenberg.		melee.....	393
	465, 468	Oswego & Syracuse R. Co. ads. Price.	77
O'Reilly ads. Bertholf.....	87, 97, 418	Oswego & Syracuse R. Co. ads. Steves.	313
O'Reilly v. Guardian Mut. L. Ins. Co.	240	Otis ads. Boughton.....	268
O'Reilly ads. Malcom .....	116	Otis v. Dodd.....	282
O'Reiley v. People .....	143	Otis ads. People.....	95, 307
Organ v. Stewart.....	408	Otis v. Spencer.....	34
Orient Mut. Ins. Co. ads. Bunten.	26, 230	Otis ads. Stowell.....	367, 368
Ormes v. Dauchy.....	33, 110, 440, 441	Otis ads. Supervisors.....	128, 423
Ormiston v. Olcott.....	198	Otis v. Williams.....	88, 437
Ormsby v. Douglass.....	264	Ott v. Schroepfel.....	41
Ormsby v. People .....	136, 140	Ousby v. Jones.....	156
Ormsby v. Vermont Copper Mining		Outhouse ads. Adams.....	110
Co. ....	120, 255	Overing v. Foote.....	430, 431
O'Rourke ads. Lamoreaux.....	394, 430	Overseer ads. Overseers, etc.....	340
Orr v. Bigelow.....	106, 146	Owen v. Cawley.....	273, 415
Orser ads. Gallarati .....	396	Owen v. Hudson River R. Co.....	314
Orser v. Orser.....	464	Owen ads. Volans.....	87
Orser ads. Smith.....	49	Owens ads. Clark.....	255
Orser ads. Sturtevant.....	390	Owens ads. Colt.....	148
Orser ads. Wood.....	370, 396, 437, 442	Owens v. Holland Purchase Ins. Co..	230
Orth ads. Pinney .....	193	Owens v. Missionary Society.....	449
Orton v. Orton .....	466, 467	Oxley v. Lane .....	461
Orvis ads. Titus.....	30	Oyster Bay, etc., Steamboat Co. ads.	
Osborn v. Gauz .....	389	Barney.....	82
Osborn ads. Magee.....	37, 441		
Osborn v. Robbins.....	162	Pacific Bank ads. Ayrault.....	59
Osborn v. Schenck .....	433	Pacific Iron Works v. Long Island R.	
Osborne ads. Winchester .....	157	Co.....	390



	Page.		Page.
Pacific Mutual Ins. Co. ads. Arnold..	237	Palmer v. Fort Plain, etc., Plankroad Co .....	154, 357, 358
Pacific Nat. Bank ads. Market Nat. Bank.....	417	Palmer ads. Fowler.....	324
Pacific Nat. Bk. ads. Raynor.....	49, 62	Palmer ads. Hastings.....	220
Pacific Pneumatic Gas Co. v. Wheelock.....	173	Palmer v. Holland .....	11
Pacific Mail Steamship Co. ads Commissioners of Pilots.....	357	Palmer v. Horn.....	465
Pacific Mail Steamship Co. v. Toel..	222	Palmer v. Hussey.....	42, 64, 207
Pack v. Mayor, etc.....	304, 474	Palmer v. Lawrence.....	33, 245, 253
Packer v. Nevin.....	222	Palmer ads. Leavitt.....	57, 385
Packer v. Rochester & Syracuse R. Co.	458	Palmer ads. Lewis .....	422
Packer ads. Southern Life Ins. and Trust Co.....	452	Palmer ads. Mann.....	106, 114, 413
Paddock v. Springfield F. and M. Ins. Co.....	21	Palmer ads. McDermott.....	282
Paddon v. Taylor.....	392	Palmer ads. Mott.....	154, 204
Page ads. Black River Bank.....	420	Palmer ads. Nixon.....	8, 9
Page v. McDonnell.....	455	Palmer ads. People.....	95, 331
Page ads. Edgerton.....	258	Palmer v. Phoenix Mut. Life Ins. Co.....	238, 239
Page v. Morrell.....	324	Palmer v. Purdy.....	352, 423
Page ads. Sherman.....	198	Palmer ads. Remington.....	410, 455
Page v. Waring.....	64, 383	Palmer v. Smith.....	168
Paige ads. DeBerski.....	407	Palmer ads. Stuart.....	89, 101
Paige ads. Binsse.....	154, 284, 288, 291, 445	Palmer ads. Vermilyea.....	27
Paige ads. Chenango Bridge Co.....	69, 98, 338, 356	Palmer ads. Wilson .....	34
Paige v. Willett.....	364	Panama R. Co. ads. Weed.....	76, 278
Paige ads. Wright.....	192, 263	Panama R. Co. ads. Whitford.....	311
Paine v. Brown .....	456	Pangburn ads. Woods.....	264
Paine v. City of Rochester.....	124	Paramore ads. Witkowski.....	25
Paine v. Howells.....	109, 278	Pardee v. Fish .....	98, 316
Paine v. Jones.....	285, 292, 385	Pardee v. Treat.....	105, 154, 292
Paine ads. McClare.....	10	Paris v. Wheeler.....	298
Paine ads. Sheldon.....	172	Parish ads. Delafield .....	462
Paine v. Upton.....	285, 385	Parish v. Golden.....	431
Paine ads. Woodworth .....	386	Parish ads. Sherman.....	274, 344
Painton v. North. Cent. Ry. Co.....	280	Parish v. Wheeler.....	120, 149
Pakalinsky v. N. Y. C., etc., R. Co.....	378, 440	Park v. Park .....	103
Palen v. Johnson.....	454	Park ads. People.....	475
Palmer, Matter of.....	19	Park ads. Reynolds.....	288, 290
Palmer v. Bagg.....	420	Park Bank ads. Lewis.....	5
Palmer ads. Baldwin.....	407	Park Bank v. Watson .....	322
Palmer ads. Cahill.....	6, 173	Park Bank ads. Weedsport Bank.....	57, 356
Palmer ads. Chipman.....	338	Park Bank v. Wood.....	429
Palmer ads. Conley .....	99, 258, 356, 404	Park Fire Ins. Co. ads. LeRoy.....	442
Palmer v. Davis.....	40, 273, 343	Park v. Arctic Fire Ins. Co.....	227
Palmer v. Dearing.....	314	Parker v. Baxter .....	39
Palmer v. De Witt.....	116	Parker v. Bogardus .....	462
Palmer v. Foley.....	223	Parker ads. Chamberlain.....	129, 148
		Parker v. Conner.....	211
		Parker ads. Crouch.....	174
		Parker ads. Dung .....	407
		Parker ads. Finch.....	26, 402
		Parker v. Jervis.....	26, 35

	Page.		Page.
Parker v. Laney .....	124, 441	Patchin Bank ads. Bank of Genesee.	58, 317, 363
Parker v. McCluer.....	6	Paton ads. Liddell.....	23
Parker ads. People .....	144	Paton ads. Smith.....	453
Parker ads. Shepard.....	192	Patrick ads. Erie & N. Y. City R. Co.	4, 105
Parker v. Syracuse, City of.....	190	Patrick v. Metcalf .....	4, 5, 446
Parker ads. Wetmore.....	126, 463, 470	Patrick ads. Philbin .....	32, 182
Parker ads. Zogbaum.....	395	Patrick ads. Pierpont. ....	466
Park Mills v. Comm'rs of Taxes.....	427	Patrick v. Shaffer.....	91, 166
Parkhurst v. Berdell.....	384	Patrick ads. Stewart....	155, 344
Parkinson v. Sherman.....	292	Pattee ads. Norton .....	291
Parkis ads. Craig.....	214	Patten ads. James .....	341, 407
Parks v. Morris Ax and Tool Co..	147, 392	Patten v. New York Elevated R. Co.	23
Parks ads. Porter .....	367	Patten v. Stitt .....	34, 126
Parmelee v. Cameron.....	389, 472	Patterson ads. Allen. ....	359
Parmelee v. Hoffman Fire Ins. Co....	230	Patterson ads. Ausley.....	63
Parmelee v. Oswego & Syracuse R. Co.	354, 393	Patterson ads. Averill .....	160
Parmelee v. Thompson.....	106	Patterson ads. Birdsall.....	441, 450, 474
Parmelee v. Van Keuren.....	353, 415	Patterson v. Birdsall.....	293, 450
Parmelee ads. Worrall.....	180, 189, 440	Patterson v. Brown.....	220, 337
Parmley ads. Porter.....	299	Patterson ads. Butler.....	474
Parr v. Greenbush, President, etc., of.	302	Patterson ads. Daniels.....	423
Parr ads. People.....	336	Patterson ads. Havens .....	456
Parrish ads. Beale.....	319	Patterson ads. Hennessy .....	470
Parrott v. Knickerbocker & New York		Patterson ads. Hudson River Bridge	
Ice Cos.....	145, 243, 400	Co. ....	69, 427
Parsell v. Stryker .....	99, 109	Patterson ads. Hynes .....	115, 151, 441
Parshall v. Eggert.....	368	Patterson v. Patterson....	395
Parshall ads. Tanner.....	182	Patterson Fire Ins. Co. ads. Dunlop.	17, 24, 50
Parsons ads. Ballou.....	123, 384	Pattison v. Blanchard.....	349, 359
Parsons ads. Dounce.....	351	Pattison ads. Davis.....	75
Parsons ads. Emerson .....	353	Pattison v. Syracuse Nat. Bk .....	62
Parsons v. Johnson.....	157, 163	Patton ads. Hale .....	67
Parsons v. Loucks.....	408	Patridge v. Gildermeister.....	105
Parsons v. Lyman.....	200	Paul, Matter of.....	96, 328
Parsons v. Sutton.....	127, 148, 439	Paul v. Munger.....	20
Partridge ads. Briggs.....	11	Paulding v. Chrome Steel Co .....	122
Partridge v. Eaton.....	157	Paulding v. Sharkey .....	200
Partridge v. Gilbert.....	354	Payne v. Becker.....	277, 381
Partridge v. Gildermeister.....	393	Payne v. Burnham.....	170
Passenger v. Thorburn.....	147	Payne ads. Fort Edward, etc., Plank-	
Patchin v. Astor Mutual Ins. Co....	191	road Co.....	109, 118
Patchin ads. Coit.....	462	Payne v. Freer .....	348, 450
Patchin ads. Devin .....	34, 126, 425	Payne v. Gardiner .....	104, 411
Patchin ads. Kimberly.....	391	Payne ads. Hathaway .....	154
Patchin ads. Mack.....	147	Payne ads. Low .....	38, 181
Patchin ads. Meech.....	298	Payne ads. Sheldon.....	397
Patchin ads. Morris.....	186	Payne v. Troy & Boston R. Co.....	378
Patchin v. Peck.....	365	Payne v. Wilson .....	283, 287
Patchin ads. Provost .....	400		

# TABLE OF CASES.

587

	Page.		Page.
Payne ads. Woodworth.....	156	Pendleton v. Franklin.....	399
Payne v. Young.....	49	Pendleton ads. People.....	121, 223
Peabody v. Speyers.....	408	Pendleton v. Weed.....	181, 247
Peacock v. New York Life Ins. Co. .	238	Penfield ads. Brown.....	320
Pearce ads. Bissell.....	13, 300	Penfield ads. Grocers' Bank.....	320
Pearce ads. Dobson.....	186, 212, 246	Penfold v. Universal Life Ins. Co....	240
Pearce v. Hitchcock.....	343	Penman v. Slocum.....	443
Pearce ads. Struthers.....	30, 125, 350	Penn v. Buffalo & Erie R. Co.....	77
Pearce v. Wilkins.....	326, 350	Pennie v. Continental Life Ins. Co....	29
Pearsall ads. Bullard.....	192	Pennock ads. Hammond.....	114, 212
Pearsall ads. Mersereau.....	246	Pennock ads. People.....	418, 421
Pease v. Christ.....	457	Pennsylvania Cent. R. Co. ads. Mc-	
Pease ads. Emery.....	359	Cormick.....	81, 145, 182, 251, 272
Pease ads. People.....	165	Pennsylvania R. Co. ads. Rawson.....	81, 273
Pease v. Smith.....	115, 314	Pennsylvania Coal Co. v. Blake.....	293, 356
Pechner v. Phoenix Ins. Co.....	233, 387		363
Peck v. Burr.....	111	Pennsylvania Coal Co. v. Delaware,	
Peck v. Callaghan.....	176, 182	etc., Canal Co.....	40, 402, 438
Peck v. Cary.....	402	Pentz ads. Brown.....	354
Peck ads. Chase.....	291	Pentz ads. Mann.....	374, 381, 382
Peck ads. Earl.....	315	Peoble v. Hascall.....	173
Peck ads. Hakes.....	109	People ads. Abbott.....	63, 135, 143, 142
Peck v. Ingersoll.....	260	People ads. Adams.....	132
Peck v. Mallams.....	154, 290, 344	People v. Albany Ins. Co.....	119, 429
Peck ads. McKibbin.....	78	People v. Albany & Susquehanna R.	
Peck ads. Meyer.....	66	Co.....	100
Peck v. Minot.....	292, 354	People v. Albany & Vermont R. Co..	122
Peck ads. Morrell.....	26, 186, 218, 314		347, 373
Peck v. N. Y. Cent., etc., R. Co.....	23, 80	People v. Albertson.....	98
Peck ads. Patchin.....	365	People v. Allen.....	98, 134, 436
Peck v. Sherwood.....	200, 372, 433	People v. American Art Union.....	265
Peck v. Tiffany.....	195	People v. American Mut. Life Ins. Co.	17
Peck v. Valentine.....	175	People v. Ames.....	196, 396
Peck v. Van Keller.....	181	People v. Andrews.....	71, 85
Peck ads. Wiles.....	41	People v. Apportionment, Board of...	268
Peck v. Yorks.....	124		329, 406
Peckham v. Van Wagenen.....	119	People ads. Armstrong.....	142
Peddle ads. Bagley.....	149	People v. Arnold.....	135, 414
Peebles ads. Winans.....	275	People v. Assessors, Board of.....	85, 86, 122
Peekskill Sav. Bk. ads. Hill.....	36		213, 371, 427, 429
Peet ads. Lowry.....	127	People v. Atlantic Mut. Life Ins.....	241
Pell v. Almar.....	265	People ads. Baccio.....	143
Pell ads. Leavitt.....	273	People v. Baker.....	139, 216, 277
Pell ads. Tallmadge.....	58	People ads. Balbo.....	134, 137
Pelton, Matter of Petition of.....	333	People v. Bancker.....	224
Pelton v. Rens. & Sar. R. Co.....	77	People v. Banks.....	96, 306
Pelton v. Westchester Fire Ins. Co. .	231	People v. Barker.....	427
Pemberton ads. Hawkins.....	267, 392	People ads. Barringer.....	86, 189
Pendell v. Coon.....	370	People ads. Bartow.....	133, 140
Pendleton v. Empire Stone Dressing		People v. Batchellor.....	96, 267, 305, 306
Co.....	10, 191	People v. Beach.....	135

	Page.		Page.
People v. Becker.....	196	People ads. Cancemi....	85, 134, 136, 253
People ads. Behan.....	140	People ads. Canter.....	138, 205, 454
People v. Bell.....	72	People v. Carnal.....	404
People v. Benedict.....	22	People v. Carpenter.....	253, 372, 434
People v. Bennett.....	16, 132, 134	People v. Carr.....	267, 424
People v. Benton.....	72	People ads. Case.....	143
People v. Bergen.....	103	People v. Casey.....	138
People v. Betts.....	86	People v. Cassity.....	428
People ads. Beyer.....	139	People v. Cent. R. Co. of N. J....	338, 459
People v. Blanchard.....	141	People v. Chalmers.....	48
People ads. Blaufus.....	474	People ads. Chamberlain.....	143, 474
People ads. Blend.....	137	People ads. Champlain.....	134, 361
People ads. Bloomer.....	143, 144	People v. Chapman.....	241
People v. Boardman.....	16, 28, 86, 261	People ads. Charles.....	142
People v. Boas.....	27, 133, 134, 138	People v. Chautauqua, Supervisors of.	98
People v. Booth.....	361, 366	People v. Chenango, Supervisors of..	101, 266
People ads. Bork.....	138, 140	People v. Church.....	15, 267
People v. Boston & Albany R. Co.	97, 376	People v. Clark.....	136, 347, 372, 404
People v. Bostwick.....	68	People v. Clarke.....	123, 354
People v. Bowe.....	42	People v. Clements.....	140
People v. Bowen.....	98, 100	People v. Clews.....	134
People v. Bowers.....	142	People v. Clute....	97, 123, 164, 372, 404
People ads. Boyce.....	142	People v. Clyde.....	23
People v. Brady.....	201, 216	People ads. Coats.....	140
People v. Bragle.....	134	People v. Cole.....	136
People v. Brandreth.....	439	People ads. Coleman.....	143
People ads. Brandon.....	476	People v. Colgate.....	155, 354
People v. Bransby.....	133	Peck v. Collins.....	354
People v. Briggs.....	96	People v. Columbia Co., Supervisors	of.....397, 404
People v. Brinkerhoff.....	267, 372, 419	People v. Comm'rs of Taxes....	217, 432
People v. Brooklyn, Assessors of.	101, 204	People v. Comstock.....	340, 369
	428, 430	People ads. Conkey.....	143
People v. Brooklyn, etc., R. Co....	71, 374	People v. Conner.....	216
People v. Brooklyn, City of....	70, 71, 95	People ads. Connors.....	476
	308, 404	People v. Conover.....	329, 339
People v. Brooklyn, Common Council	of.....267, 339, 372	People v. Contracting Board.	72, 267, 405
People ads. Brooks.....	95, 144	People v. Cook.....	372
People v. Broome Co., Supervisors of.	418	People ads. Copperman.....	143
People ads. Brotherton.....	132, 141	People v. Corbin.....	141
Peabody ads. Brower.....	391	People v. Cornetti.....	142, 253
People v. Brown.....	94, 136, 220, 436	People v. Corning.....	138
People v. Buffalo, Common Council of.	305	People v. Cowles.....	100, 216
People v. Brundage.....	100, 245, 341	People ads. Cowley.....	133
People ads. Buel.....	134, 141	People v. Cox.....	134, 137, 142, 306
People v. Bull.....	102	People v. Crapo.....	137
People v. Burton.....	218	People ads. Crichton.....	139
People v. Campbell.	23, 267, 284, 331, 332	People v. Crissey.....	95, 307
	340, 428	People ads. Cronin.....	302, 306
People v. Canal Appraisers....	73, 267, 459	People v. Crooks.....	365
People v. Canal Board.....	73, 222		

	Page.		Page.
People v. Cummins .....	270	People v. Fairchild.....	54, 267, 340, 372
People v. Curtis.....	100	People v. Fairman.....	20, 268
People ads. Cyphers.....	253	People ads. Fallon.....	132, 142
People v. Daniell .....	94	People v. Fancher.....	99
People v. D'Argencour.....	138, 141	People v. Ferguson. . . . .	427
People v. Darling.....	260	Pearce v. Ferris.....	85, 129, 267, 345
People ads. Darry.....	141	People v. Fields.....	328, 336
People v. Davenport .. . . .	122, 429	People ads. Filkins.....	139
People v. Davis.....	132, 133, 135, 193	People v. Finn.....	142
People ads. Dawson.... . . .	133	People v. Fire Comm'rs, Board of..	22, 31
People v. Dayton.....	72, 73, 102		86, 101, 229, 330, 331
People ads. Dedieu.....	133	People's Fire Ins. Co. ads. Wilkes.	
People v. Delaney.....	86		226, 399
People v. Delaware Co., Supervisors of.		People ads. Fitzgerald.....	141
	194, 266, 419	People v. Fitzsimmons .....	339
People v. Delvecchio.....	21	People v. Flagg.....	101, 334
People v. Dennison.....	127, 403	People v. Flanagan....	132, 165, 328, 372
People v. Denniston.....	96	People v. Fleming.....	139, 196
People v. Devlin.....	403	People v. Flynn.....	129, 330
People v. Dibble.....	93, 220	People ads. Follett .....	72
People v. Dikeman.....	398, 448	People ads. Foote.....	140
People v. Dock Co., N. Y., etc .....	268	People v. Ft. Edward, Trustees of	
People v. Dolan.... . . . .	133, 135, 427	Village of .....	435
People v. Dohring.....	143, 252	People ads. Foster....	139, 140, 141, 143
People ads. Donohue.....	136, 201, 476	People v. Fowler .....	26, 44, 267, 431
People v. Doty.....	61	People v. Freeman.....	19
People v. Dowling.....	136, 138, 143	People v. French.....	32, 331
People v. Draper.....	98, 284, 327	People ads. Friery.....	134, 141
People v. Dudley.....	99, 257, 297	People v. Fulton.....	344, 386
People ads. Duffy .....	135, 137	People ads. Gaffney.....	134, 137, 476
People v. Dunlap.....	96, 328	People v. Gallagher .....	99, 393
People ads. Dunn.....	134, 137, 192	People ads. Gardner ..	72, 129, 165, 245
People v. Dutcher.....	99, 129		330
People v. Dutchess & Columbia R.		People v. Gates ..	99, 153, 183, 193, 342
Co .....	266, 376		396
People v. Dwyer.....	18, 103, 222	People v. Gay.....	136
People v. Dyle.....	137	People v. Genet.....	19, 138
People v. Eastwood .....	176	People v. German, etc., Church.	267, 306
People ads. Eckhardt.....	139, 141	People v. Gibbs.....	135, 139
People ads. Eggler.....	135	People v. Gilmore.....	25, 125
People ads. Eighthmy...134, 138, 143, 181		People v. Globe, etc., Ins. Co....	10, 242
	342	People ads. Godfrey.....	142
People ads. Elkin.....	143	People v. Goff.....	31, 430
People v. Elmira, Town Auditors of.	434	People ads. Goldstein.....	133, 143
People v. Empire, etc., Ins. Co. . . .	239	People v. Gonzalez.....	136
People v. Esopus, Board of Town		People ads. Goodrich.....	144
Auditors of .. . . .	219, 267	People v. Goodwin .....	86, 218
People v. Essex Co., Supervisors of.		People ads. Gordon.....	135
	1, 267, 268, 406, 432	People v. Green...129, 268, 329, 330, 335	
People v. Evans.....	141, 143		340
People v. Faber.....	139, 278	People ads. Greenfield.....	134, 135, 136

	Page.		Page.
People v. Griswold.....	219	People v. Jefferson Co., County Court	
People ads. Guenther.....	138	of.....	161
People v. Hackley.....	100	People ads. Johnson.....	142
People ads. Hadden.....	142	People v. Johnson.....	206, 387
People v. Hadley.....	430	People v. Jones.....	24, 86, 133, 219
People ads. Hagerty.....	139	People v. Jourdan.....	330
People v. Haines.....	43, 166	People v. Keeler.....	341
People v. Hall.....	95, 140, 329, 339	People ads. Keefe.....	138
People v. Halsey.....	266, 431	People v. Kelly.....	26, 69, 96, 103, 134, 139
People v. Hamilton.....	85, 261		140, 439, 475
People v. Hamilton Co., Supervisors		People ads. Kelly.....	253
of.....	432	People ads. Kennedy.....	186, 141
People v. Hardenburgh.....	267, 396	People ads. Kenny.....	132, 253
People ads. Harris.....	102, 138, 143, 219, 331	People ads. Kenyon.....	142
People ads. Harrison.....	142	People v. Kerr.....	166, 329
People ads. Hartung.....	16, 98, 137, 139	People ads. Kerrains.....	135, 278
People ads. Harwood.....	139	People v. Keyser.....	293
People ads. Hawker.....	133, 138	People v. Kilbourn.....	306
People v. Haskins.....	137, 139, 142	People ads. King.....	139
People ads. Hayes.....	139	People v. Kingman.....	219
People ads. Height.....	190	People v. Kinney.....	32
People ads. Hendrickson.....	135, 136	People v. Kings Co., Supervisors of.....	95, 404
People ads. Higgins.....	143	People v. Kingsland.....	103, 419
People v. Highways, Commissioners		People ads. Klein.....	142
of.....	86, 218	People ads. Knickerbocker.....	143
People ads. Hildebrand.....	142	People v. Kniskern.....	219
People ads. Hill.....	23, 132, 138	People v. Knowles.....	436
People v. Hills.....	405	People v. Koll.....	356
People v. Hislop.....	194	People ads. LaBeau.....	136
People ads. Hitchins.....	141	People v. Lacoste.....	386
People ads. Hochreiter.....	135	People v. Lake.....	176
People v. Hoffman.....	428	People v. Lamb.....	141
People ads. Hollygood.....	132, 139	People ads. Lambert.....	143
People ads. Home Ins. Co.....	101, 429	People v. Lane.....	267, 339
People ads. Hope.....	133	People ads. Lanergan.....	129, 137
People v. Hopkins.....	340	People v. Lansing.....	196
People v. Horton.....	29, 72	People v. Larned.....	139, 253, 440
People v. Hovey.....	27, 133	People v. Leask.....	331
People v. Howlett.....	262, 452	People ads. Lighton.....	133, 142, 328, 439
People v. Hoyt.....	268, 435	People ads. Lemmon.....	94
People ads. Huber.....	95	People v. Leonard.....	267
People v. Hulbert.....	435	People ads. Lesser.....	140
People v. Hulburt.....	374, 435	People v. Levy.....	134
People ads. Hunt.....	138	People v. Lewis.....	135, 267
People ads. Hyde.....	394	People ads. Leighton.....	32
People v. Hydrostatic Paper Co.....	270	People ads. Lindsay.....	137, 177
People v. Hynds.....	218	People v. Liscomb.....	138, 216
People v. Ingersoll.....	403	People v. Little Valley, Town Au-	
People v. Irving.....	137	ditors of.....	219, 435
People v. Jackson.....	331	People v. Livingston.....	72, 98, 165, 174, 182
People v. Jacobs.....	216		255, 341, 372, 387, 441

	Page.		Page.
People v. Livingston Co., Board of Supervisors of.....	267	People v. Merrill.....	19
People ads. Lohman.....	133, 253, 475	People ads. Messner.....	134, 135
People v. Long Island City, Common Council of.....	86, 306	People v. Metropolitan Police Board.....	267, 330, 339, 365
People ads. Loomis.....	142	People v. Miller.....	242
People ads. Lowenberg.....	137	People ads. Miller.....	141
People v. Lucas.....	68	People v. Minck.....	182
People v. Lynch.....	196, 205	People v. Mitchell.....	306
People ads. Mack.....	132, 252	People ads. Moett.....	135
People v. Madison Co., Supervisors of.....	85	People v. Molyneux.....	284
People v. Main.....	96	People v. Montgomery Co., Supervisors of.....	404, 418
People v. Majone.....	136	People v. Morgan.....	436
People ads. Manke.....	138	People v. Moring.....	70, 427
People ads. Manley.....	132	People v. Morrison.....	193, 329
People v. Mann.....	141	People v. Mott.....	219
People v. Maring.....	101, 432	People v. Mulholland.....	303
People v. Marine Court, Clerk of.....	129, 266	People ads. Mullaly.....	14, 142
People v. Marine Court, Justices of.....	17, 129	People ads. Mullins.....	86, 405
People v. Marlborough, Commrs. of Highways of.....	95	People ads. Mungeon.....	404
People v. Martin.....	434	People ads. Murphy.....	141
People ads. Mason.....	140	People v. Murray.....	193, 330, 339
People v. Matsell.....	331	People v. Mutual Endowment Ass'n.....	117, 416
People v. Matthews.....	261	People v. Mutual Gas-light Co.....	476
People ads. Maurer.....	134	People v. Myers.....	194
People ads. Mayer.....	140	People's Bank v. Mitchell.....	261
People v. Mayor, etc.....	43, 100, 307, 330	People v. Nash.....	128, 252, 418
People v. McCall.....	381	People v. Nat. Trust Co.....	122
People v. McCann.....	98, 132, 242, 361	People v. Nearing.....	86, 94
People ads. McCarney.....	133	People v. Nelleston.....	34, 123
People ads. McCord.....	140	People v. Nelson.....	99, 268
People ads. McCourt.....	140	People v. Newburgh, etc., Plankroad Co.....	357
People v. McComber.....	364, 369	People ads. Newell.....	95
People v. McDonald.....	97, 142, 217	People v. New England Mut. Life Ins. Co.....	428
People v. McDonnell.....	142	People v. N. J. Cent. R. Co.....	252
People ads. McGary.....	133	People v. N. Y., Common Council of City of.....	336
People v. McGloin.....	135, 137	People v. N. Y., Comptroller of City of.....	44
People ads. McIntyre.....	475	People v. N. Y., Supervisors of.....	310, 431
People ads. McKee.....	136, 137, 138	People v. N. Y., etc., Dry Dock Co.....	428
People ads. McKenna.....	135	People v. New York, etc., Ferry Co.....	354
People v. McKinney.....	89, 97	People v. New York, etc., Ry. Co.....	5, 164
People v. McLean.....	429		338, 435
People v. McMahon.....	135	People v. New York Cent. R. Co.....	28, 94
People v. Mead.....	67, 103, 134, 182, 266, 306, 357	People v. New York Cent., etc., R. Co.....	143, 376, 379
People v. Mechanics, etc., Sav. Inst.....	62	People v. New York & New Jersey Ry. Co.....	25
People v. Medical Society.....	266, 356		
People v. Merchants and Mechanics' Bank.....	53, 382		

	Page.		Page.
People v. Niagara Co., Board of Supervisors of.....	53, 128	People v. Police Commissioners..	97, 193
People v. Nichols... 85, 86, 128, 142, 245, 341, 371, 388	218		330
People ads. Noakes.....	132, 135, 141	People ads. Polinsky .....	144
People v. Noelke.....	95, 135, 265	People ads. Pontius...133, 135, 136, 181, 190	
People v. North.....	306	People ads. Poole .....	138
People v. North America, Bank of... 403	115	People v. Porter.....	97, 98
People v. Northern R. Co....	121, 367	People v. Potter .....	100
People ads. Northrup.....	128	People v. Powell.....	140
People v. Norton .....	443	People v. Powers ..	135
People v. Nostrand.....	268	People ads. Pratt .....	138
People v. O'Brien.....	98, 224	People v. Queens Co., Supervisors of.	86, 431
People ads. O'Brien.....	134	People v. Quigg.....	94, 328
People ads. O'Connell.....	132	People ads. Quimbo Appo..	128, 327, 371
People v. Ogdensburgh, Trustees of Village of.....	429	People ads. Quinn.....	140
People v. O'Keefe.....	71, 267	People v. Randall.....	53, 103
People v. Ontario Co., Supervisors of.	431	People ads. Ranney .....	140, 405
People v. Open Board, etc., Co..	199, 382	People v. Ransom .....	196, 267
	393	People v. Rathbun .....	196
People ads. O'Reiley.....	143	People ads. Ratzky.....	139
People ads. Ormby.....	136, 140	People ads. Rau .....	140
People ads. Osgood.....	133	People v. Raymond .....	101
People v. Otis..	95, 307	People ads. Read .....	133
People v. Otsego Co., Supervisors of.	266, 430	People ads. Real.....	35, 133, 136
People v. Oyer and Terminer, Court of .....	140	People v. Reeder .....	168, 396
People v. Palmer.....	95, 331	People ads. Remsen .....	136
People v. Park.....	475	People v. Richmond Co., Supervisors of .....	19, 218, 219, 266, 268, 336, 419
People v. Parker.....	144	People v. Robinson .....	394
People v. Parr.....	336	People v. Rochester, City of .....	98
People v. Pease .....	165	People v. Rochester, City Bank of.	56, 59
People v. Pendleton .....	121, 223	People v. Rochester, Common Council of .....	306
People v. Pennock... ..	418, 421	People v. Rochester, etc., R. Co..	103, 267
People ads. People.....	135		376
People v. Perley.....	165, 339	People ads. Rodgers.....	140
People ads. Perry .....	136	People v. Rogers.....	132, 137
People v. Petrea.....	100, 306	People v. Roper.....	101, 404
People v. Pettit .....	272, 382	People ads. Ruloff.....	141, 182
People ads. Phelps.....	141, 142	People ads. Rumsey.....	98
People v. Phillips.....	86, 137	People ads. Ryan... ..	129, 136, 137, 476
People ads. Pierson.....	134, 135, 136	People v. Ryan .....	430
People v. Pinckney..	98, 327	People v. Ryder .....	344
People v. Pinkerton ..	201	People ads. Sanchez ...	21, 132, 133, 136
People v. Police, Board of... 86, 123, 194	267, 330, 331, 339, 365	People ads. Sawyer .....	139
People v. Police and Excise, Board of.	71, 86	People v. Sawyer .....	436
		People v. Saxton.....	165
		People v. Schiellein .....	95, 165
		People ads. Schnicker .....	143
		People v. Schoonmaker .....	22, 72



# TABLE OF CASES.

593

	Page.		Page.
People v. Schroeder .....	71	People ads. Teachout .....	135
People v. Schryver.....	141	People v. Thacher .....	28, 339, 372
People v. Schuyler...73, 262, 267, 340, 397		People v. Thayer .....	73
People v. Scott .....	382	People ads. Therasson .....	140, 441
	421	People ads. Thomas... 134, 185, 139, 140	
People v. Security Life Ins. Co... 26, 241		People v. Thompson.....	141, 330
	242, 382	People v. Tibbets .....	459
People ads. Seiler.....	137	People v. Tompkins.....	219
People ads. Sessions, Justices of ...	142	People v. Trinity Church, Rector,	
People v. Shaw.....	129	etc., of .....	169, 173, 214, 413
People ads. Shay ....	132, 474	People v. Troy, Common Council of.	
People v. Shepard .....	98		19, 267, 307
People ads. Shepherd .....	98, 138, 139	People v. Tubbs.....	374, 422
People ads. Shippy.....	142	People ads. Tully....	143
People ads. Shorter.....	133, 141	People v. Tuthill .....	386
People ads. Shufflin.....	141	People ads. Tuttle.....	134, 143
People v. Simpson .....	261	People v. Tweed.....	23, 67, 301, 360
People ads. Sindram .....	135	People v. Ulster, Supervisors of....	219
People ads. Slatterly ....	135		266, 267, 284, 418, 432, 435
People ads. Smith.128, 140, 142, 328, 405		People v. Van Allen .....	100, 129
People v. Smith.. 25, 166, 193, 284, 331		People v. Van Alstyne...86, 122, 217, 218	
	374, 405, 428, 436	People v. Vanderbilt...327, 328, 338, 405	
People v. Snedecker.....	128	People v. Van Rensselaer.....	354
People v. Snyder .....	172, 173, 372	People v. Vilas .....	421, 448
People v. Soper.....	220	People ads. Wagner.....	132, 138
People v. Special Sessions, Justices of		People v. Walker .....	132, 404
Court of .....	99, 129	People ads. Walsh... .435, 436, 439, 440	
People v. Speir .....	224	People v. Walsh... ..	71
People v. Spencer .....	436	People ads. Walter ...100, 134, 137, 173	
People v. Spring Valley, etc., Co.122, 429		People v. Walter .....	86, 436
People ads. Stape ...	137	People v. Warden of State Prison ...	138
People ads. Starin .....	133	People v. Wasson .....	73
People ads. Stephens.....	134	People v. Waterford Turnpike Co....	447
People v. Stephens ....73, 161, 403, 415		People ads. Watson.....	140
People v. Stillwell .....	21	People ads. Webster.....	20, 141
People ads. Stokes ....	100, 141	People ads. Weed .....	138, 139
People ads. Stover .....	136, 142	People v. Weissenbach.....	40, 329
People ads. Stratton .....	143	People v. Wendell.....	267
People v. Sturtevant .....	252	People v. Wentz .....	137
People v. Suffern .....	435	People ads. Wenzler.....	98, 330
People v. Sullivan .....	136	People v. Westbrook .....	25
People ads. Sumner .....	144	People v. Westchester, Supervisors	
People v. Supervisors...101, 267, 336, 404		of .....	268, 431
	406, 419, 427, 428, 429	People v. Wheeler.....	339, 344
People v. Supervisors of Madison ...	430	People ads. White .....	133
People v. Sutherland . ....7, 222, 224		People v. Whitlock.....	97, 307
People v. Syracuse, Common Council		People ads. Wilke .....	26, 134, 137
of .....	167, 267, 305	People ads. Williams.....	142, 405, 475
People ads. Tabor.....	16, 138	People v. Williams.....	218
People v. Texas, Com'rs of...24, 60, 101		People ads. Wilson.....	142
	331, 405, 427, 428, 429, 430	People v. Wilson .....	164

	Page.		Page.
People v. Willett .....	137	Petrea ads. People .....	100, 306
People v. Williamsburgh Turnpike, etc., Co. ....	447	Petree ads. Stewart. ....	450
People ads. Willis .....	132	Petrie v. Adams. ....	29
People v. Willsea. ....	94	Pettee ads. Fountain .....	189
People's Fire Ins. Co. ads. Wilkes. .	237	Pettibone ads. Bush. ....	223
People ads. Wood. ....	133, 143	Pettibone ads. Foster. ....	55
People v. Wood. ....	307	Pettibone ads. Howe Machine Co ...	23
People ads. Woodford .....	139	Pettie ads. Shields. ....	146, 390
People v. Woodruff .....	330	Pettit ads. People .....	272, 382
People ads. Woods. ....	143	Pettit v. Shepard. ....	155, 177
People ads. Wynehamer. ....	97	Petty v. Tooker. ....	386
People ads. Yates. ....	141	Peugnet, Matter of .....	33, 332
People v. Zeyst .....	172	Peyser v. Mayor, etc. ....	44, 355
People ads. Zink .....	142	Peyser ads. Ranney. ....	295, 382
Pepin v. Lachenmeyer .....	246	Peyser v. Wendt. ....	31, 345, 384
Pepoon, Matter of. ....	464	Pfeiffer v. Adams .....	408
Percy, In re. ....	52	Pfohl v. Sampson .....	20
Perine ads. Barnes .....	106, 417	Pfohl v. Simpson .....	118
Perkins ads. Campbell. ....	65, 73, 366	Phalon ads. Burnett. ....	437
Perkins ads. City Bk. of New Haven.	326	Phelan ads. Collender. ....	187, 352, 384
Perkins v. Giles .....	41	Phelan ads. Mack .....	170, 300
Perkins v. Hill. ....	38	Phelps v. Bostwick. ....	113
Perkins ads. Hope Mut. Ins. Co. .	235, 238	Phelps ads. Case .....	210
Perkins ads. Laraway .....	146, 366	Phelps ads. City Nat. Bk. of Pough- keepsie. ....	215, 415, 421
Perkins ads. Leggett .....	446	Phelps v. Hawley. ....	218, 406
Perkins v. N. Y. Cent. R. Co .....	79	Phelps ads. Hiscock. ....	351
Perley ads. People. ....	165, 339	Phelps v. McDonald. ....	38
Perley v. N. Y. Cent., etc., R. Co. .	81	Phelps v. Nowlen .....	459
Perrin ads. Dows .....	8, 66	Phelps v. People. ....	141, 142
Perrin v. N. Y. Cent. R. Co. ....	155	Phelps ads. Pumpelly .....	114, 147
Perry ads. Adams .....	87, 473	Phelps, Exr. v. Pond .....	417
Perry v. Chester. ....	53, 395	Phelps v. Racey. ....	94, 213
Perry v. Dickerson .....	206	Phelps ads. Stockwell .....	57, 144
Perry v. Edwards .....	405	Phelps v. Van Dusen .....	256
Perry ads. Harris. ....	309, 328	Phelps v. Vischer .....	30, 317
Perry v. Lorrillard Fire Ins. Co. ....	234	Phelps v. Wait. ....	11, 343
Perry v. People. ....	136	Phoenix Bank v. Donnell .....	361
Persch ads. Foster. ....	31, 183	Phoenix Bank ads. Jones. ....	221, 388
Person v. Grier .....	476	Phoenix Bank ads. Michigan, State of.	41
Persons ads. Werely. ....	181	Phoenix Bank ads. New Hope and Delaware Bridge Co. ....	60
Pesant ads. Morse .....	105, 399	Phoenix Bank ads. Risley. ....	58, 91, 325
Pesant ads. Robinson. ....	65	Phoenix Bank v. Stafford .....	211
Peteler ads. Gilbert .....	457	Phoenix Nat. Bank of New York ads. Chapman. ....	91
Peters v. Delaplaine .....	403, 412	Phoenix Fire Ins. Co. ads. Colt. ....	227
Peters ads. Ogden. ....	46	Phoenix Ins. Co. v. Church. ....	320
Peterson v. Chemical Bank. ....	197, 198	Phoenix Ins. Co. v. Continental Ins. Co. ....	130
Peterson ads. Craighead .....	9	Phoenix Ins. Co. ads. Fabbri. ....	234
Peterson v. Mayor, etc. ....	334		
Peterson v. Rawson. ....	18, 107		
Peterson ads. Therasson .....	2		

	Page.		Page.
Phoenix Ins. Co. ads. Graham.....	234	Pickersgill ads. Easton .....	19, 296
Phoenix Ins. Co. ads. O'Brien....	227	Pickett v. Leonard.....	414
Phoenix Ins. Co. ads. Pechner....	233, 387	Pickett ads. Meth. Epis. Union Ch'rch,	386
Phoenix Ins. Co. ads. Providence, etc.,		Pier v. George.....	269
Co .....	236	Pier v. Hanmore.....	269
Phoenix Ins. Co. ads. Stevens.....	387	Pierce ads. Bell .....	428
Phoenix Mut. Life Ins. Co. ads. Bar-		Pierce v. Delamater .....	100
teau.....	239	Pierce v. Keator.....	156, 294
Phoenix Mut. Life Ins. Co. ads. Hig-		Pierce v. Pierce.....	108, 207, 271
gins.....	239	Pierce ads. St. John .....	359
Phoenix Mut. Life Ins. Co. ads. Mer-		Pierce ads. Wells .....	290, 296
sereau.....	229	Pierpont v. Patrick.....	466
Phoenix Mut. Life Ins. Co. ads. Palmer.		Pierpont v. Barnard.....	264
	238, 239	Pierpont v. Edwards .....	472
Phoenix Mut. Life Ins. Co. ads. Shaft.	387	Pierpont, Town of, v. Loveless.....	110, 279
Phoenix Warehousing Co. v. Badger.	118	Pierson v. Atlantic Nat. Bank.....	172
Phila., etc., v. Hotchkiss .....	270	Pierson ads. Bridger .....	19, 157
Philbin v. Patrick.....	32, 182	Pierson v. Freeman.....	42
Phillips, Matter of.....	332	Pierson v. Morch .....	105
Phillips v. Campbell .....	116	Pierson v. People.....	134, 135, 136
Phillips v. Clark .....	345	Pike v. Butler.....	169, 258
Phillips v. Conklin.....	455	Pike v. Johnson.....	244
Phillips ads. Cook.....	70	Pike v. Nash .....	106, 112
Phillips v. Davies.....	465	Pinckney v. Hegeman.....	167, 194
Phillip v. Gallant .....	104	Pinckney ads. People.....	98, 327
Phillips ads. Gillett .....	60	Pindar v. Continental Ins. Co.....	230
Phillips v. Gorham.....	96, 359	Pindar v. Kings Co. Ins. Co.....	227
Phillips ads. Hatters' Bank.....	324	Pindar v. Resolute Fire Ins. Co....	227
Phillips ads. Keller .....	272	Pinder ads. Reno .....	254
Phillips v. Mackellar .....	451	Pinkerton ads. People.....	201
Phillips v. McComb .....	179, 463	Pinkney ads. Heckmann .....	282, 404
Phillips v. Mayor, etc.....	330	Pinner ads. Nichols .....	207
Phillips ads. Noyes.....	113, 149	Pinney v. Orth.....	193
Phillips ads. People .....	86, 137	Pistor v. Hatfield.....	27
Phillips ads. Purdy .....	243	Pistor ads. Russell.....	288, 289
Phillips v. Rensselaer & Sar. R. Co..	312	Pitcher v. Hennessey.....	285
Phillips ads. Ritter.....	291	Pitcher ads. Ruckman .....	66, 346
Phillips ads. Robinson .....	7	Pitney v. Glens Falls Ins. Co....	227, 346
Phillips ads. Rogers.....	409	Pitt v. Davidson .....	103
Phillips ads. Roome....	111, 401, 466, 468	Pitt ads. Muldoon .....	38, 282
Phillips ads. Ruhl.....	210	Pitts ads. Argall.....	158, 292
Phillips v. Terry.....	151, 176, 460	Pitts v. Congdon.....	317
Phillips ads. Tilley .....	37	Pitts v. Corydon .....	422
Phillips v. Wheeler .....	196, 301	Pitts ads. Moore.....	248, 423
Phillips ads. Wood.....	433	Pitts v. Pitts.....	277
Phillips v. Wooster.....	210	Pitts v. Wilder....	7, 180
Phinney v. Broschell .....	301	Pittstown & Elmira Coal Co. ads.	
Phipps ads. Totten.....	258	Arnot .....	110
Phyfe ads. Chrystie.....	466	Pixley v. Clark .....	460
Phyfe v. Eimer.....	261	Place v. Cheesebrough.....	384
Pickering ads. McCormick. ....	64, 364	Place ads. Hills .....	323

	Page.		Page.
Place v. Minister...	93, 454	Poole v. Kermit.....	97, 399
Place ads. Nat. Bank of Gloversville.	318	Poole v. People.....	138
Planck ads. Thurber.....	131	Poor v. Guilford.....	343
Plass ads. Carman.....	347	Pope v. Allen.....	193, 337
Plass ads. Snyder.....	219	Pope v. Bank of Albion.....	61, 316
Plate v. N. Y. Cent. R. Co.....	205	Pope v. Cole.....	351
Platner ads. Dows.....	47, 249	Pope v. Hanmer.....	7
Platner v. Platner.....	190	Pope ads. James.....	260
Plato v. Reynolds.....	191, 326	Pope v. O'Hara.....	168, 461
Platt v. Beebe.....	62, 320	Pope v. Terre Haute Car Manuf. Co.	417
Platt ads. Bruce.....	269	Popham ads. Adams.....	338
Platt ads. Cahen.....	146, 391	Popham v. Cole.....	437
Platt ads. Carnes.....	197, 248	Poppenhausen ads. Richter.....	345
Platt ads. King.....	16, 251, 405	Poppenhausen ads. Riper...124, 351,	352
Platt v. Lott.....	46	Poppenhusen v. Seeley.....	448
Platt v. Platt.....	18, 23, 255	Port Chester, Village of, ads. Merritt.	44
Platt v. Woodruff.....	248, 252	Port Henry Iron Ore Co. ads. Man-	
Platte, County of, ads. Dodge...169,	435	ning.....	244, 311
Plattsburgh, etc., R. Co. ads. Hoyle.	119, 373	Porter ads. Chapman.....	445
Platz v. Cohoes, City of.....	304, 418	Porter v. Kingsbury.....	205, 361
Pleystead ads. Coleman.....	28	Porter ads. Macauley... ..	287, 383
Plimpton v. Bigelow... ..18, 49,	119	Porter ads. Newton.....	191, 320, 439
Plimpton ads. Robinson.....	36	Porter v. Parks.....	367
Plimpton Fireproof Elevating Co. ads.		Porter v. Parmley.....	299
Nelson.....	112	Porter ads. People.....	97, 98
Plumb v. Cattaraugus Co. Mut. Ins.		Porter v. Potter.....	476
Co... ..	231	Porter v. Purdy.....	43
Plumb ads. Schell.....	148, 175, 185	Porter v. Ruckmann.....	30
Plumb v. Tubbs.....	156	Porter v. Spence.....	107
Poillon ads. Jordan.....	348	Porter ads. Tift.....	471
Poillon v. Lawrence.....	65	Porter v. Waring.....	172, 328
Poillon v. Mayor, etc.....	282	Porter ads. Wetmore.....	198, 345, 365
Poillon v. Secor.....	351	Porter v. Williams.....	46, 419
Poillon ads. Smith.....	319	Porter v. Wormser.....	33, 407, 416
Poineer ads. Buswell.....	178, 380	Post v. Campbell.....	282
Poler v. N. Y. Cent. R. Co.....	376	Post v. Doremus.....	36
Police Comm'rs ads. People.....	330	Post v. Hover... ..	446, 471
Polinsky v. People.....	144	Post v. Kearney.....	259
Pollen v. LeRoy.....	149, 393	Post v. Mason.....	200, 464, 472
Pollett v. Long.....	308	Pothier v. Adriance.....	317
Pollock v. National Bank.....	61	Potter v. Carpenter.....	39, 104
Pollock v. Pollock.....	186, 442	Potter v. Cromwell.....	204
Pomeroy v. Tanner.....	318	Potter v. Ellice.....	346
Pond ads. Phelps' Exr.....	467	Potter ads. Fiske... ..	288, 455
Pond ads. Rider.....	106	Potter v. Greenwich, Town of....	385
Pondir ads. Muller.....	320	Potter v. Merchants' Bank...60, 150,	188
Pontius v. People..133, 135, 138, 181,	190	Potter ads. People.....	100
Ponvert ads. Belmont.....	208	Potter ads. Porter.....	476
Poole ads. Bard.....	91, 293, 344, 449	Potter v. Rowland.....	295
Poole ads. Day.....	392	Potter v. Smith.....	367
		Potter v. Van Vranken.....	1, 21

	Page.		Page.
Potter ads. Winfield.....	52	Pratt v. Hudson R. R. Co.....	11, 104
Potts v. Mayer. ....	193	Pratt v. Munson .....	374
Poucher v. Blanchard .....	54	Pratt v. New York Cent. Ins. Co. 233,	234
Poucher v. New York Cent. R. Co... 79		Pratt v. Ogden.....	455
Poucher ads. Second Nat. Bk. of Oswego . . . . .	32, 317	Pratt v. People .....	138
Poughkeepsie, City of, ads. Dickinson. 110, 184		Pratt v. Short.....	117, 323, 406
Poughkeepsie, City of, ads. Swift....	305	Pratt v. Stevens.....	48
Poughkeepsie Gas Co. v. Citizens' Gas Co .....	213, 222	Pratt v. Strong.....	327
Poughkeepsie Ins. Co. ads. Wood ...	231	Pray v. Hegeman.....	470, 473
Poughkeepsie Mut. Ins. Co. ads. Bryant .....	236	Prentice ads. Galvin.....	184
Poughkeepsie & Salt Point Plank-road Co. v. Griffin.....	358	Prentice v. Geiger.....	459
Poulin v. Broadway, etc., R. Co....	80	Prentice v. Janssen... 153, 347, 367,	463
Powell ads. Bergen.....	326, 341		467, 468
Powell ads. Berger. ....	102	Prentice v. Knickerbocker Life Ins. Co .....	241
Powell ads. McAlpin.....	258	Prentice ads. Marvin .....	147
Powell ads. People.....	140	Presbyterian Church ads. Alexander Presbyterian Church .....	386
Powell v. Powell.....	115	Pres. Cong., Trustees of, ads Van Deuzen .....	347, 386
Powell ads. Price .....	73, 77, 78	Presbyterian Soc. v. Beach.....	417
Powell ads. Rider.....	286, 369, 385	Prescott ads. Van Biel.....	437
Powell v. Tuttle.....	265, 443	President, etc., Del. & H. C. Co. v. Whitehall, Village of .....	375
Powell v. Waldron.....	371, 381, 438	President, etc., of D. & H. C. Co. v. Pennsylvania Coal Co .....	40
Power v. Cassidy.....	465, 467	President, etc., v. Cornen.....	120
Power v. Lester.....	273, 287	President, etc., v. Hasbrouck... 199,	426
Power ads. Quinn.....	279	President, etc., of Fredonia ads. Miner .....	428
Powers v. Benedict.....	393	President, etc., of Greenbush ads. Parr .....	302
Powers v. Bergen.....	96	President, etc., of Gt. Western Turnpike Co. ads. Titus .....	121
Powers ads. Booth.... 115, 150, 205,	325	President, etc., of Ins. Co. of N. A. ads. McMaster .....	233
Powers ads. Curry .....	213	Preston ads. Gates.....	247
Powers ads. Everson . ....	146	Preston v. Morrow .....	384
Powers ads. French .....	34, 388	Preston ads. Westfall .....	430, 432
Powers ads. Grissler .....	168	Prevot v. Lawrence.....	259, 274
Powers v. Gross .....	124	Price, Matter of .....	221, 251
Powers v. Johnson .....	173	Price ads. Crane .....	451
Powers ads. People .....	135	Price ads. Drake .....	200
Powers v. Shepard..... 69, 94,	409	Price ads. Haight.....	6, 460
Powers ads. Vanneman .....	274	Price v. Hartshorn .....	75, 175
Powers ads. Walsh .....	221	Price v. Keyes .....	10, 209
Pratt v. Andrews .....	191	Price v. Lyons Bank .....	450
Pratt ads. Chamberlain .....	433	Price v. McGown .....	103
Pratt v. Chase.....	224, 367	Price ads. Onondaga Trust and Deposit Co. ....	467
Pratt v. Coman .....	320	Price v. Oswego & Syracuse R. Co... 77	
Pratt v. Eaton .....	120, 293		
Pratt v. Elkins.....	193, 453		
Pratt v. Foote.....	32, 57, 92		
Pratt ads. Harris.....	391		
Pratt ads. Hook.....	110, 315, 342		

	Page.		Page.
Price v. Powell.....	73, 77, 78	Pugsley ads. West Side Bank.....	419
Price v. Price.....	1, 19	Puig ads. Madge.....	42
Price ads. Priest.....	26	Pullman v. Corning.....	111
Price ads. Sweetman.....	212	Pullman ads. Horn.....	462
Price ads. Wakeman.....	20	Pultz ads. Carman... ..	38, 434, 456
Prichard v. Thompson.....	470	Pulver ads. Armitage.....	384, 423
Priebe v. Kellogg Bridge Co.....	440	Pulver v. Harris.....	53
Prior v. Price.....	26	Pumpelly v. Phelps.....	114, 147
Priest ads. Stilwell.....	161	Purcell ads. Cone.....	63
Prime v. Koehler.....	410	Purcell ads. Innes.....	26
Prince v. Conner.....	157	Purcell v. Jaycox.....	8
Prince ads. Stannard.....	207	Purchase v. Matteson.....	442
Prindle v. Caruthers.....	273, 360	Purdy ads. Estevez.....	451
Pringle v. Woolworth... ..	92, 172, 246	Purdy ads. Gedney.....	28
Prior ads. Chamberlain.....	26, 352	Purdy v. Hayt.....	425, 465, 466
Prior v. Williams.....	285, 286, 385	Purdy ads. Hunt.....	423
Produce Bk. v. Morton.....	17, 29, 48, 130, 250	Purdy v. Huntington.....	290
Proestler v. Kuhn.....	38	Purdy ads. Lounsbury.....	19, 89, 444
Prospect Park, etc., R. Co., Matter of Petition of.....	25, 94, 126, 375	Purdy v. N. Y. & N. H. R. Co.....	376
Prospect Park, etc., R. Co. ads. Mur- dock.....	222, 265	Purdy ads. Palmer.....	352, 423
Prospect Park, etc., R. Co. ads. Wash- ington Cemetery.....	167, 406	Purdy v. Phillips.....	243
Prospect Park, etc., R. Co. v. Wil- liamson.....	166, 217, 375	Purdy ads. Porter.....	43
Prosser ads. Bush.....	187, 363	Purdy v. Vermilyea.....	367
Prosser ads. Roberts.....	365	Pursell ads. Riggs.....	296, 301
Protestant Episcopal School, Matter of.....	125, 327	Pursell v. Mayor, etc.. ..	44
Prouty v. Lake Shore, etc., R. Co. ...	347	Purvis v. Coleman.....	223
	359, 373	Purvis ads. Morss.....	196
Prouty ads. Schermerhorn ... ..	124, 336	Putnam ads. Bank of Auburn... ..	121, 322
Prouty ads. Swift.....	361, 395	Putnam v. Broadway, etc., R. Co....	81
Providence, etc., Co. v. Phoenix Ins. Co.....	236	Putnam v. Hubbell.....	47
Providence, etc., Steamboat Co. ads. Knowlton.....	400	Putnam ads. Leavitt.....	317
Provoost v. Calyer.....	469	Putnam ads. Savage.....	352
Provost v. Patchin.....	400	Putnam ads. Truslow.....	56, 195
Provost v. Provost.....	29, 469	Putnam Fire Ins. Co. ads. Holden... ..	170
Prowitt v. Rodman.....	465		387, 435
Pruden v. Schiffer.....	277	Pyle ads. Beebe.....	64
Prussia, etc., Society ads. Gram.....	386	Pyne ads. Ferrer... ..	465
Pruyn ads. Saratoga Co. Bk.....	249, 276, 319	Quackenbos v. Sayer.....	450
Pryor ads. Chamberlin.....	208	Quackenboss v. Southwick.....	446
Pryor ads. Hatch.....	175	Quackenbush ads. Danks.....	95
Public Works, Matter of Department of.....	25	Quackenbush ads. Lockwood.....	31
Pugsley v. Aikin.....	255	Queens Co. Ferry Co. v. Wyckoff....	203
Pugsley v. Kisselburgh.....	20, 358	Queen Ins. Co. ads. Gibbs.....	235
		Quenzer ads. Wachter.....	263
		Quick v. Wheeler.....	104
		Quicksilver Mining Co. ads. Kent ...	119
		Quigg ads. People ... ..	94, 328
		Quigley ads. Barnes.....	360
		Quimbo Appo v. People ... ..	123, 327, 371
		Quimby v. Clafin.....	24, 301

	Page.		Page.
Quin v. Lloyd.....	189, 366	Ransom ads. Barry.....	169, 177, 410
Quin v. Moore.....	4, 45, 474	Ransom v. N. Y. & Erie R. Co.....	145
Quin ads. Skinner.....	255, 466	Ransom v. Nichols.....	272
Quinby v. Straus.....	441	Ransom ads. People.....	196, 267
Quinby v. Vanderbilt.....	75	Rapalee v. Stewart.....	16, 46, 169
Quincey v. White.....	416	Raplee ads. Wilkin.....	19
Quincey v. Young.....	22	Rapp ads. Dorrity.....	336
Quinlan v. Russell.....	336	Rapp ads. Ducker.....	345, 423
Quinn ads. Erickson.....	412	Raritan, etc., R. Co. ads. Beach.....	115, 183
Quinn ads. Globe Marble Hills Co.....	204		432
Quinn v. Hardenbrook.....	468	Ratcliffe v. Cary.....	155, 189
Quinn v. People.....	140	Ratcliffe v. Gray.....	69, 155
Quinn v. Power.....	279	Rathbone ads. Codd.....	58, 118, 363, 451
Quinn ads. Smillie.....	240, 274	Rathbone v. Hooney.....	71, 288
Quinn v. Van Pelt.....	145	Rathbone ads. Juliard.....	48
Quintard ads. Richard.....	110	Rathbone v. McConnell.....	123
Quitman ads. Lovell.....	463	Rathbone v. Citizens' Steamboat Co..	79
		Rathbun ads. Fitch.....	276
Racey ads. Dobson.....	8, 474	Rathbun ads. Harris.....	109
Racey ads. Phelps.....	94, 213	Rathbun v. Northern Cent. Ry. Co..	413
Race ads. Tillotson.....	463	Rathbun ads. People.....	196
Radcliff ads. Van Heusen.....	255, 287	Rathbun ads. Smith.....	25, 32, 384
Radcliff ads. Livingston.....	19	Rathburn ads. Smith.....	19
Radcliff's Ex'rs v. Mayor, etc.....	303	Rathman ads. Bitter.....	275
Radway v. Briggs.....	461	Ratzky v. People.....	139
Radway ads. McAndrew.....	173, 319, 337	Rau ads. Hess.....	416
Rae v. Beach.....	448	Rau v. People.....	140
Raeder ads. Rickerson.....	298, 300	Raub ads. Fisher.....	103
Rafferty ads. McMullen.....	412	Raubitschek v. Blank.....	325, 407, 475
Railway Pass. Ass. Co. ads. Northrup.	242	Rauhr ads. McMahon.....	35, 49
Railway Pass. Ass. Co. ads. Shader..	242	Raux v. Brand.....	414
Ramaley v. Leland.....	223	Raux ads. Hagadorn.....	418
Ramsden v. Ramsden.....	272, 277	Rawdon ads. Austin.....	250, 360
Ramsey ads. Erie Ry. Co.....	16, 221	Rawdon ads. Campbell.....	471
Rand ads. Hancock.....	223	Rawley v. Brown.....	163, 173
Rand ads. More.....	127	Rawls v. American Mut. Life Ins.	
Randall v. Carpenter.....	145	Co.....	177, 238
Randall v. Elwell.....	374, 427	Rawls v. Deshler.....	66, 205
Randall ads. People.....	53, 103	Rawson v. Holland.....	76
Randall ads. Reed.....	392, 393	Rawson v. Lampman.....	447
Randall v. Sackett.....	2, 448	Rawson v. Pennsylvania R. Co.....	81, 273
Randall v. Sanders.....	157	Rawson ads. Peterson.....	18, 107
Randall ads. Wallis.....	189	Ray ads. DuBois.....	464
Randall ads. Wilson.....	108, 183	Ray ads. Sizer.....	352, 354, 420
Randolph v. Loughlin.....	176	Ray ads. Sutton.....	35
Ranger v. Goodrich.....	292, 293, 294	Ray ads. Wait.....	393
Rankin v. Elliott.....	373	Raymond ads. Ogden.....	121
Rann v. Home Ins. Co.....	227	Raymond ads. People.....	101
Ranney v. People.....	140, 405	Raymond v. Richmond.....	36, 206, 366
Ranney v. Peyser.....	295, 382	Raymond v. Schwinger.....	76, 385
Ranney ads. Wilder.....	198, 467	Raynor ads. Bullard.....	453

	Page.		Page.
Raynor v. Pacific Nat. Bk.....	49, 62	Reed v. Stryker.....	345
Raynor v. Raynor.....	25	Reed v. United States Express Co...	75
Raynor ads. Robinson.....	4, 34	Reed ads. Vose.....	341
Raynor v. Selmes.....	296	Reeder ads. People.....	168, 396
Read ads. Allis.....	409	Reeder v. Sayre.....	38, 260
Read v. Buffalo, City of.....	254, 302, 341	Rees ads. Arnold...	99
Read ads. Collum.....	44	Reese v. Rutherford.....	243
Read ads. Collumb.....	351, 445	Reese v. Smyth.....	33, 242
Read ads. Concordia Sav. Assn.....	117, 288	Reeve, Matter of Petition of.....	21
	450	Reeves v. Kimball.....	456
Read ads. Davis.....	306, 371	Reformed Dutch Church ads. Att'y- Gen'l.....	386
Read v. Decker.....	108	Reformed Church of Gallupville v. Schoolcraft.....	386
Read v. French.....	53, 249	Reformed Prot. Dutch v. Brown.....	386, 417
Read v. People.....	133	Reformed Protestant Dutch Church of New Prospect ads. Connitt.....	386
Read v. Spaulding.....	76	Rehberg v. Mayor of N. Y. ....	304
Read ads. Van Rensselaer.....	256, 469	Reid v. Gardner .....	247
Read v. Waterhouse.....	125	Reid ads. Geraty.....	71
Real v. People...	35, 133, 136	Reid ads. Harsha..	130, 145, 402, 407, 456
Real Estate Trust Co. v. Keech.....	452	Reid v. Lancaster F. Ins. Co...	236
Reals ads. Globe, etc.....	5, 238	Reid v. McCrum.....	225, 292
Reciprocity Bank, Matter of.....	61, 101	Reid v. Sprague.....	446
Reckhan v. Schanck.....	260	Reilly ads. Hesberg.....	398
Rector v. Clark...	218	Reilly ads. Anderson ...	99, 129
Rector, etc., v. Crawford.....	4, 386	Reilly ads. Lockman.....	198, 295
Rector of Christ Church v. Mack.....	162, 296	Reilly ads. Schaeffer.....	290
Rector, etc., of Trinity Church v. Higgins ..	257	Reiman ads. Schuehle...	48
Rector, etc., of Trinity Church ads. People.....	169, 173, 413	Reitz v. Reitz.....	412, 444
Rector, etc., v. Rector, etc.....	386	Relief Fire Ins. Co. ads. Steinbach. 165, 206, 232	
Reddington ads. Gilman.....	446	Remerschnider ads. Dygert.....	271
Redfield v. Holland Purchase Ins. Co. 31, 229		Remington ads. Baker.....	37
Redfield v. Tegg.....	10	Remington v. Palmer.....	410, 455
Redfield ads. Walrath.....	168	Remington Ag. Works ads. New York, etc., Assoc.....	14
Redlich v. Doll...	323	Remington Paper Co. ads. O'Dough- erty.....	294
Redmond v. Liverpool, etc., Steam- boat Co.....	77	Remington Paper Co. v. O'Dougherty. 89, 176, 206	
Reed v. Board of Education.....	106	Remsen v. Beekman.....	423
Reed v. Board of Education of Brook- lyn.....	114	Remsen ads. Brookfield.....	396, 397
Reed ads. Boisaubin .....	259, 364, 390	Remsen ads. Buck.....	33, 151
Reed ads. Brady.....	178	Remsen v. Graves.....	168, 216
Reed ads. Emmet.....	228	Remsen ads. Jacobs .....	47
Reed v. Farr .....	69	Remsen ads. McClelland.....	349
Reed v. Gannon.....	300, 337	Remsen v. People.....	136
Reed v. McCourt.....	69, 156	Remsen ads. Richtmeyer ..	19, 45, 194, 397
Reed ads. Mitchell.....	350	Remsen ads. Sibell.....	47
Reed v. New York Cent. R. Co.....	186	Remsen ads. Towle ..	155, 329
Reed v. Randall.....	392, 393		
Reed v. Reed .....	275, 425		



	Page.		Page.
Renard v. Hargous . . . . .	49, 129	Rhinebeck & Conn. R. Co., Matter of.	375
Renard v. O'Brien . . . . .	130	Rhineland, Matter of . . . . .	335
Renard v. Sampson . . . . .	104	Rhodes ads. Culver . . . . .	6, 433
Reubens v. Joel . . . . .	48	Ricard v. Sanderson . . . . .	291
Reno v. Pinder . . . . .	254	Rice ads. Bull . . . . .	449
Rencis ads. Chrysler . . . . .	174, 316, 324	Rice v. Ehele . . . . .	17, 358, 388
Rensselaer & Saratoga R. Co. ads.		Rice v. Floyd . . . . .	37
Barkley . . . . .	9, 409	Rice v. Harbeson . . . . .	92, 465
Rens. & Sar. R. Co. ads. Bernhardt .	187	Rice ads. Herkimer . . . . .	197, 225
	811	Rice v. Isham . . . . .	11, 38, 355, 423
Rensselaer, etc., R. Co. v. Davis .	125, 166	Rice ads. Lapham . . . . .	219, 254, 357
Rensselaer & Saratoga R. Co. ads.		Rice v. Manley . . . . .	152, 209, 407
Hart . . . . .	81	Rice ads. Matthews . . . . .	210
Rens. & Sar. R. Co. ads. Pelton . . .	77	Rice ads. Vail . . . . .	184, 188
Rens. & Sar. R. Co. ads. Phillips . .	321	Rich ads. Milks . . . . .	410
Renwick v. New York Cent. R. Co .	377	Rich v. New York Cent., etc., R. Co.	111, 189
Repp ads. Baltes . . . . .	116		
Republic Fire Ins. Co. ads. Greene . .	234	Richard v. Quintard . . . . .	110
	246	Richard v. Wellington . . . . .	187
Republic Life Ins. Co. ads. Shaw .	106, 238	Richards ads. Hackett . . . . .	259
Requa v. Collins . . . . .	317	Richards v. Millard . . . . .	7
Requa v. Holmes . . . . .	2, 348	Richards v. Richards . . . . .	328
Requa v. Requa . . . . .	476	Richards v. Warring . . . . .	317, 322
Requa v. Rochester, City of . . . . .	303	Richardson ads. Brown . . . . .	187, 360, 474
Resolute Fire Ins. Co. ads. Pindar .	227	Richardson v. Carpenter . . . . .	342
Revere Copper Co. v. Dimock . . . .	65	Richardson v. Crandall . . . . .	340, 407
Rexford ads. Guernsey . . . . .	3, 243	Richardson v. Draper . . . . .	215, 244
Rexford v. Knight . . . . .	72, 93	Richardson v. Hughitt . . . . .	349
Rexford ads. Morris . . . . .	363, 389	Richardson v. New York Cent. R. Co.	377
Rexford v. Widger . . . . .	450	Richardson ads. Tremain . . . . .	102
Rexter v. Starin . . . . .	311, 440	Richardson ads. Wilmot . . . . .	389, 393
Reymert ads. West Point Iron Co .	157, 222	Richmond Gas-light Co. v. Town of	
	357, 370	Middletown . . . . .	406, 435
Reynolds ads. Beach . . . . .	2, 255	Richmond ads. Coulter . . . . .	317
Reynolds ads. Beers . . . . .	351	Richmond v. Niagara Fire . . . . .	32, 225, 232
Reynolds ads. Coffin . . . . .	359, 361, 405		458
Reynolds ads. Cole . . . . .	351	Richmond ads. Raymond . . . . .	36, 206, 366
Reynolds v. Commerce Fire Ins. Co .	227	Richmond, Supervisors of, ads. Peo-	
Reynolds ads. Higgins . . . . .	72, 218	ple . . . . .	19
Reynolds ads. Mandeville . . . . .	52, 174, 186	Richmond v. Union Steamboat Co . .	78
Reynolds v. New York Cent. R. Co .	313	Richmond Turnpike Co. ads. Vander-	
Reynolds v. Park . . . . .	288, 290	bilt . . . . .	11, 121
Reynolds ads. Plato . . . . .	191, 326	Richmondville Union Seminary v.	
Reynolds v. Reynolds . . . . .	277	McDonald . . . . .	417
Reynolds v. Reynolds' Executors . .	472	Richter v. Poppenhausen . . . . .	345
Reynolds v. Robinson . . . . .	106, 173, 176, 272	Richtmeyer v. Morss . . . . .	204, 371
	472	Richtmyer v. Bartley . . . . .	342, 394
Reynolds ads. Sperry . . . . .	254	Richtmyer ads. Mott . . . . .	155
Reynolds ads. Stephens . . . . .	99	Richtmyer v. Remsen . . . . .	19, 45, 194, 397
Reynolds ads. Wheeler . . . . .	402, 410	Rickerson v. Reader . . . . .	298, 330
Rheel v. Hicks . . . . .	65	Ricketts ads. Catlin . . . . .	20, 50, 418

	Page.		Page.
Rider v. Bagley...	295	Robbins v. Fuller.....	353
Rider ads. Friess.....	454	Robbins v. Gorham.....	254
Rider v. Miller.....	176, 207	Robbins ads. Ingram.....	249
Rider v. Pond.....	106	Robbins ads. Osborn.....	162
Rider v. Powell.....	286, 369, 385	Robbins v. Robbins.....	446, 448
Rider v. Stryker.....	167	Robert v. Corning.....	465, 467
Rider v. Union India Rubber Co.	104, 205	Robert v. Good.....	30
Rider v. White.....	14, 438	Roberts, Matter of.....	23, 224, 333
Ridge ads. Turk.....	68	Roberts ads. Bank of Auburn...	288, 405
Ripley v. Glenville Woolen Co...	419	Roberts v. Berdell.....	412
Riggs v. American Tract Society.	114, 214	Roberts v. Carter.....	395
	223	Roberts v. Chittenden.....	78
Riggs v. Cragg.....	425	Roberts ads. Cisco.....	357
Riggs v. Pursell.....	296, 301	Roberts v. Donnell.....	35
Riggs v. Waydell.....	24	Roberts ads. Favill.....	170
Righter, Matter of.....	185, 334	Roberts v. Fisher.....	285, 355
Riley v. Brooklyn, City of.....	188	Roberts ads. Gauge.....	184
Riley ads. Hessberg.....	95	Roberts ads. Gillett.....	115
Riley v. Rochester, City of.....	305	Roberts ads. Hunt.....	423
Rinaldo ads. Ruff.....	151	Roberts ads. Jackson.....	228
Rinchey v. Stryker.....	51, 397	Roberts v. Johnson.....	78, 166, 346, 474
Rindge v. Baker.....	353	Roberts ads. Kelly.....	104
Rindge v. Judson.....	214	Roberts ads. Lehman.....	89, 233
Ring v. Cohoes, City of.....	304	Roberts v. Opdyke.....	399
Ring ads. Mason.....	53	Roberts v. Prosser.....	365
Ring v. McCoun.....	447	Roberts v. Roberts.....	163
Ring v. Steele.....	383	Roberts ads. Smith.....	284, 288, 295
Rinn v. Astor Fire Ins. Co.....	121	Roberts ads. St. John.....	317
Rintoul ads. Buchan.....	336, 425	Roberts ads. Van Buskirk.....	82, 146
Riper v. Poppenhausen....	124, 351, 352	Roberts v. White.....	149, 222
Ripley v. Aetna Ins. Co....	229, 231, 232	Robertson ads. Arnold.....	39
Ripp ads. Baltes.....	171, 195, 298, 300	Robertson v. Atlantic Mut. Ins. Co...	237
Risley v. Brown.....	422	Robertson v. Bullion.....	386, 446
Risley v. Chautauqua Co. Bank...	44, 120	Robertson ads. Caw.....	468, 471
	196	Robertson ads. Heermans.....	445
Risley v. Indianapolis, etc., R. Co...	105	Robertson ads. Herrington...	26, 274, 443
Risley v. Phoenix Bank of the City of		Robertson v. Knapp.....	474
New York.....	58, 91, 325	Robertson v. Met. Life Ins. Co.....	239
Risley v. Smith.....	342	Robertson ads. Smith.....	293, 463
Ritch v. Smith.....	9	Robertson ads. Wilson.....	47
Rittenhouse v. Independent Line of		Robie v. Sedgwick.....	184, 437
Telegraph.....	433	Robins v. Ackerly.....	204, 354
Ritter ads. Krekeler.....	29, 247, 363	Robins v. Carll.....	243
Ritter v. Phillips.....	291	Robinson v. Ryan.....	297
Ritter v. Worth.....	90, 154, 205	Robinson, Matter of.....	446
Roach ads. Duckworth.....	251, 269	Robinson v. Bank of Attica.....	60
Roach ads. Lake Shore, etc., R. Co.		Robinson ads. Bartlett.....	317
	88, 306, 431	Robinson ads. Billings.....	119, 270
Roach v. N. Y. & Erie Ins. Co.....	232	Robinson v. Brennan.....	195, 249
Robbins, Matter of.....	333	Robinson v. Chamberlain.....	72, 309
Robbins v. Dillaye.....	450, 453	Robinson v. Chemical Nat. Bank....	8

## TABLE OF CASES.

603

	Page.		Page.
Robinson v. Chittenden.....	401	Rochester, Commercial Bank of, v. Spencer .....	21
Robinson ads. First Baptist Soc., Trustees of.....	106, 417	Rochester, Common Council of, ads. People .....	306
Robinson ads. Fuller .....	184	Rochester, etc., R. Co. ads. Craig....	166
Robinson ads. Hall.. ..	115	Rochester, etc., R. Co. ads. People, 103, 267, 376	
Robinson v. Howes.....	56, 395	Rochester & Syracuse R. Co. ads. Clarke.....	76
Robinson v. International Life Ass. Soc .....	9	Rochester & Syracuse R. Co. ads. Curtis.....	148, 173, 379
Robinson v. Kime.....	7, 155, 458	Rochester & Syracuse R. Co. ads. Packer ..	458
Robinson ads. McKenna.....	295	Rochester & Syracuse R. Co. ads. Sherman .....	280
Robinson v. Nat. Bank of Newberne, 49, 62, 117, 252		Rochester Water Commissioners, Matter of Application of.....	166, 307
Robinson v. N. Y. Cent. R. Co.....	312	Rochester White Lead Co. v. City of Rochester.....	304, 458
Robinson ads. Olcott.....	195	Rockefeller ads. Fryer ....	153, 154, 294
Robinson ads. People.....	394	Rockford, etc., R. Co. v. Boody....	42, 50
Robinson v. Pesant.....	65	Rockwell v. Brown .....	156, 189, 246
Robinson v. Phillips .....	7	Rockwell v. McGovern.....	224
Robinson v. Plimpton .....	36	Rockwell v. Merwin. ....	358, 381
Robinson v. Raynor.....	4, 34	Rockwell v. Nearing.....	100
Robinson ads. Reynolds ....	106, 173, 176, 272, 472	Rocky Mountain Nat. Bank v. Bliss..	269
Robinson v. Stewart.....	210	Rodbourn v. Seneca Lake Grain and Wine Co .....	282
Robinson v. Weil .....	108	Rodes v. Bronson .....	107
Robinson v. Wheeler .....	172, 262, 458	Roderigas v. East River Sav. Inst..	197, 198, 425
Robinson v. Wiley .....	208	Rodman v. Fincke .....	473
Robinson v. Williams .....	289	Rodman v. Henry .....	419
Robinson ads. Wood.....	210, 445	Rodman ads. Bowitt.....	465
Roby ads. Turner .....	367	Rodermund v. Clark ..	165
Roche ads. Emigrant Ind. Sav. Bk....	46	Rodgers v. People... ..	140
Roche ads. Knapp .....	60, 145, 250	Rodgers v. Phillips .....	409
Roche v. Marvin .....	357	Roe v. Barker.....	410
Rocheleau ads. Hatcher.....	246	Roe v. Boyle .....	24
Rochester, City Bank of, ads. People. 56		Roe ads. Carpenter.....	210
Rochester, City Bank of, ads. Whiting 310		Roe v. Conway .....	256
Rochester City Bank ads. Cattle.....	113	Roehner v. Knickerbocker Life Ins. Co .....	239, 319
Rochester City Bank v. Elwood ....	420	Roessle ads. Rosenplaenter .....	223
Rochester, City of, ads. Bastable ....	29	Rogers v. Bonner .....	50
Rochester, City of, ads. Clarke....	28, 306	Rogers ads. Clapp.....	353
Rochester, City of, ads. Hassan .....	307	Rogers ads. Clyde.....	25
Rochester, City of, ads. Monroe Sav. Bk .....	60, 427	Rogers v. Durant .....	22
Rochester, City of, v. Montgomery... 305		Rogers ads. Garnsey .....	287
Rochester, City of, ads. Paine.....	124	Rogers ads. Kinnier.....	467
Rochester, City of, ads. People .....	98	Rogers v. Laytin.....	33,
Rochester, City of, ads. Requa .....	303		
Rochester, City of, ads. Riley.....	305		
Rochester, City of, ads. Rochester White Lead Co.....	304, 458		
Rochester, City of, ads. Smith... ..	305, 459		
Rochester, City of, v. Town of Rush, 307, 432			

	Page.		Page.
Rogers v. McLean.....	348	Root v. Henry.....	221
Rogers ads. New York Guaranty and Indemnity Co.....	21	Root ads. Taylor.....	2, 28, 127
Rogers ads. People.....	132, 137	Root v. Wagner.....	194
Rogers ads. Scott.....	148, 150, 202	Root v. Wright.....	54, 292
Rogers v. Sinsheimer.....	354	Roper ads. People.....	101, 404
Rogers v. Smith.....	104	Roraback v. Stebbins.....	249, 273, 431
Rogers v. Stephens.....	96	Rorke v. Thomas.....	268
Rogers ads. Tobias.....	65, 422	Rosa v. Butterfield.....	420, 452
Rogers v. Vosburgh.....	324	Rosa ads. Spaulding.....	112
Rogers v. Weir.....	56	Rose v. Boston & Albany R. Co... ..	379
Rogers v. Wheeler.....	32, 73, 77, 78	Rose v. Bunn.....	157
Rogers ads. Woodmansee.....	21	Rose ads. Chapman.....	320
Rogers Locomotive, etc., v. Kelly... ..	443	Rose ads. Copley... ..	254, 339
Rohrbach v. Germania Fire Ins. Co... ..	230	Rose ads. Distin.....	263
Rohrschneider v. Knickerbocker Life Ins. Co.....	209	Rose v. Rose.....	466
Rollin v. Cross.....	282	Rose v. Rose Association.....	126
Rolland ads. Frecking.....	275, 360	Rose ads. Samson.....	88, 144, 164
Rolker v. Great Western Ins. Co....	236	Rose Association ads. Rose.....	126
Rollwagen v. Rollwagen.....	463	Rosenback ads. Hinnemann.....	107
Romaine v. Van Allen.....	150	Rosenback v. Manuf. & Builders' Bank.....	61
Romaine ads. Waldron.....	391	Roseboom v. Roseboom.....	467
Rome Exchange Bank v. Aff.....	262	Rosebrook v. Dinsmore.....	441, 454
Rome Exchange Bank v. Eames.....	444, 446	Rosekrans ads. Bates.....	355, 362
Rome, etc., R. Co. ads. Anderson.....	31, 179	Rosendale Manuf. Co. ads. Bogardus.....	117
Rome, etc., R. Co. ads. City Bank... ..	66	Rosendale ads. Mowry... ..	229
Rome, etc., R. Co. ads. Holsapple.....	75, 346	Rosenplaenter v. Roessle.....	223
Rome, etc., R. Co. ads. McBratney... ..	54	Rosenstock ads. Greentree.....	11, 51, 360
Rome, Village of, ads. Bank of Rome.....	95, 96, 316	Rosenthal ads. Woodhull.....	157, 164, 259
Rome, etc., R. Co. ads. Webb.....	379		260
Rome, etc., R. Co. ads. Wilcox.....	313	Rosevelt v. Brown.....	269
Romertze v. East River Nat. Bank... ..	192	Ross, Matter of.....	27, 176
Ronald ads. Watts.....	473	Ross v. Ackerman.....	453
Rondout, Trustees of, ads. Woolsey.....	14, 302, 341, 367	Ross v. Curtiss.....	419
Roof ads. Elwood.....	25, 35	Ross v. Ferry.....	291
Roome v. Phillips.....	11, 401, 466, 468	Ross v. Hardin.....	104
Roome ads. Trustees of Exempt Fire- men's Fund.....	94, 328	Ross ads. Holt.....	11
Rooney v. Second Ave. R. Co.....	53	Ross v. Hurd.....	319
Roop ads. Erie County Savings Bank.....	294, 297	Ross ads. Loughran.....	154, 259
Roosevelt v. Draper.....	305, 331	Ross v. Mather.....	360
Roosevelt v. Hopkins.....	260	Ross ads. Moncrieff.....	468
Roosevelt Hospital v. Mayor, etc.....	43, 333	Ross ads. Thorp.....	111, 114
Roosevelt v. Linkert.....	29	Ross ads. White.....	117, 171, 234
Root ads. Burrell.....	409	Ross v. Wood.....	209, 247, 356
Root ads. Evans.....	202	Roth v. Buffalo & State Line R. Co... ..	81
Root v. Great Western R. Co.....	75	Roth ads. Day.....	2, 182, 446
		Roth v. Wells.....	195
		Rothery v. New York Rubber Co.....	125, 460
		Rounds v. Delaware, etc., R. R. Co... ..	279, 380
		Rouse v. Lewis.....	390, 440

## TABLE OF CASES.

605

	Page.		Page.
Rouse ads. March.....	408	Ruse v. Mut. Ben. L. Ins. Co....	238, 241
Rouse ads. Vann. ....	33, 261	Rushmore ads. Mumper....	48, 196, 392
Rouse v. Whited... ..	190		398
Rowan v. Hyatt.....	9	Russell v. Allen .....	433
Rowan v. Kelsey .....	171, 259	Russell ads. Birdsall.....	324
Rowe ads. Briggs.....	70	Russell v. Carrington.....	391
Rowe ads. Fuller.....	116	Russell ads. Caryl.....	65
Rowe ads. Guillaume... ..	162	Russell v. Coon.....	14, 454
Rowe v. Smith.....	273	Russell ads. Essex County Bank. .	19, 320
Rowe v. Stevens .....	10	Russell v. Freer.....	68
Rowen v. Kelsey.....	261	Russell ads. Goodrich .....	13
Rowland ads. Henshaw.....	77	Russell v. Hartt.....	425, 467
Rowland v. Mayor, etc.....	331	Russell v. Hudson River R. Co. .	182, 280
Rowland ads. Potter.....	295	Russell ads. Lansing .....	28
Rowland ads. Wright.....	16, 51	Russell ads. Levin.....	189, 199
Rowley v. Empire Ins. Co.....	228, 233	Russell v. Livingston.....	77
Rowley ads. Smith.....	104	Russell ads. Marsh.....	110, 349
Rowley ads. Van Deusen.....	213	Russell ads. Newton.....	145
Rowling ads. Clark.....	65	Russell v. Pistor.....	288, 289
Roy ads. Ward.....	124	Russell ads. Quinlan .....	336
Royal Baking Powder Co. v. Sherrell.	436	Russell v. Russell.....	467
Royal Ins. Co. ads. Fried.....	226	Russell v. Winne.....	170, 299
Royal Ins. Co. of Liverpool ads. Ex-		Rust v. Eckler.....	392
celsior Fire Ins. Co.....	226, 228, 229	Rust v. Hauselt.....	28
Rubber Tip Pencil Co. ads. Hovey...	145	Rutgers Fire Ins. Co. ads. Sohn.....	233
	223, 252, 263	Rutherford v. Holmes.....	203, 253
Ruck ads. Loomis.....	162, 276, 325	Rutherford ads. Reese.....	243
Ruckman ads. Brownell.....	25	Ruthvan ads. Wheeler .....	472
Ruckman v. Correll.....	64, 65, 252, 339	Rutter v. Kilpatrick.....	117
Ruckman ads. Davenport.....	303, 308	Ryall ads. Kennedy .....	310, 331, 424
Ruckman v. Pitcher.....	66, 346	Ryan ads. Dennis .....	266
Ruckman ads. Wheeler.....	205	Ryan v. Dox.....	446
Ruckmann ads. Porter... ..	30	Ryan v. Fowler.....	280
Rudd ads. Haynes .....	320	Ryan ads. Mayor, etc.....	421, 422
Rudde ads. Butterfield.....	29, 99	Ryan v. N. Y. Cent. R. Co.....	149
Ruff v. Rinaldo .....	151	Ryan v. People....	129, 136, 137, 430, 476
Rugg v. Rugg.....	463	Ryan ads. Robinson .....	297
Ruger v. Heckel....	278	Ryan ads. Smith.....	414
Ruger ads. Nickerson.....	320	Ryan v. Ward.....	3, 330
Ruggles v. Chapman.....	241	Ryan v. Waule .....	29
Ruggles ads. Howell.....	174	Ryan v. Wilson.....	261
Ruggles ads. Hull.....	265	Ryckman v. Gillis .....	157
Ruhl v. Phillips.....	210	Ryers, Matter of.....	94
Ruloff v. People... ..	135, 141, 182	Ryder ads. Bailey .....	252, 260
Rumsey v. People.....	98	Ryder v. Hulse .....	272
Rundell v. Lakey.....	455	Ryder ads. Moore .....	316
Rundle v. Allison .....	414	Ryder ads. People .....	344
Ruppert v. Haug .....	50, 51	Ryers, Matter of .....	17, 161, 245, 387
Rush, Town of, ads. Rochester, City		Ryers ads. Mersereau .....	217
of .....	307, 432	Ryerson ads. Welling.....	288, 296
Ruscoe ads. Fero.....	264	Ryerson v. Willis .....	455

	Page.		Page.
S., Matter of.....	27	Sammon v. New York & Hud. R. Co.	281
Saccha ads. Aspinwall..	118	Sampson ads. Hall .....	301
Sacia v. O'Conner.....	164, 327	Sampson ads. Pfohl.....	20
Sackett, etc., Streets, Matter of...	71, 99	Sampson ads. Renard .....	104
Sackett ads. Havens.....	467	Samson v. Rose ....	83, 144, 164
Sackett ads. Hight .....	476	Samson v. Springsteen .....	107
Sackett ads. Moffet .....	27, 367	Samuels v. Bryant .....	22
Sackett ads. Randall.....	2, 448	Samuels v. Evening Mail Association.	364
Sacketts Harbor Bank v. Codd .....	58	Sanborn ads. Hoe .....	15, 144, 392
Sackrider ads. Allen.....	73	Sanborn v. Lefferts.....	270
Sackrider ads. Board of Excise ..	194, 340	Sanborn ads. Mowry.....	289, 298
Saddler ads. Wright.....	13	Sanchez v. People .....	21, 132, 133, 136
Saenz ads. Mojarrieta.....	24, 50	Sander v. Hoffman .....	120, 214
Safeguard Fire Ins. Co. ads. Lowell		Sanders v. Gillespie .....	110, 410
Manuf., etc .....	177, 233	Sanders v. Lake Shore, etc., R. Co ..	243
Sage, Matter of .....	23	Sanders ads. Randall.....	157
Sage ads. Adams ...	209	Sanders ads. Sands .....	121, 235
Sage v. Cartwright.....	195	Sanders ads. Scully .....	38
Sage v. City of Brooklyn.....	71, 101	Sanders ads. Wright .....	34
Sage ads Dunham.....	411	Sanders v. Yonkers, Village of.....	89
Sage ads. Fonda.....	88, 153	Sanderson v. Caldwell.....	264
Sage ads. Livingston.....	41, 257	Sanderson v. Morgan .....	5, 343
Sage v. Sherman.....	9	Sanderson ads. Ricard.....	291
Sage v. Truslow .....	130	Sandford v. Bennett.....	264
Sage v. Volkening .....	34	Sandford v. Norris.....	171, 411, 443, 444
Sage ads. Welch .....	205, 325	Sandford v. Travers.....	156
Sage v. Woodin.....	196, 198	Sanford v. Ellithorp.....	37, 80, 180, 475
Sage ads. Wooster.....	105	Sanford v. McIntyre.....	396
Sager v. Blain .....	88	Sanford v. Sanford.....	17, 272, 275, 413
Salisbury v. Brisbane.....	8	Sanford v. White .....	347
Salisbury v. Howe .....	209	Sands ads. Agate.....	118
Salisbury ads. Keeler.....	2, 9	Sands v. Boutwell.....	121, 235, 381
Salisbury ads. Morss.....	108, 123, 180	Sands v. Campbell.....	228, 413
Salles v. Butler .....	20	Sands v. Church .....	453
Salomon ads. Story.....	66	Sands v. Crooke.....	28, 106
Salmon v. Gedney .....	35	Sands ads. Elmore .....	80
Salt Co. of Onondaga ads. Morris Run		Sands v. Graves.....	228
Coal Co.....	41	Sands v. Harvey.....	100, 383
Salter v. Black River, etc., R. Co ...	311	Sands v. Hill.....	122
Salter ads. Hun .....	125	Sands v. Hughes .....	6, 259
Salter v. Ham.....	349, 351	Sands v. Kimbark.....	100, 185
Salter ads. Lane.....	244	Sands v. Lilienthal.....	228, 411
Salter v. Utica.....	123	Sands v. New York Life Ins. Co.....	239
Salter v. Utica, etc., R. Co.....	244, 313, 377	Sands v. Sanders .....	121, 225
Salter ads. Zabriskie .....	292	Sands v. Shoemaker.....	32, 228, 234
Salt Springs Nat. Bk. v. Burton.....	323	Sandy Hill, Village of, ads. Lee ..	11, 152
Salt Springs Nat. Bk. v. Wheeler ...	115		303
Saltus, Matter of.....	199	Sanger ads. Smith.....	132
Saltzman ads. Decker.....	69	Santee ads. Stephens .....	108, 251, 254
Same ads. Perkins..	79	Saratoga Co. Bank ads. Conaughty.	18, 125
Sammis v. McLaughlin.....	272	Saratoga Co. Bank v. King.....	110

## TABLE OF CASES.

607

	Page.		Page.
Saratoga Co. Bank v. Pruyn .....	276	Schell, Matter of ....	333, 445
Saratoga Co. M. F. Ins. Co. ads. Benjamin .....	233	Schell v. Devlin.....	347
Saratoga Victory Manfg. Co. ads. Bullard.....	459	Schell v. Plumb.....	148, 175, 185
Saratoga & Washington R. Co. ads. Adams .....	253	Schell ads. Traver.....	472
Sargeant ads. Williams .....	21, 179	Schen ads. Western Trans. Co....	183, 268
Sargent v. Nat. Fire Ins. Co .....	229		403
Sarria ads. King.....	92, 352	Schenck v. Andrews.....	120, 268
Sarson ads. McCormick .....	393	Schenck ads. Boerum .....	447
Sartwell v. Field.....	23	Schenck v. Dart.....	34, 200
Satterlee ads. Satterlee .....	294	Schenck ads. Gray . . . . .	344
Satterlee ads. Simson.....	344	Schenck ads. Kitchel.....	451
Saulsbury v. Village of Ithaca .....	304	Schenck v. Mayor, etc.....	329
Saunders ads. Day.....	316	Schenck ads. Osborn .....	433
Saunders v. Hanes .....	155	Schenectady Co. M. Ins. Co. ads. Hynds.....	226
Saunders ads. Wright.....	310	Schenectady and Saratoga Plankroad Co. v. Thatcher .....	169, 357
Sauter v. New York Cent. R. Co. ....	80, 185	Schepp v. Carpenter.....	323
	314	Scherder ads. Miller.....	123, 224
Savage v. Allen.....	222	Schermerhorn v. Hudson River R. Co.	376
Savage ads. Barker.....	314	Schermerhorn ads. Mayor, etc....	37, 301
Savage v. Burnham .....	446, 473	Schermerhorn v. Prouty .....	124, 336
Savage v. Corn Ex. Ins. Co.....	149, 225	Schermerhorn v. Talman.....	450
Savage v. Howard Ins. Co.....	225, 233	Schermerhorn ads. Thompson.....	302
Savage v. Medbury.....	381	Schettler v. Smith.....	466
Savage v. Murphy .....	210	Schiffer v. Dietz .....	455
Savage v. O'Neil .....	92, 274	Schiffer v. Pruden.....	277
Savage v. Putnam.....	352	Schile v. Brokhahaus.....	151, 182, 353
Savage v. Sherman.....	444	Schilling ads. Elston.....	256
Savery ads. Atlantic State Bank ..	66, 323	Schlesinger ads. Boyd .....	455
	350	Schloemer v. Schloemer.....	278
Sawyer ads. Clark .....	33, 253	Schmidt ads. Holtz....	105
Sawyer ads. People.....	436	Schmidt ads. Sussdorff.....	10, 179, 360
Sawyer v. People .....	139	Schmitz v. Langhaar .....	127
Sawyer ads. Quackenbos.....	450	Schneider v. McFarland.....	253, 426
Sawyer ads. Van Benthuyzen... ..	432	Schneider v. McLane.....	284
Sayles v. Sims .....	321, 327	Schnicker v. People.....	143
Sayre ads. Reeder .....	38, 260	Schoellkopf ads. Francis... ..	338
Saxton ads. Atkins .....	351	Schoenwald v. Metropolitan Sav. Bk.	61
Saxton ads. Bissell .....	340, 420, 421	Schofield ads. Boyer.....	188, 247, 254
Saxton ads. People.....	165	Schofield v. Doscher.....	297
Scattergood v. Wood ....	175	Scholey v. Halsey .....	4, 367
Schall ads. Vilmar .....	125, 191, 383	Scholey v. Mumford.....	162, 188
Schanck v. Mayor, etc... ..	328	Scholey ads. Townsend.....	256
Schanck ads. Reckhow .....	260	Scholtz ads. Smith.....	64, 469
Schaefer ads. Devyr.....	7, 39, 265	Schoolcraft ads. Reformed Church of Gallupville .....	386
Schaefer v. Henkel.....	10	Schoonmaker ads. People .....	22, 72
Schaeffer v. Reilly .....	290	Schoonmaker v. Spencer.....	253
Schaettler v. Gardiner.....	21	Schoop v. Clarke.....	450
Scheillein ads. People.....	95, 165	Schouten ads. Jewell.....	54

	Page.		Page.
Schramm ads. Wing.....	275	Scott v. Ocean Bank.....	57
Schrauth v. Dry Dock Sav. Bank....	419	Scott v. Onderdonk.....	89
Schroeder v. Gurney.....	89	Scott ads. People.....	382
Schroeder ads. People.....	71	Scott v. Rogers.....	148, 150, 202
Schroepfel v. Corning.....	361, 412, 453	Scott v. Stebbins.....	207, 413, 465
Schroepfel ads. Ott.....	41	Scoville v. Griffith.....	76, 146, 178, 243
Schroepfel v. Shaw.....	422	Scoville v. Landon.....	28, 317, 321
Schreyer ads. Vanderbilt.....	24, 215, 295, 343	Scranton v. Clark ..	392
Schryver ads. People.....	141	Scranton ads. Dudley.....	439
Schuchardt v. Mayor, etc.....	335	Scranton v. Farmers and Mechanics' Bank.....	198
Schuehle v. Reiman.....	48	Scribner ads. Fuller.....	295, 327
Schulting ads. Dambmann.....	2, 209, 286	Scroggs ads. Wolfe.....	273
Schulting ads. Hardt.....	212	Scully v. Sanders.....	38
Schulting ads. Van Keller.....	104	Scully ads. Wheeler.....	418
Schults ads. Marcly.....	458	Seabury ads. Lewis.....	214, 256
Schultz v. Bradley.....	407	Seacord v. Miller.....	317
Schultz v. Schultz.....	275, 463	Sealey ads. Belknap.....	285, 454
Schultz ads. Staiger.....	20, 124	Seaman ads. Cameron.....	269
Schultz v. Third Ave. R. Co.....	81, 180, 262	Seaman ads. Campbell.....	222, 338
Schurck ads. Siemon.....	248, 443	Seaman v. Duryea.....	424
Schup ads. Clapp.....	397	Seaman ads. Foster.....	273
Schuyler v. Haywood.....	283	Seaman ads. Halstead.....	41
Schuyler ads. Miller.....	37	Seaman v. Mayor, etc.....	335
Schuyler ads. Morgan.....	349	Seaman ads. Merritt.....	175, 201, 220, 440
Schuyler ads. N. Y. & N. H. R. Co.	11, 28, 87, 121, 346	Seaman v. Whitehead.....	19, 199, 425
Schuyler ads. People.....	73, 262, 267, 340	Seaman's Friend Soc. v. Hopper.....	223, 462
	397, 421	Searing ads. Austin.....	109
Schuyler v. Smith.....	260, 384	Sears v. Burnham.....	250
Schwarz v. Oppold.....	190, 366	Sears v. Conover.....	39, 45, 113, 327
Schwerin ads. Brooks.....	272, 311	Sears ads. Hamlin.....	39, 115, 170
Schwerin v. McKie.....	458	Sears ads. Hancock.....	419
Schwier v. N. Y. Cent., etc., R. Co....	311	Sears ads. Manhattan Brass and Mfg. Co.....	349
Schwinger v. Hickok.....	195, 247, 290	Sears v. Shafer.....	207, 412
Schwinger v. Raymond.....	76, 385	Sea View Ry. Co. ads. Stranahan.....	375
Scofield v. Churchill.....	197	Seacord v. Morgan.....	448
Scofield v. Hernandez.....	35	Second Ave. Meth. Epis. Church, Mat-ter of Petition of.....	332
Scofield ads. Southworth.....	68	Second Ave. R. Co. ads. Coleman.....	18, 328
Scofield ads. Wheeler.....	29, 282	Second Ave. R. Co. ads. Furst.....	179
Scofield v. Whitelegge.....	361	Second Ave. R. Co. ads. Ginna.....	313
Scott ads. Alger.....	44	Second Ave. R. Co. ads. Honegsberger.....	312, 342
Scott ads. Barlow.....	370, 454	Second Ave. R. Co. ads. Jackson.....	80, 279
Scott v. Conway.....	276	Second Ave. R. Co. ads. Mayor.....	302
Scott v. Delahunt.....	399	Second Ave. R. Co. ads. McMahon.....	378
Scott v. Frink.....	285	Second Ave. R. Co. ads. Mentz.....	378
Scott v. Guernsey.....	347, 464	Second Ave. R. Co. ads. Rooney.....	53
Scott ads. Kelly.....	353	Second Man. Bld'g Ass. v. Hayes.....	72, 117
Scott ads. Maxon.....	276		406
Scott v. McMillan.....	354		
Scott v. Middletown, etc., R. Co....	376		
Scott v. Morgan.....	39, 196		



## TABLE OF CASES.

609

	Page.		Page.
Second Nat. Bank ads. Burkhalter...	323	Seneca Falls, Town of, v. Syracuse	
Second Nat. Bank ads. Getman...	59, 64	Sav. Bk. ....	436
	247	Settle v. Van Evrea.....	100
Second Nat. Bank of Oswego v. Burt.		Seward ads. Giddings.....	187, 472
	61, 62	Seward v. Huntington.....	152, 296
Second Nat. Bank of Oswego ads.		Seward ads. McCollum.....	176, 243
Conklin . . . . .	62	Sewell v. City of Cohoes.....	303
Second Nat. Bank of Oswego v.		Sexton ads. Howard.....	81, 263
Poucher .....	32, 317	Sexton v. Zett.....	309
Second Nat. Bank of Watkins v.		Seybel v. National Currency Bk. ....	320
Miller.....	275	Seybolt v. New York, Lake Erie &	
Secor v. Law.....	14, 343, 384	Western R. Co. ....	75, 79, 379
Secor v. Lord .....	4, 190	Seymour ads. Bliven.....	465, 472
Secor ads. Poillon.....	351	Seymour v. Corning.....	33, 315, 441
Secor v. Sturgis.....	4	Seymour v. Fellows.....	175, 275
Security Bank of New York v. Na		Seymour v. Judd.....	29
tional Bank of the Republic. ....	59	Seymour ads. Marvin.....	20
Security Fire Ins. Co. ads. Wolf. .	33	Seymour v. Montgomery.....	398, 399
Security Life ads. People..	26, 241, 242, 382	Seymour v. Sturgess.....	118
Sedgwick ads. Berdan.....	453	Seymour v. Van Wyck.....	462
Sedgwick ads. Robie.....	184, 437	Seymour v. Wilson.....	93, 185
Sedgwick v. Stanton.....	87, 109	Seymour v. Wyckoff.....	202
Sedgwick ads. Van Kirk.....	52	Shader v. Railway Pass. Ass. Co....	242
See ads. Kenyon .....	470	Shafer ads. Sears.....	207, 412
See ads. McKeon.....	338, 438	Shafer ads. Chapin.....	221
Seekins ads. Judd.....	156	Shaffer ads. Patrick.....	91, 168
Seeley v. Clark .....	191	Shaft v. Phoenix Mut. Life Ins. Co..	387
Seeley v. Engell.....	189, 364	Shakespeare v. Markham.....	110, 424
Seeley ads. Hyatt .....	20, 221	Shaler & Hall Quarry Co. v. Bliss....	268
Seeley ads. Poppenhusen.....	448	Shand v. Hanley.....	131
Seely v. Clark.....	346	Shank v. Shoemaker.....	30
Seely ads. Wood.....	277	Shannon ads. Baskins.....	299
Segelken v. Meyer....	42, 52, 220, 343	Shannon ads. Beers.....	68, 359, 424
Seguine v. Seguine.....	463	Shannon ads. Munger.....	816, 364
Seiler v. People... ..	137	Shannon ads. Trow.....	213, 385
Selchow v. Baker.....	16, 437	Shapley v. Abbott.....	415
Selden ads. Cromwell.....	156	Shapley ads. Ochsenbein.....	310, 314
Selden v. Del. & H. C. Co..	21, 183, 264	Shapter ads. Studwell.....	221
Selden ads. Garr.....	54, 264	Sharkey v. Mansfield. ....	286
Selden v. Vermilya.....	20, 443, 444	Sharkey ads. Paulding.....	200
Seligman ads. Jones.....	376	Sharp, Matter of.....	71
Sellick v. Tallman.....	434, 456	Sharp ads. Dobiecki.....	313
Selling ads. Barnett.....	42	Sharp ads. Doyle.....	63
Selover v. Coe.....	217	Sharp ads. Durkin.....	311
Selmes ads. Raynor.....	296	Sharp ads. Milhau.....	328
Seltenrich v. Heimenz.....	108	Sharpe v. Freeman.....	182
Seneca County Bank v. Neass... ..	318, 322	Sharpsteen ads. Wadsworth.....	114, 161, 319
Seneca Lake Grape and Wine Co. ads.		Shattuck ads. Colman .....	90, 430
Rodbourn.....	282	Shattuck v. Lamb.....	154
Seneca Nation of Indians v. Knight.		Shaver v. Western Union Tel. Co....	316
	16, 69	Shaw ads. Bedell.....	6

	Page.		Page.
Shaw ads. Bisby.....	264, 364	Shelton v. Merchants' Dispatch Trans. Co.....	9, 74, 418
Shaw v. Cock.....	411	Shepard ads. Fiester.....	35, 424
Shaw ads. Doscher.....	106	Shepard ads. McMullen.....	98
Shaw v. Dwight.....	131	Shepard v. Parker.....	192
Shaw ads. Eastman.....	452	Shepard ads. People.....	98
Shaw ads. First Nat. Bank of Toledo. 91, 202,	458	Shepard ads. Pettit.....	155, 177
Shaw ads. Mead.....	439	Shepard ads. Powers.....	69, 94, 404
Shaw ads. Moore.....	24	Shepherd ads. Barlyte.....	341
Shaw ads. People.....	129	Shepherd v. Buffalo, etc., R. Co....	377
Shaw v. Republic Ins. Co.....	106	Shepherd v. People.....	98, 138, 139
Shaw v. Republic Life Ins. Co.....	238	Sheppard v. Steele.....	97, 356, 399
Shaw ads. Schroepf.....	422	Sherard ads. Madan.....	75
Shaw v. Smith.....	29, 441	Sheridan v. Andrews.....	164, 250, 337
Shaw v. Tobias.....	88, 361	Sheridan v. Brooklyn & Newton R. Co.....	312
Shay v. People.....	132, 474	Sheridan v. House.....	155, 168
Shea ads. Mead.....	192	Sheridan v. Jackson.....	361
Shea v. Sixth Ave. R. Co.....	279, 380	Sheridan v. Linden.....	164, 250
Shearman v. Niagara Fire Ins. Co....	231	Sheridan v. Mayor, etc.....	346
Sheehan ads. Clarke.....	450	Sherman v. Rochester & Syracuse R. Co.....	280
Sheehan ads. Hall.....	283	Sherman ads. Sage.....	9
Sheehan v. Hamilton.....	284	Sherman ads. Savage.....	444
Sheehan ads. Kelly.....	31	Sherman ads. Sheldon.....	4
Sheehan v. Matthews.....	178	Sherman ads. Snyder.....	425
Sheehan v. New York Cent., etc., R. Co.....	378	Sherman v. Elder.....	273
Sheehan ads. Wood.....	108	Sherman ads. Farmers and Citizens' Bank.....	363
Sheehy v. Burger.....	314	Sherman v. Felt.....	19, 20, 252, 301
Sheffield ads. Cowperthwaite.....	44, 326	Sherman ads. Home Life Ins. Co....	262
Sheldon v. Atlantic F. & M. Ins. Co..	228	Sherman v. Hudson R. R. Co.....	76
Sheldon ads. Beck.....	18, 108	Sherman v. Kane.....	7, 329
Sheldon v. Bliss.....	461	Sherman v. Mayor, etc.....	107, 178
Sheldon v. Carpenter.....	246	Sherman v. McKeon.....	163
Sheldon v. Chapman.....	326	Sherman v. Page.....	198
Sheldon v. Edwards.....	284, 298	Sherman v. Parish.....	274, 344
Sheldon ads. Embury.....	465	Sherman ads. Parkinson.....	292
Sheldon ads. Griswold.....	287	Sherman ads. Wakeman.....	224, 415
Sheldon v. Haxtun.....	449	Sherman v. Willett.....	144
Sheldon v. Horton.....	318	Sherman v. Wright.....	216, 222, 402
Sheldon v. Hudson R. R. Co.....	186	Sherrell ads. Royal Baking Powder Co.....	436
Sheldon ads. Jones.....	405	Sherrill ads. Ten Broeck.....	72
Sheldon v. Payne.....	172, 397	Sherwood v. Agricultural Ins. Co....	234
Sheldon v. Sheldon.....	38	Sherwood v. American Bible Society. 121,	446
Sheldon v. Sherman.....	4	Sherwood ads. Bullard.....	243, 246
Sheldon v. Van Buskirk....	188, 339, 431	Sherwood ads. Farron.....	360
Sheldon v. Wright.....	247, 424, 426	Sherwood v. Hauser.....	148, 385
Sheldon, etc., Co. v. Eickemeyer, etc., Co.....	10, 117	Sherwood v. McConnell.....	47
Shelley ads. Conkling.....	299		
Shelington v. Howland.....	269, 270, 441		
Shelly ads. Williams.....	420		

# TABLE OF CASES.

611

	Page.		Page.
Sherwood v. Mercantile Mut. Ins. Co.	237	Silliman ads. Martin.....	10, 244
Sherwood ads. Musgrave.....	222	Silliman ads. National Ex. Bk.....	368
Sherwood ads. Peck.....200, 372,	433	Silsbury v. McCoon.....	2, 371
Sherwood v. Stone.....	410	Silver ads. Lorillard.....	106
Sherwood ads. Wooster.....	297	Silverman ads. Mushlitt.....	281
Shew ads. Tugman.....	387	Simar v. Canaday.....209, 343,	346
Shibley v. Angle.....	417	Simmons ads. Church.....	448
Shields ads. Gelston.....465, 466		Simmons v. Cloonan.....157, 163,	460
Shields v. Pettit.....	146, 390	Simmons ads. Dagal.....	453
Shindler v. Houston.....	408	Simmons v. Law.....	67, 73
Shipman ads. Casler.....18, 205, 294,	460	Simmons v. Sines.....	218, 462
Shipply v. People.....	142	Simmons v. Sisson.....	364
Shipsey v. Bowery Nat. Bank.....	325	Simon ads. Knapp.....	385
Shoemaker v. Benedict.....	414	Simons v. First National Bank of Un-	
Shoemaker ads. Sands.....32, 228,	234	ion Springs.....	62, 289
Shoemaker ads. Shank.....	30	Simonson ads. Burgess.....	38, 172
Shoop v. Clark.....	453, 454	Simonson ads. Chatfield.....	53, 183
Short v. Home Ins. Co.....	231, 232	Simonson ads. Goodwin.....	297
Short ads. Pratt.....117, 323,	406	Simpkins v. Law.....	150
Short ads. Spring.....	210, 289	Simpson v. Del Hoyo.....	169, 293
Short ads. Stevenson.....	471	Simpson ads. People.....	261
Shorter v. People.....	133, 141	Simpson ads. Pfohl.....	118
Shriver v. Shriver.....25, 348,	413	Simpson v. St. John.....42, 88,	142
Shufflin v. People.....	141	Simpson ads. Wilson.....	25
Shuler ads. Hodges.....	316	Sims ads. Bull.....	316
Shuler ads. Walrod.....	254	Sims ads. Sayles.....	321, 327
Shults ads. Marcy.....182,	327	Sims v. Sims.....	135, 475
Shultz v. Hoagland.....	46	Simon v. Brown.....	68
Shuman v. Strauss.....	22, 247	Simon v. Satterlee.....	294, 344
Shumway ads. Green.....	95, 165	Sinclair ads. Magoun.....	66, 326
Shumway v. Shumway.....	164, 327	Sindram v. People.....	135
Shuttleworth v. Winter.....28, 199,	214	Sines ads. Simmons.....	218, 462
Shwartz ads. Bliss.....	90, 380	Sinsebaugh ads. Halsey.....	191
Sibbald v. Bethlehem Iron Co.....	10	Sinsheimer ads. Rogers.....	354
Sibbens ads. Mayor, etc.....	448	Sipperly v. Baucus.....	424, 425
Sibell v. Remsen.....	47	Sisson v. Barrett.....	321, 442
Sibley ads. Hubbell.....	412	Sisson ads. Clark.....	316
Sibley v. Waffle.....	426	Sisson ads. Culver.....	4, 298
Sickel ads. Weigand...183, 208, 363,	365	Sisson v. Hibbard.....	204
Sickler ads. Clark.....	423	Sisson ads. Simmons.....	364
Sickles v. Flanagan.....	442, 451	Sisson ads. Wilber.....	105
Sidenberg v. Ely.....	291, 427, 483	Sistare v. Best.....	62
Siegel v. Lewis.....	184	Sisters of Charity v. Kelly.....	462
Siemon v. Schurck.....	248, 443	Sitterly ads. Gerwig.....	452
Siewert v. Hamel.....	451	Sixth Ave. R. Co. ads. Colt.....	439
Sigourney ads. Brown.....	29	Sixth Ave. R. Co. ads. Drew.80, 148,	279
Silence ads. Brewster...178, 215, 322,	408		312
Sill v. Corning, Village of.....	96	Sixth Ave. R. Co. v. Gilbert Elevated	
Silliman ads. Brewster.....	88	R. Co.....	23
Silliman ads. Burritt.....	444, 474	Sixth Ave. R. Co. v. Kerr.....	98, 166
Silliman v. Lewis.....	400	Sixth Ave. R. Co. ads. Nichols... ..	312

	Page.		Page.
Sixth Ave. R. Co. ads. Shea.....	279, 380	Smith ads. Bentley . . . . .	114, 385
Sixth Ave. R. Co. ads. Wolfkiel.....	310	Smith v. Bettee . . . . .	391
Sixth Nat. Bank of N. Y. ads. Union		Smith ads. Bidenlac . . . . .	8, 440
Nat. Bank of Troy . . . . .	285	Smith v. Bodine.....	14, 349
Sizer ads. Briggs.....	104, 342	Smith v. Bowen.....	444
Sizer v. Ray.....	352, 354, 420	Smith v. Brady.....	111, 114
Skelly ads. Lavalie.....	14, 32	Smith v. Brinkerhoff.....	64
Skiddy ads. Elwell.....	399	Smith v. British, etc., Steam Packet	
Skiddy ads. Morgan.....	208	Co . . . . .	80
Skidmore ads. Bangs.....	235	Smith v. Burch.....	465, 466
Skidmore ads. Clarkson.....	297	Smith ads. Burrows.....	61
Skidmore v. Quin.....	250, 466	Smith ads. Calkins.....	47, 249, 350
Skinner ads. Terpening.....	468	Smith ads. Campbell.....	154, 291, 294
Skinner v. Valentine.....	214	Smith ads. Candee.....	249, 321
Skinnion v. Kelley.....	253	Smith ads. Caughey . . . . .	17, 342
Slade v. Warren.....	123	Smith ads. Childs.....	107
Slater v. Jewett.....	281	Smith v. Coe.....	30, 441
Slater v. Mersereau . . . . .	310	Smith ads. Congreve . . . . .	338
Slater v. Merritt . . . . .	52	Smith ads. Coon, . . . . .	69, 286
Slater ads. Truax . . . . .	180	Smith ads. Corning.....	294, 343
Slatterly v. People.....	135	Smith v. Countryman.....	212, 364, 438
Slauson ads. Kellogg.....	46	Smith ads. Crary.....	251, 424
Slauson v. Walkins.....	124, 421	Smith v. Cross.....	193
Slimmon ads. Eadie . . . . .	162, 240	Smith ads. Dalton.....	63, 450
Slingerland ads. Van Rensselaer....	256	Smith ads. Denny.....	413
Sloan v. N. Y. Cent. R. Co.....	192	Smith ads. Devlin . . . . .	257, 280
Sloan v. Van Wyck . . . . .	441	Smith v. Duchardt.....	107
Sloane v. Elmer . . . . .	440	Smith v. Dunning.....	360
Sloane v. Van Wyck.....	391	Smith v. Edwards.....	470, 473
Slocum v. Barry.....	125, 445	Smith ads. Erickson.....	175, 182
Slocum v. English.....	199	Smith v. Erwin . . . . .	196, 323
Slocum ads. Fitzpatrick.....	70, 341	Smith ads. Fake.....	321
Slocum v. Freeman.....	286	Smith ads. Fassett.....	152, 403, 457
Slocum ads. Penman . . . . .	443	Smith v. Felton.....	395
Slocum ads. Verdin.....	344, 473	Smith ads. Fordham.....	190
Sloman v. Great Western Ry. Co....	81	Smith ads. Fort Plain Bridge Co. .	69, 102
Slosson ads. Corning . . . . .	253	Smith v. Frankfield.....	168, 247
Small v. Herkimer Mfg. Co.....	118	Smith v. Frost . . . . .	444, 445
Small v. Ludlow.....	48	Smith v. Glens Falls Ins. Co.....	17, 234
Smart v. Bement.....	295, 296	Smith ads. Grant.....	422
Smedis v. Brooklyn, etc., R. Co.....	314, 441	Smith v. Grant.....	34
Smillie v. Quinn . . . . .	240, 274	Smith ads. Greton.....	258
Smith, Matter of... 35, 193, 332, 462, 475		Smith ads. Gruman.....	150, 416
Smith v. Aetna Life Ins. Co.....	17, 238	Smith ads. Hale . . . . .	314
Smith v. Albany, City of.....	303	Smith v. Hall.....	363
Smith ads. Allen . . . . .	344	Smith v. Hathorn . . . . .	453
Smith v. Babcock . . . . .	454	Smith ads. Hinckley.....	274, 402, 455
Smith ads. Bagley.....	149, 352	Smith v. Holbrook.. . . .	130, 145
Smith ads. Bascom.....	37, 50, 283, 292	Smith v. Holland . . . . .	178
Smith ads. Beach . . . . .	373	Smith v. Holmes . . . . .	251, 363
Smith v. Beattie.....	45, 298	Smith ads. Jenks . . . . .	33, 38, 261, 371

## TABLE OF CASES.

613

	Page.		Page.
Smith ads. Jones .....	69, 156	Smith v. Robertson.....	293, 463
Smith ads. Kain .....	280, 381	Smith v. Rochester, City of.....	305, 459
Smith ads. Kellogg.....	291	Smith ads. Rogers.....	104
Smith v. Kerr .....	130, 350, 361	Smith ads. Rowe.....	273
Smith v. Kidd.....	293	Smith v. Rowley.....	104
Smith ads. Kilmer.....	385	Smith v. Ryan.....	414
Smith ads. Knapp.....	273	Smith v. Sanger.....	432
Smith v. Knapp ....	43, 167, 194, 396	Smith ads. Schettler.....	466
Smith v. Lansing.....	444	Smith v. Scholtz....	64, 469
Smith ads. Lathrop.....	197	Smith ads. Schuyler.....	260, 384
Smith ads. Laughran ..	258	Smith ads. Shaw.....	29, 441
Smith v. Law .....	119	Smith v. Smith.....	168, 177, 195
Smith ads. Leaird.....	402	Smith v. Starr.....	19
Smith v. Levinus.....	359	Smith ads. Stewart.....	164, 276
Smith ads. Lewis.....	246, 277, 467	Smith ads. Suydam.....	356, 447
Smith v. Littlefield.....	260	Smith v. Sweeney.....	40
Smith v. Lynes.....	36, 390	Smith ads. Thomson.....	457
Smith ads. Marshall .....	30	Smith ads. Tim.....	51
Smith ads. Marvin .....	276, 283, 446	Smith v. Townsend .....	433
Smith v. Marvin .....	450	Smith v. Tracy.....	9
Smith v. Mayor, etc....	304, 334, 339, 427	Smith ads. Vanderpool.....	262
Smith ads. McCaughey.....	324	Smith v. Van Nostrand.....	469
Smith ads. McKenzie.....	42	Smith v. Van Olinda.....	13
Smith v. Mechanics & Traders' Ins. Co.....	229	Smith v. Velie.....	278, 414
Smith v. Miller .....	248, 323, 336	Smith ads. Vernan.....	246, 259
Smith ads. Mitchell .....	336	Smith v. Wells.....	418
Smith ads. Moffat.....	256, 259, 261	Smith ads. White.....	150, 359, 416, 442
Smith ads. Moody .....	8, 410	Smith v. White.....	19
Smith ads. Morgan .....	256, 422	Smith ads. Whitehead.....	475
Smith ads. Nat. Bk. of Newburgh.....	57, 313	Smith v. Wilcox.....	418
Smith v. Nelson.....	247	Smith v. Wright .....	348, 360
Smith v. City of Newburgh.....	306	Smith v. Zabriskie.....	30, 209
Smith v. New York Cent. R. Co. ....	79	Smith v. Zalinski.....	417
183, 189, 408, 409, 440		Smyles v. Hastings.....	461
Smith v. New York & Harlem R. Co. ....	280	Smyth v. Knickerbocker Life Ins. Co. 169, 242, 291, 383	
Smith v. New York & Oswego Mid- land R. Co.....	375	Smyth v. Munroe.....	169, 242
Smith v. Orser.....	49	Smyth ads. Reese.....	33, 242
Smith v. Paton.....	453	Smyth ads. Willis.....	62, 342, 443
Smith v. Palmer.....	168	Snebley v. Conner.....	24
Smith ads. Pease.....	115, 314	Snedaker ads. Fitch.....	388
Smith ads People.....	25, 166, 193, 284	Snedeker ads. People.....	128
331, 374, 405, 428, 436		Snedeker v. Warring.....	204
Smith v. People...128, 140, 142, 328,	405	Snedeken ads. Hatfield .....	277, 471
Smith v. Poillon .....	319	Snell ads. Brown.....	129
Smith ads. Potter .....	367	Snelling v. Howard.....	349
Smith v. Rathbun .....	19, 25, 32, 384	Snethen ads. Laverty.....	12
Smith ads. Risley.....	342	Snow v. Columbian Ins. Co.....	236
Smith ads. Ritch.....	9	Snow ads. Draper .....	215, 403
Smith v. Roberts.....	284, 288, 295	Snow v. Mercantile Mut. Ins. Co....	237
		Snyder v. Atlantic Mut. Ins. Co... .	237

	Page.		Page.
Snyder ads. Burnett.....	349	Spaulding ads. Murphy.....	39
Snyder ads. Eisenlord .....	276	Spaulding ads. Reed.....	76
Snyder ads. Lounsbery.....	262, 409	Spaulding v. Strang... ..	47
Snyder ads. Mapes.....	1, 288	Spear v. Wardell....	224
Snyder ads. People.....	172, 173, 372	Spears ads. Hazard.....	9
Snyder v. Plass.....	219	Spears v. Matthews.....	221
Snyder v. Sherman.....	425	Spears v. Mayor, etc.....	23, 336
Snyder v. Trumpbour.....	219	Speight ads. National Bank of Fish- kill.....	201, 317
Snyder ads. Van Rensselaer.....	99	Speir ads. People.....	224
Snyder ads. Whiton....	174, 176, 274	Speis ads. Barton.....	123
Society for Reformation of Juvenile Delinquents ads. Wallack.....	222	Spellman ads. Wehle.....	448
Society of Concord ads. Wallman....	112	Spelman ads. Borst.....	274
Soder ads. Waring.....	292	Spence ads. McGuire... ..	310
Sohn v. Rutgers Fire Ins. Co. ....	233	Spence ads. Porter. ....	107
Solinger v. Earle....	162, 323	Spencer v. Ayrault.....	210, 283
Solley ads. McNulty. ....	41, 161	Spencer ads. Baker.....	30, 191, 212
Somborn ads. Waring.....	170	Spencer v. Ballou.....	317, 322
Soper ads. People.....	220	Spencer ads. Bank of Genesee.....	21
Sorchan v. City of Brooklyn....	71	Spencer v. Barnett .....	283
Soule ads. Carpenter.....	193, 214	Spencer v. Carr... ..	221
Soule v Chase.....	224	Spencer ads. Commercial Bank of Rochester.....	21
Soule ads. Cook.....	261	Spencer ads. Davis.....	252, 356
Soulice ads. Tompkins.....	20	Spencer ads. Hill.....	269
Southard v. Benner.....	63, 298	Spencer ads. Otis. ....	34
Southard ads. Besson.....	266	Spencer ads. People.....	436
Southard v. Boyd .....	110	Spencer ads. Schoonmaker .....	253
Southard v. Walsh.....	45	Spencer v. Spencer.....	290
Southern Life Ins. and Trust Co. v. Packer .....	452	Spencer ads. Walker .....	3, 25, 349
South Side R. Co. of Long Island ads. Broiestedt.....	6	Spencer ads. White.....	366
Southwick ads. Buel.....	469	Sperry v. Miller.....	257
Southwick v. First Nat. Bank of Memphis.....	40, 286, 324	Sperry v. Reynolds.....	254
Southwick ads. Quackenboss.....	446	Speyers ads. Peabody.....	408
Southwick v. Southwick. ....	28, 100, 405	Spicer ads. Bartlett.....	1, 252
Southworth v. Barnett.....	192	Spicer ads. Emerson .....	216
Southworth v. Bennett .....	19, 439, 453	Spies v. Gilmore .....	317, 318
Southworth v. Scofield.....	68	Spieß ads. Oberlander.....	208
Soverhill v. Suydam.....	197	Spinetti v. Atlas Steamship Co ....	67
Spalding ads. Merchants' Bank.....	91	Spinner v. New York Cent., etc., R. Co.....	377
Spalding v. Rosa.....	112	Spinola ads. Wheeler.....	452
Spargur ads. Chamberlain .....	153	Spofford ads. Bassett.....	77
Sparman v. Keim.....	221, 360	Spofford ads. Carll.....	107
Sparrow v. Kingman.....	276	Spofford ads. Goelet.....	250
Spaulding ads. Freeman.....	474	Spofford ads. Henderson .....	357
Spaulding ads. Getty .....	22	Spofford ads. Sturgis.....	17, 97, 357
Spaulding v. Hallenbeck... ..	179	Spooner v. Brooklyn City R. Co.....	309, 312
Spaulding ads. Hollingsworth.....	198	Spooner v. Keeler.....	263
Spaulding v. Kingsland. ....	37	Spoor v. Fannan.....	33
		Sprague ads. Butler.....	331

	Page.		Page.
Sprague ads. Downs .....	175, 440	St. Luke's Home v. Association for Indigent Females.....	471
Sprague ads. Farmers and Mechanics' Nat. Bank of Buffalo.....	42	St. Nicholas Bank ads. Falkland ..	65, 395
Sprague v. Holland Purchase Ins. Co.	233	St. Nicholas Ins. Co. ads. Brown....	237
Sprague v. Hosmer.....	67	St. Nicholas Ins. Co. ads. Stringham.	7, 234
Sprague ads. Reid.....	446	St. Nicholas Nat. Bk. ads. Barlow ...	154
Sprights v. Hawley .....	298	St. Peter v. Denison .....	72, 438
Spraker v. Cook.....	195, 251	St. Peter's Church ads. De Ruyter....	386
Spraker ads. Diefendorf .....	444	Staats v. Bristow.....	351
Spring v. Short.....	210, 289	Staats ads. Fulton.....	188
Spring ads. Whiton .....	399	Staats v. Hudson River R. Co .....	376
Springer v. Dwyer .....	364, 421	Stackus v. N. Y. Cent. & H. R. R. Co.	310, 314, 440
Springfield F. and M. Ins. Co. v. Allen.	234, 292	Stacy v. Graham.....	160, 243, 476
Springfield F. and M. Ins. Co. ads. Pad- dock .....	21	Stafford ads. Phoenix Bank .....	211
Springport, Town of, v. Teutonia Sav. Bk.....	434, 435, 436	Stagg v. Jackson.....	200
Springsteen v. Samson.....	107	Stahelin ads. Youngs.....	152
Spring Valley, etc., Co., ads. People.	122, 429	Stahl ads. Ward.....	420
Sprong v. Boston & Albany R. Co....	313	Staiger v. Schultz .....	20, 124
Sproul ads. Strong.....	364	Statt v. Wilbur .....	433
Spuyten Duyvil, etc., R. Co. ads.		Standard, etc., v. Amazon....	16, 185, 327
Ditchett .....	278	Standard Oil Co. ads. New York Cent., etc., R. Co.....	78
Spuyten Duyvil, etc., R. Co. ads. Mc- Cafferty .....	379	Standard Oil Co. v. Triumph Ins. Co.	228
Spuyten Duyvil Rolling Mill Co. ads.		Standard Oil Co. ads. Van Santen....	67
Booth.....	112, 148	Standard Sugar Refinery Co. v. Dayton.	42, 202
Squires v. Abbott .....	399	Stanford v. Lockwood... ..	48
Squires ads. Wood.....	416	Stanley ads. Newton.....	472
St. Clair v. Day.....	29	Stannard v. Prince .....	207
St. John v. American M. Life Ins. Co.	226, 240	Stanton v. Ellis.....	224
St. John ads. Cullen .....	309	Stanton ads. Gihon.....	10
St. John ads. Dwight.....	245, 301	Stanton v. King.....	24, 248, 345
St. John ads. Holsman.....	2	Stanton v. Kline.....	297
St. John ads. Kilbourne.....	222, 435	Stanton v. Miller....	154, 402
St. John ads. Mullen .....	186	Stanton ads. Mors.....	283
St. John v. Pierce.....	359	Stanton ads. Sedgwick.....	87, 109
St. John v. Roberts.....	317	Stape v. People .....	137
St. John ads. Simpson.....	42, 88, 142	Stapenhorst v. Wolff.....	33
St. John ads. Tiffany.....	51, 196, 434	Staple ads. Best.....	399
St. Joseph's Asylum, Matter of Peti- tion of.....	332	Staples v. Fairchilds.....	49
St. Joseph, etc., Ins. Co. ads. Lasher.	231	Staples v. Gould. ....	111
St. Lawrence Bank ads. Bank Com- missioners.....	58	Staples ads. Hier ..	346, 360
St. Louis Ins. Co. ads. Allen .....	236	Staples ads. Stillwell.....	234
St. Louis Mut. Life Ins. Co. ads. Mar- cus.....	214, 240	Starbird v. Barrons.....	127, 146
		Star Fire Ins. Co. ads. Hay.....	235
		Starin v. Genoa, Town of.....	99
		Starin v. People....	133
		Starin ads. Rexter.....	311, 440
		Starin v. Kelly .....	179, 182, 211, 476

	Page.		Page.
Stark ads. Hendricks .....	354	Stephens ads. People.54, 73, 161, 403, 415	
Starkey v. Kelly.....	150, 271	Stephens v. People.....	134
Starr ads. Smith.....	219	Stephens v. Reynolds .....	99
Starkweather ads. Crim.....	26, 318	Stephens ads. Rogers..	96
State of New York ads. Danolds.102, 128		Stephens v. Santee .	108, 250, 254
	146, 403	Stephens v. Vroman.....	179
State of New York ads. Flack....	196, 398	Stephens v. Wider .....	39
State of New York ads. Kehn....	171, 340	Sterling ads. Barber.....	64
State of New York v. Levinus.....	93	Sterling, Town of, ads. Gould.....	99
State of New York ads. Swift ...	189, 403	Stern ads. Fleischman .....	25, 170, 364
State Nat. Bk. of Boston v. Cooke.59, 387		Stern v. O'Connell.....	295
Staten Island R. Co. ads. Carroll..80, 252		Sternberger v. McGovern .....	402
	400, 418	Sternburgh ads. Enders .....	175
Staten Island R. Co. ads. Henry.....	281	Stettheimer v. Killip .....	286
Staten Island R. Co. ads. Lambert... 400		Steuben Co. Bank v. Alberger....	17, 51
Staten Island R. Co. ads. Landers.71, 99		Stevens v. Armstrong ..	278
Steamboat Josephine, In re .....	97	Stevens v. Brennan.174, 208, 211, 441, 475	
Steam Nav. Co. ads. Miller.....	76	Stevens ads. Columbia Ins. Co .....	125
Steam Nav. Co. ads. Wells....	55, 73, 110	Stevens v. Commercial Mut. Ins. Co.	236
	400, 434	Stevens ads. Dodge.343, 444, 445, 446, 471	
Stearns ads. De Lancey.....	383	Stevens ads. Equitable Life Ins. Soc.17, 295	
Stearns v. Field.....	175	Stevens v. Glover.....	26
Stearns v. Gage.....	185, 211, 455	Stevens v. Hanser .....	63, 163
Stearns ads. Townsend .....	46	Stevens ads. Ketchum.....	368
Stebbins v. Howell .	213, 287	Stevens ads. Kings Co. F. Ins. Co ...	155
Stebbins ads. Roraback..	249, 273, 431	Stevens ads. Lewis.....	42
Stebbins ads. Scott .....	207, 413, 465	Stevens v. Mayor, etc.....	262
Steckels ads. Koenig .....	42	Stevens v. Phoenix Ins. Co.....	387
Stedeker v. Bernard .....	20, 415	Stevens ads. Pratt.....	48
Stedman v. Davis.....	91, 174	Stevens ads. Rowe .....	10
Stedman v. Fiedler .....	401	Stevens v. Watson.....	293, 374
Stedwell ads. Glenney .....	347, 388	Stevenson ads. Bardin.....	176
Steele v. Benham .....	301	Stevenson ads. Bennett.....	295
Steele v. Lord.....	189	Stevenson v. Lesley.....	473
Steele ads. Ring.....	383	Stevenson v. Maxwell.....	243, 402, 455
Steele ads. Sheppard .....	97, 356, 399	Stevenson v. Short.....	471
Steen v. Niagara Fire Ins. Co.227, 231, 232		Stevens v. Oswego & Syracuse R. Co..	313
Steers v. Liverpool, etc., Steamship		Steward v. Biddlecum .....	52, 224
Co .....	81	Steward v. Brown.....	195
Steinbach v. La Fayette Fire Ins. Co.	227	Steward ads. Lowery.....	40
Steinbach v. Relief Fire Ins. Co..165, 206		Steward ads. Trustees of Hamilton	
	232	College .....	417
Steinweig v. Erie Ry ..	74	Stewart v. Bramhall.....	323, 452
Stellwagen ads. Graser .....	350	Stewart v. Brooklyn, etc., R. Co..81, 279	
Stenton ads. Burr.....	257	Stewart v. Brown .....	251
Stenton v. Jerome.....	368	Stewart ads. Bryan.....	198
Stephens v. Board.....	115	Stewart ads. Coit.....	12, 22
Stephens v. Board, etc.....	315	Stewart v. Drake.....	415
Stephens ads. Ferry .....	213, 402	Stewart v. Keteltas.....	112
Stephens v. Fox.....	184, 373	Stewart ads. Mills.....	373
Stephens ads. Hillman.....	200	Stewart v. Morss .....	18, 442



# TABLE OF CASES.

617

	Page.		Page.
Stewart ads. Organ.....	408	Storrs v. Utica, City of.....	303
Stewart v. Patrick.....	155, 344	Storrs ads. Wright.....	355, 423
Stewart v. Petree.....	450	Story v. Conger.....	114, 456
Stewart ads. Rapalee.....	16, 46, 169	Story v. Furman.....	94, 269
Stewart ads. Robinson.....	210	Story v. Hamilton.....	298
Stewart v. Smith.....	164, 276	Story v. N. Y. Cent. & H. R. Co.....	30, 146
Stief v. Hart.....	368, 404	Story v. N. Y. El. R. Co.....	102, 166, 375
Stigeler ads. Buffalo, etc., R. Co.....	155	Story v. Salomon.....	66
Stiger ads. Canaday.....	455	Stotenbur ads. Freer.....	206, 258, 259
Stiger ads. Crane.....	20	Stouvenel ads. Draper.....	33, 205, 247, 273
Stiles ads. Foot.....	218	Stover ads. Baucus.....	200
Stiles ads. Goddard.....	53, 382, 419	Stover ads. Davis.....	127
Stiles v. Howland.....	391	Stover v. Eycleshimer.....	45
Stillman ads. White.....	451	Stover v. Flack.....	105
Stillwell v. Carpenter.....	248, 425	Stover v. People.....	136, 142
Stillwell v. Hurlbert.....	343	Stow ads. Haydock.....	409
Stillwell v. Mutual Life Ins. Co.....	9, 162	Stowe ads. Markham.....	163
Stillwell v. N. Y. Cent. R. Co.....	186	Stowell v. Chamberlain.....	247
Stillwell ads. People.....	21	Stowell ads. Lobdell.....	150
Stillwell v. Staples.....	234	Stowell v. Otis.....	367, 368
Stillwell v. Swarthout.....	200, 424	Stowell ads. Stowell.....	433
Stilwell ads. Carpenter.....	396	Straiton ads. Mechanics' Bank.....	316, 321
Stilwell v. Carpenter.....	31, 33, 183, 359	Stranahan v. Sea View R'y Co.....	375
Stilwell v. Priest.....	161	Strang ads. Bradner.....	65, 185, 351
Stilwell v. Swarthout.....	221	Strang ads. Spaulding.....	47
Stimmel ads. Johnson.....	345	Strasberger ads. Keller.....	440
Stimmel ads. Johnston.....	244, 448	Stratton v. Cornfield.....	26
Stinson v. N. Y. Cent. R. Co.....	379	Stratton ads. Mead.....	87
Stinson v. Wrigley.....	409	Stratton v. People.....	143
Stitt v. Little.....	211	Straus ads. Quinby.....	441
Stitt ads. Patten.....	34, 126	Strause v. Josephthal.....	291
Stocking ads. Butler.....	349	Strauss ads. Shuman.....	22, 247
Stoddard v. Gailor.....	295, 296	Streever v. Bank of Fort Edward.....	321
Stoddard v. Hart.....	285, 287	Strever ads. Agawam Bank.....	215, 322, 324
Stoddard ads. Higinbotham.....	155	Strickland ads. Dorwin.....	43, 430
Stoddard v. Whiting.....	287, 455	Striker ads. Brewster.....	464
Stockwell v. Holmes.....	450	Striker v. Mott.....	468
Stockwell v. Phelps.....	87, 144	Stringham v. St. Nicholas' Ins. Co.....	7, 234
Stokes v. Johnson.....	190, 457	Stroud v. Tilton.....	181
Stokes v. People.....	100, 141	Strong ads. Bangs.....	246
Stone v. Browning.....	407, 409	Strong ads. Trustees of Brookhaven.....	204, 354
Stone v. Burgess.....	369	Strong v. City of Brooklyn.....	70, 152, 164
Stone v. Flower.....	405, 411, 441		375
Stone ads. Hargous.....	389	Strong ads. Brooklyn Cross-town R. Co.....	190, 212
Stone ads. Kendall.....	263	Strong v. Brooklyn Cross-town R. Co.....	119
Stone v. Lord.....	153, 402	Strong ads. De Puy.....	37, 344, 346
Stone ads. Sherwood.....	410	Strong v. Lyon.....	214
Stone v. Western Transp. Co.....	280, 367	Strong v. Nat. Mechanics' Banking Ass'n.....	58
Stoneman v. Erie Ry. Co.....	81, 92		
Stoner ads. Meech.....	45, 66		
Storey v. Brennan.....	66		

	Page.		Page.
Strong ads. Pratt...	327	Sun Mut Ins. Co. ads. McColl ...	90
Strong v. Sproul.....	364	Sun Mut. Ins. Co. ads. McConoche ...	237
Strong v. Sun Mutual Ins. Co.....	226	Sun Mut. Ins. Co. ads. Nelson .....	236
Struble ads. Hoppough .....	164, 285	Sun Mut. Ins. Co. ads. Strong. ....	226
Struffman v. Muller .....	34	Sun Mut. Ins. Co. ads. Willetts .....	110
Strasburgh v Mayor, etc .....	44	Supervisors ads. Brady .....	419
Struthers v. Pearce.....	30, 125, 350	Supervisors ads. Doolittle.....	5
Stryker ads. Brewster.....	169, 385	Supervisors v Ellis.....	419
Stryker v. Cassidy.....	283	Supervisors ads. Ely.....	286
Stryker ads. Hall.....	49, 210	Supervisors ads. Town of Guilford...	101
Stryker v. Metcalf .....	184	Supervisors ads. Hill.....	69, 428
Stryker ads. Parsell .....	99, 109	Supervisors ads. Mut. L. Ins. Co. ....	431
Stryker ads. Reed.....	345	Supervisors v. Otis.....	128, 423
Stryker ads. Rider .....	167	Supervisors ads. People.....	101, 267, 336, 404
Stryker ads. Rinchey. ....	51, 397		419, 428, 429
Stuart v. Palmer .....	89, 101	Supervisors v. People.....	406
Studley ads. Bissell .....	32	Supervisors of Broome Co. ads. Peo-	
Studwell ads. Huguenot Nat. Bank. .	270	ple.....	418
Studwell v. Shapter.....	221	Supervisors of Broome ads. Susque-	
Sturges ads. Bloomer.....	294	hanna Bk.....	431
Sturges v. Vanderbilt.....	122	Supervisors of Chenango ads. People.	98
Sturgess v. Bissell.....	76, 146		101, 266
Sturgess ads. Seymour .....	118	Supervisors of Columbia Co. ads. Peo-	
Sturgis v. Hendricks.....	184	ple. ....	397, 404
Sturgis v. Merry... ..	19	Supervisors of Delaware Co. ads. Peo-	
Sturgis ads. Secor.....	4	ple.....	194, 266, 419
Sturgis v. Spofford.....	17, 97, 357	Supervisors of Erie ads. Buffalo &	
Sturm v. Atlantic Mut. Ins. Co.....	236	State Line R. Co .....	427
Sturtevant v Orser.....	390	Supervisors of Erie ads. Mutual Ins.	
Sturtevant ads. People.....	222, 252	Co .....	427
Sturtevant v. Sturtevant.....	178	Supervisors of Erie ads. People....	1, 267
Stuyvesant ads. Mayor, etc.....	5, 154		268, 406, 432
St. Vincent Orphan Asylum v. City of		Supervisors of Greene Co. ads. Martin.	128
Troy .....	7, 302	Supervisors of Hamilton ads. People.	432
Sudlow v. Knox .....	16, 103	Supervisors of Kings Co. ads. People.	
Suffern ads. People.....	435		95, 404
Sullivan v. Bonesteele.....	320	Supervisors of Livingston ads. New-	
Sullivan ads. Caulfield.....	424, 465	man.....	428
Sullivan v. Mayor, etc.....	96, 330	Supervisors of Livingston Co., ads.	
Sullivan ads. People. ....	136	People .....	267
Sullivan v. Sullivan.....	347	Supervisors of Madison Co. ads. Peo-	
Sumner v. People.....	144	ple .....	85, 430
Sumner ads. Titus.....	263	Supervisors of Monroe v. Clark..	128, 244
Sunderlin v. Bradstreet. ....	263		341, 421, 423
Sun Mutual Ins. Co. ads. Alexander..	236	Supervisors of Montgomery Co. ads.	
Sun Mutual Ins. Co. ads. Buffalo		People .....	404, 418
Steam Engine Works .....	234	Supervisors of New York ads. Mut.	
Sun Mut. Ins. Co. ads. DePeyster....	237	Ben. Life Ins. Co.....	85, 222
Sun Mut. Ins. Co. ads. Gillilan.....	400	Supervisors of N. Y. ads. People.....	316, 431
Sun Mut. Ins. Co. v. Mayor, etc.....	404, 427	Supervisors of Niagara County ads.	
Sun Mut. Ins. Co. ads. McCall .....	237	Dewey .....	128

	Page.		Page.
Supervisors of Niagara ads. McClure.		Svenson v. Atlantic Mail Steamship	
	28, 126	Co .....	278
Supervisors of Niagara Co., ads.		Swan ads. Hudson.....	89
People .....	53, 128	Swan ads. Medbury .....	21
Supervisors of Onondaga Co. v. Mor-		Swanton ads. McLean .....	13
gan .....	223	Swarthout v. Curtis.....	19, 26, 216, 292
Supervisors of Ontario ads. People ..	431	Swarthout v. New Jersey Steamboat	
Supervisors of Otsego Co. ads. Peo-		Co .....	415
ple .....	266, 430	Swarthout ads. Stillwell ...	200, 221, 424
Supervisors of Queens ads. People.		Sweeney ads. Dorris.....	417
	86, 431	Sweeney ads. Kellogg.....	250
Supervisors of Rensselaer v. Bates...	422	Sweeney ads. Smith.....	40
Supervisors of Richmond County ads.		Sweet v. Barney .....	77
People ....	218, 219, 266, 268, 336, 419	Sweet v. Buffalo, etc., R. Co.....	98, 167, 306
Supervisors of Saratoga Co. v. Deyoe.		Sweet v. Chase.....	466
	67, 244	Sweet ads. Hale .....	224, 299
Supervisors of Sullivan ads. Bridges.	435	Sweet ads. Thompson .....	397
Supervisors of Sullivan Co. ads. Wal-		Sweet v. Tuttle.....	175, 246, 364, 474
ler .....	268	Sweet ads. Van Deusen.....	170, 188, 223
Supervisors of Tompkins ads. Board-		Sweet ads. Woodworth .....	274
man .....	428	Sweetman v. Price.....	212
Supervisors of Tompkins ads. Gray..	40	Swezey v. Lott.....	398
	221, 303	Swett ads. Marston.....	354, 360, 366
Supervisors of Ulster ads. People.		Swezey ads. Booth.....	180, 453
	219, 266, 267, 284, 418, 432, 435	Swift ads. Drew.....	155, 164
Supervisors of Wayne ads. Williams.	429	Swift ads. Hulett.....	223
Supervisors of Westchester ads. Peo-		Swift v. Massachusetts Life Ins. Co..	241
ple .....	268, 431	Swift v. Mayor, etc.....	335
Suspension Bridge, Village of, ads.		Swift v. City of Poughkeepsie.....	305
Fleming .....	302	Swift v. Prouty .....	361, 395
Susquehanna Bk. v. Supervisors of		Swift v. State .....	189, 403
Broome .....	431	Swift ads. Wangler.....	40, 105
Susquehanna Valley Bank v. Loomis.		Swift ads. Wood.....	222, 384
	318, 322	Swinburne v. Swinburne .....	413
Sussdorff v. Schmidt .....	10, 179, 360	Swinnerton v. Columbian Ins. Co.....	188, 236
Sutcliffe ads. Underwood .....	419	Swinton ads. Wallace.....	196
Sutherland v. Carr.....	418	Swords v. Edgar.....	461
Sutherland v. Olcott.....	269	Syme ads. Ward.....	422
Sutherland ads. People.....	7, 224	Syracuse, City of, ads. Barton.....	304
Sutton ads. Messerve.....	16	Syracuse, City of, ads. Brewster.....	98, 101
Sutton v. N. Y. Cent., etc., R. Co....	379	Syracuse, City of, ads. Cain.....	305
Sutton ads. Parsons.....	127, 148, 439	Syracuse, City of, ads. Kinne.....	95, 96
Sutton v. Ray.....	35	Syracuse, City of, ads. McCarthy....	304
Suydam v. Barber .....	92, 246	Syracuse, City of, ads. Parker.....	190
Suydam ads. Chouteau.....	104, 197	Syracuse, City of, ads. Weston.....	404
Suydam ads. Danforth.....	72, 404	Syracuse, Common Council of, ads.	
Suydam ads. Gardiner.....	457	People .....	167, 305
Suydam v. Jackson.....	260	Syracuse Chilled Plow Co. v. Wing..	275
Suydam v. Smith.....	356, 447	Syracuse Nat. Bk. ads. Pattison.....	62
Suydam ads. Soverhill.....	197	Syracuse Sav. Bk. v. Seneca Falls,	
Suydam ads. Wiles.....	359	Town of.....	435

	Page.		Page.
Syracuse Sav. Bk. v. Syracuse, etc...	128	Talmage v. Hunting.....	219
Syracuse, etc., R. Co., Matter of.....	120	Talmage v. First Nat. Bank .....	368
Syracuse, etc., R. Co. ads. Dexter ...	81	Talmage v. Third Nat. Bank....	357, 434
Syracuse, etc., R. Co. ads. Hill....	74, 80	Talmage ads. Tracy .....	104
Syracuse, etc., R. Co. ads. Lombard.		Talman ads. Schermerhorn .....	450
	281, 283	Tamajo ads. First Nat. Bk.....	384
Syracuse, etc., R. Co. ads. Maynard.		Tamajo ads. First Nat. Bk. of Coop-	
	75, 76	erstown.....	415
Syracuse, etc., R. Co. ads. Mehan ...	280	Tanner v. Hills.....	108
Syracuse, etc., R. Co. ads. Northrop .	77	Tanner ads. Livingston. ....	260
Syracuse, etc., ads. Syracuse Sav. Bk.	128	Tanner v. Parshall.....	182
Syracuse, etc., R. Co. v. Syracuse &		Tanner ads. Pomeroy.....	318
Chenango R. Co.....	26	Tanner ads. Wheelock. ....	112
Syracuse, etc., R. Co. ads. Tallman..	376	Tapscott ads. Tinkham.....	95, 403
Syracuse, etc., R. Co. ads. Tolman...	18	Tarbox ads. Ackley.....	345
	125, 201	Tarbox ads. Bartlett.....	180, 476
Syracuse & Chenango R. Co. ads. Syra-		Tarbell v. West. ....	383
cuse, etc., R. Co.....	26	Tatham ads. Hartley.....	290, 294
Syracuse & Utica R. Co. ads. Coon...	280	Tator ads. Vosburgh.....	69
Taber v. Delaware, etc., R. Co.....	80	Taussig v. Hart.....	150, 416
Taber ads. Johnson.....	285, 457	Tauton v. Groh....	244
Tabor v. Bradley.....	460	Taylor v. Atlantic Mut. Ins. Co.....	461
Tabor v. Gardner.....	21	Taylor ads. Averill.....	255, 290
Tabor v. People.....	16, 138	Taylor v. Barnes.....	189, 412
Tabor v. Van Tassell.....	180, 440	Taylor ads. Board of Comm'rs.....	404
Taddiken v. Cantrell.....	321	Taylor v. Bradley.....	113, 148
Taft v. Chapman.....	415	Taylor ads. Broome....	360
Taggart v. Murray.....	469	Taylor ads. Browne.....	31
Talbot ads. Bakeman.....	348, 461	Taylor v. Carnes.....	147
Talbot ads. King.....	444	Taylor ads. Chamberlain.....	164
Talbot v. Talbot.....	16, 474	Taylor v. Church.....	263
Talcott ads. Miller.....	414	Taylor ads. Concklin .....	23, 123
Tallcot ads. Davis.....	205	Taylor v. Dodd.....	472
Tallcott v. Harris....	171, 183	Taylor ads. Frederick.....	17, 358
Tallmadge ads. Bowers.....	30	Taylor v. Gillies.....	437
Tallmadge ads. Dunlevy.....	130	Taylor ads. Gottsberger ....	420
Tallmadge v. East River Bank .....	163	Taylor v. Guest.....	27, 212
Tallmadge ads. Wright.....	273, 369	Taylor ads. Hamilton.....	177
Tallmage v. Pell.....	58	Taylor ads. Hart.....	104
Tallman v. Atlantic F. and M. Ins. Co.	225	Taylor ads. Howland.....	34
Tallman v. Bresler ....	18	Taylor ads. Hyatt....	223
Tallman ads. Coffin .....	259	Taylor v. Mayor, etc.....	243, 262, 331
Tallman v. Coffin .	256, 257	Taylor v. City of New York.....	173, 395, 406
Tallman ads. Colegrove.....	351, 422	Taylor ads. Oatman.....	317
Tallman v. Franklin .....	177, 408	Taylor ads. Paddon....	392
Tallman ads. Grant.....	147	Taylor v. Root .....	3, 28, 127
Tallman v. Hovey.....	44	Taylor v. Shew.....	387
Tallman ads. Sellick.....	434, 456	Taylor v. Taylor.....	401
Tallman v. Syracuse, etc., R. Co ....	376	Taylor ads. Thompson.....	323, 421
Tallman v. White .....	90, 428, 432	Taylor ads. Thomson .....	426
Talmage ads. Cotheal .....	149	Taylor v. Troncoso.....	50

	Page.		Page.
Taylor ads. Van Bokkelen..	180, 385, 394	Thacher ads. Schenectady & Saratoga	
Taylor ads. Vanderwiele..	459	Plankroad Co.....	169, 357
Taylor ads. West River Bank.....	326	Thaule v. Krekeler..	31, 266
Taylor v. Wing.....	31, 244, 289	Thayer ads. Blydenburgh..	45, 249, 368
Teachout v. People .....	135	Thayer v. Clark.....	425
Teal ads. Cowdin .....	36	Thayer v. Manley.....	115, 150
Teall v. Felton .....	5, 115	Thayer ads. People.....	73
Teall v. Fulton .....	369	Thayer Manuf. Jewelry Co ads. Cush-	
Tebo v. Baker .....	347	man.....	270
Teed v. Morton .....	470	Therasson v. People.....	140, 441
Teed v. Valentine.....	211	Therasson v. Peterson.....	2
Teerpenning v. Corn Ins. Co.....	175	Thiel ads. Best.....	62, 170, 294
Tefft v. Munson .....	290	Third Ave. R. Co. ads. Barrett....	21, 52
Tegg ads. Redfield .....	10		379
Ten Broeck v. Sherrill... ..	72	Third Ave. R. Co. ads. Dingledein... ..	113
Ten Eyck ads. Commercial Bank of		Third Ave. R. Co. ads. Hamilton....	151
Albany .....	61, 310, 405	Third Ave. R. Co. ads. Isaacs....	80, 279
Ten Eyck v. Craig.....	196, 290	Third Ave. R. Co. ads. Mayor, etc....	222
Tennessee Marine and Fire Ins. Co.			302
ads. Hodges .....	178	Third Ave. R. Co. ads. Schultz... ..	81, 180
Tenney v. Berger ... ..	37, 53		262
Tenth Nat. Bk. ads. McNeil.....	368	Third Ave. R. Co. ads. Van Schaick..	256
Terbell ads. Long Island Ferry Co..	339	Third Nat. Bank v. Blake .....	62, 274
Terhune ads. Bedford .....	256	Third Nat. Bank ads. Talmage... ..	357, 434
Terhune v. Mayor, etc .....	330, 341	Thomas v. Bartow.....	286, 456
Terpening v. Skinner.....	468	Thomas v. Beebe.....	180, 360
Terre Haute Manf. Co. ads. Pope....	417	Thomas ads. Blackmar.....	202, 367
Terre Haute & Richmond R. Co. ads.		Thomas ads. Chapman.....	46
Jones .....	119	Thomas v. Crofut.....	458
Terrett v. Cowenhoven .....	170, 259, 262	Thomas v. Dickinson.....	409
Territt v. Brooklyn Improvement Co.	246	Thomas ads. Edgerton.....	169, 300
Terry ads. Annett.....	421	Thomas v. Fleury.....	112
Terry v. Chandler.....	69	Thomas ads. Guild.....	68
Terry v. Jewett.....	378	Thomas ads. Hays.....	1
Terry ads. Phillips.....	151, 176, 460	Thomas v. Hubbell.....	246, 421
Terry ads. Spelman, Matter of Peti-		Thomas v. Hunt.....	177
tion of... ..	124, 216	Thomas ads. Lord .....	102, 403
Terry v. Wait.....	212, 248	Thomas v. Murray.....	450
Terry v. Wheeler.....	27, 390	Thomas ads. Nat. Bank of Salem....	350
Terry v. Wiggins .....	469	Thomas v. Nelson.....	258
Terwilliger v. Brown.....	198	Thomas v. People .....	134, 135, 139, 140
Terwilliger ads. Tilson.....	211, 409	Thomas ads. Rorke.....	268
Terwilliger v. Wands.....	264	Thomas ads. Whitney.....	430
Teutonia Sav. Bank ads. Springport,		Thomas v. Winchester..	309
Town of.....	434, 435, 436	Thompson v. American, etc., Ins.	
Thalheimer ads. Kundolf.....	99	Co.....	239
Thacher ads. Columbia College, Trus-		Thompson v. Bennett.....	32
tees of.....	156	Thompson v. Blanchard..	29, 169, 191, 299
Thacher v. Morris.....	360		408, 475
Thacher ads. People.....	28, 339, 372	Thompson ads. Buckmaster.....	402
Thacher v. Candee.....	47, 345, 444	Thompson ads. Burhans..	90, 153, 163, 430

	Page.		Page.
Thompson ads. Capron..	416	Thorp ads Kennedy.....	48
Thompson ads. Carr.....	414	Thorp v. Keokuk Coal Co.....	154, 367
Thompson ads. Chapin..	47, 326, 327, 454	Thorp v. Ross.....	111, 114
Thompson v. Commissioners.	265, 292, 297	Thorp v. Thorp.....	278
Thompson ads. Curtis.....	112	Thorpe v. N. Y. Cent., etc., R. Co.	80
Thompson v. Erie Ry. Co.....	345, 364	Thrasher v. Bentley.....	48, 63
Thompson v. Fargo.....	12, 78	Thurber v. Blanck.....	51
Thompson ads. Goodrich.....	11, 207	Thurber ads. Brown.....	177
Thompson, Town of, ads. Horton....	436	Thurber v. Chambers.....	22, 466
Thompson ads. Hoyt.....	119, 121	Thurber v. Harlem, etc., R. Co....	35, 312
Thompson ads. Kellogg.....	219	Thurber ads. Morton.....	259, 438, 451
Thompson v. Kessel.....	14, 363	Thurber v. Planck.....	131
Thompson ads. Leavitt.....	15, 171, 406	Thurber v. Townsend.....	37, 94
Thompson ads. Manhattan Brass and Manuf. Co.....	276	Thurber ads. Young.....	127, 203
Thompson v. Mayor, etc.....	7, 328	Thursby v. Lidgerwood.....	351
Thompson v. Menck.....	29, 210, 390, 407	Thurst v. West.....	182, 248
Thompson ads. Merchants' Bank....	403	Thurston v. Cornell.....	186, 450, 453
Thompson ads. Merritt.....	40, 125	Tibbets ads. People.....	459
Thompson v. Mink.....	38	Tibbets ads. Chapman.....	216
Thompson ads. Parmelee.....	106	Tice v. Zinsser.....	113
Thompson ads. Prichard.....	141, 330, 470	Tiemeyer v. Turnquist.....	45, 274
Thompson v. Schermerhorn.....	302	Tierney v. N. Y. Cent., etc., R. Co..	76
Thompson v. Sweet.....	397	Tiffany v. Clark.....	444
Thompson v. Taylor.....	323, 421	Tiffany ads. Peck.....	50, 149, 195
Thompson v. Tracy.....	198	Tiffany v. St. John.....	51, 196, 434
Thompson ads. Valarino.....	103, 252	Tift v. Buffalo, City of.....	95, 306, 447
Thompson v. Van Vechten.....	249, 299, 453	Tift ads. Colie.....	21
Thompson ads. Veltman.....	399	Tift ads. Ganson.....	261
Thompson ads. Walworth.....	215	Tift ads. Harding.....	356
Thompson ads. Westcott.....	391	Tift v. Horton.....	204
Thompson's Exr. ads. Hoyt.....	183	Tift v. Porter.....	471
Thomson v. Bank of North America. 27, 323, 355,	412	Tilley v. Hudson River R. Co....	148, 149
Thomson ads. Gleadell.....	74	Tilley v. Phillips.....	37
Thomson v. McGregor.....	421	Tillinghast ads. Brigham.....	46
Thomson ads. Merchants' Bank.....	295	Tillman v. Davis.....	465, 466, 468
Thomson v. Smith.....	457	Tillon v. Kingston Mutual Ins. Co....	203
Thomson v Taylor.....	426	Tillotson v. Hudson River R. Co. 374,	404
Thomson v. Tracy.....	371	Tillotson ads. McKeon.....	220
Thorburn ads. Passenger.....	147	Tillotson v. Race.....	463
Thorn v. Helmer.....	185, 210	Tillotson v. Wolcott.....	419
Thorn v. Knapp.....	147	Tilson v. Bruce.....	411
Thorn ads. McCready.....	400	Tilson v. Terwilliger.....	211, 409
Thorn ads. Millerd.....	353, 438	Tilt ads. Williams.....	453
Thorn ads. Neil.....	359, 439, 476	Tilton v Beecher.....	17, 67
Thorn ads. Williams.....	131, 445, 447	Tilton ads. Kelly.....	14, 438
Thorne ads. Lockwood.....	3	Tilton ads. Stroud.....	181
Thorne v. Turck.....	141, 203	Tim v. Smith.....	51
Thornton ads. Dean.....	474	Tinkham v. Tapscott.....	95, 404
Thornton v. Wabash Ry. Co.....	117	Tinsley, Matter of.....	128, 415
		Tinson v. Welch.....	442

	Page.		Page.
Tioga R. Co. ads. Blossburg, etc., R. Co.....	109, 380	Torrey ads. Bissell.....	400, 434
Tioga R. Co. ads. Mallory....	39, 121, 258	Torrey v. Torrey.....	271, 433
	413, 442	Torry v. Black .	216, 394
Tioga R. Co. ads. Olcott.....	119, 319, 326, 413	Tostevan ads. Burroughs.....	282, 359
Tipton v. Feitner .....	107	Totten v. Phipps.....	258
Titus ads. Cobb.....	421, 451	Toulmin ads. Davis .....	395
Titus v. Glens Falls Ins. Co.....	232	Tousley v. Barry.....	180
Titus v. Orvis.....	30	Towle v. Forney .....	248
Titus v. Pres., etc., of Gt. Westn. Turnpike Co.....	121	Towle v. Remsen.....	155, 329
Titus v. Sumner.....	263	Town Auditors ads. People .....	434
Tobey ads. Gibson .....	355, 393	Townsend, Matter of.....	102, 167
Tobias ads. Catlin.....	389	Townsend v. Bary.....	152
Tobias v. Cohn.....	257, 469	Townsend ads. Continental Nat. Bk..	320
Tobias v. Ketchum.....	467	Townsend ads. Dykers..	405, 408
Tobias v. Rogers.....	65, 422	Townsend v. Hayt.....	155
Tobias ads. Shaw.....	88, 361	Townsend ads. Lawrence .....	54
Todd v. Botchford.....	194	Townsend ads. Lynes .....	468
Todd ads. Bowling Green Sav. Bk....	53	Townsend v. Masterson, etc., Stone Dressing Co.....	30
Todd v. City of Troy.....	303	Townsend v. Mayor, etc.....	89
Todd ads. Merritt....	318	Townsend v. McDonald.....	458
Todd v. Weber. ....	342, 343	Townsend ads. Mickler .....	293
Toel ads. Pacific Mail Steamship Co.	222	Townsend v. N. Y. C., etc., R. Co.....	80, 151
Tompkins ads. Chesebrough.....	38	Townsend v. North-western Ins. Co..	230
Tompkins v. Dudley ...	113	Townsend v. Scholey.....	256
Tompkins v. Hyatt.....	19, 205, 455	Townsend ads. Smith... ..	423
Tompkins v. Ives .....	124	Townsend v. Stearns.....	46
Tompkins ads. People.....	219	Townsend ads. Thurber.....	37, 94
Tompkins v. Soulice .....	20	Townsend ads. Whitney.....	26
Tomlinson ads. Hanover Fire Ins. Co.	17	Townsend v. Whitney .....	26, 426
Tomlinson v. Mayor, etc.....	34	Townsend ads. Williams.....	294
Tomlinson v. Miller .....	179, 407	Townshend ads. Foster .....	54, 381
Toles v. Adees.....	42, 398, 420	Tracey v. Altmyer.....	17
Tolman v. Syracuse, etc., R. Co.....	18	Tracey v. Corse .....	337, 388
	125, 201	Tracey ads. Morey.....	4, 244
Tonawanda R. Co. ads. Munger.....	377	Tracy v. First Nat. Bk. of Selma..	16, 381
Tone v. Mayor, etc.....	333	Tracy v. McManus.....	187, 353
Tonnele ads. Bean.....	355	Tracy ads. Smith.....	9
Tonnele v. Hall.....	462	Tracy v. Talmage.....	104
Tooker v. Arnoux .	360, 440	Tracy ads. Thompson.....	198
Tooker ads. Petty.....	386	Tracy ads. Thomson .....	371
Toole ads. Le Fevre.....	472	Tracy v. Troy & Boston R. Co.....	376
Toole ads. Osgood .....	33, 228	Tracy ads. Tuthill.....	297
Tooley v. Bacon.....	192	Train v. Holland Purchase Ins. Co...	228
Topping ads. Fitzgerald.....	245, 444		233
Topping ads. Geib .....	384	Transatlantic Ins. Co. ads. Armour ..	231
Torrance ads. Becker .....	196	Transportation Co. ads. Mahler.....	253
Torrance ads. Gillespie.....	322	Traphagen v. Burt.....	402, 409
Torrence v. Conger.....	157	Traphagen ads. McGoldrick.....	181
Torrey ads. Battell .....	221	Trask ads. Hoagland.....	343
		Travelers' Ins. Co. ads. Mallory.....	242

	Page.		Page.
Traver v. Eighth Ave. R. Co.	285, 311, 363	Troy & Lansingburgh R. Co. ads.	
Traver v. Schell	472	Mayor, etc.	247, 264, 305
Travers ads. Sandford	156	Truax v. Slater	180
Travis ads. Cook	7	True ads. Bowen	42
Travis v. Myers	23	Trull v. Granger	259
Treadwell v. Archer	276, 450	Trumpbour ads. Snyder	219
Treat ads. Pardee	105, 154, 292	Truscott v. King	249, 356
Tremain v. Cohoes Co.	186, 338	Truslow v. Putnam	56, 195
Tremain v. Richardson	102	Truslow ads. Sage	130
Tremper v. Conklin	188, 476	Truslow ads. Wetmore	30, 446
Trenton Banking Co. v. Duncan	131, 248	Trustees, etc., v. Bly	386
Trevor v. Wood	104	Trustees, etc., v. Kellogg	466
Trim ads. Blanchard	408	Trustees, etc., v. Kirk	6, 69
Trimm v. Marsh	290	Trustees, etc., v. McKechnie	120
Trimmer ads. Briant	30, 32	Tubbs ads. People	374, 422
Trinity Church, Rector of, ads. People	214	Tubbs ads. Plumb	156
Triumph Ins. Co. ads. Standard Oil Co	228	Tucker v. Bishop	472
Troncoso ads. Taylor	50	Tucker ads. Hoppock	466
Trotter v. Hughes	288	Tucker v. Leland	24
Trow v. Shannon	213, 385	Tucker v. Tucker	424, 425, 467
Trowbridge v. Horan	306, 430	Tucker ads. Weed	340, 403
Trow's Printing, etc., Co. v. Hart	51	Tuckerman v. Brown	235
Troxell ads. Enos Morgan's Sons Co.	437	Tufts ads. Matthews	417
Troy, City of, ads. Francis	302	Tugman v. National Steamship Co.	108, 387
Troy, City of, ads. Kennedy	44, 85	Tully v. People	143
Troy, City of, ads. Minick	314, 406	Tumbridge ads. Harris	66, 416
Troy, City of, ads. St. Vincent Orphan Asylum	7, 302	Tunncliffe ads. Clark	154, 341
Troy, City of, ads. Todd	303	Tunncliffe ads. Wood	40, 198, 215
Troy City Bank v. Lanman	326	Tuomy v. Dunn	251
Troy City Bank ads. McSpeddon	322	Tupper ads. Kein	389
Troy, Common Council of, ads. People	267	Turck ads. Thorne	141, 203
Troy, Fire Department of, v. Bacon	429	Turk v. Ridge	68
Troy Hospital Ass'n ads. Cheney	282, 283	Turnbridge ads. Harris	35
Troy Iron and Nail Factory ads. Corning	69, 170, 442, 460	Turnbull v. Bowyer	321
Troy Union R. Co. ads. Dunham	88, 115	Turner v. Baker	69
Troy Union R. Co. ads. Wager	166	Turner v. Bank of Fox Lake	323, 355
Troy & Boston R. Co. ads. Atcherson	121, 376	Turner ads. Crane	290, 291
Troy & Boston R. Co. ads. Baxter	313	Turner v. Haight	34, 113
Troy & Boston R. Co. v. Boston, etc., Ry. Co.	374	Turner v. Jaycox	46
Troy & Boston R. Co. ads. Buffett	79	Turner v. Keeler	8
Troy & Boston R. Co. ads. Payne	378	Turner v. Roby	367
Troy & Boston R. Co. ads. Tracy	376	Turner ads. Vrooman	291
Troy & Boston R. Co. ads. Viele	112, 169, 401, 442	Turnquist ads. Tiemeyer	45, 274
Troy & Lansingburgh R. Co. v. Kane	88	Tuska ads. Moller	64
		Tuska v. O'Brien	205
		Tuthill v. Bogart	195, 371, 455
		Tuthill ads. Bronson	190, 327
		Tuthill v. Morris	293, 294, 434
		Tuthill ads. People	386
		Tuthill v. Tracy	297



	Page.		Page.
Tuthill ads. Weller .....	113	Union Bank of Pennsylvania v. Un-	
Tuthill v. Wilson .....	11, 288	ion Bank of New York .....	59
Tuttle ads. Brill .....	45, 178, 342	Union Bank of Rochester ads. Cram..	350
Tuttle ads. Goodale .....	458	Union College, Trustees of, v. Whee-	
Tuttle v. Hazard .....	116	ler .....	291, 337
Tuttle v. People .....	134, 143	Union Dime Sav. Inst. v. Anderson..	396
Tuttle ads. Powell .....	265, 443	Union Dime Sav. Inst. v. Duryea.....	294
Tuttle ads. Sweet .....	175, 246, 364, 474	Union Dime Sav. Inst. v. Wilmot.171,	454
Tweed ads. People .....	23, 67, 301, 360	Union Ferry Co. ads. Clark .....	203
Tweedy ads. Ferguson .....	277	Union Ferry Co. ads. Ferris.....	79, 203
Twenty-third St. Railway ads. Jack-		Union Ferry Co. ads. Hoffman.....	400
son .....	213	Union Ferry Co. of Brooklyn ads.	
Twombly v. Cassidy.....	27, 28, 295, 421	Loftus.....	79, 203
Twomley v. Cent. Park, etc., R. Co .	311	Union Hotel, etc. v. Hersee.....	117, 119
Tyler v. Brock .....	64	Union Indian Rubber Co. ads. Rider.	
Tyler ads. Cole ..	23, 210		104, 205
Tyler v. Gardiner .....	381, 463	Union Mfg. Co. v. Lounsbury.....	354
Tyler v. Gould. ....	325	Union Mut. Life Ins. Co. ads. Baker.	339
Tyler ads. Manning .....	363, 453	Union Mut. Ins. Co. ads. Hartshorne.	236
Tyler ads. Miller.....	26	Union Mut. Life Ins. Co. ads. How..	241
Tyng ads. Andrews .....	53, 128, 151	Union Nat. Bank v. Kupfer.....	416
Tyng v. Commercial Warehouse Co.		Union Nat. Bank of Troy v. Sixth	
	361, 452	Nat. Bank of New York.....	285
Tyng ads. Indianapolis, etc., Ry. Co.		Union R., etc., Co. ads. Merchants'	
	11, 209	Bank of Canada.....	66, 343
Tysen ads. Lake .....	324	Union Steamboat Co. v. Buffalo.....	86
Tysen ads. Wayland .....	364	Union Steamboat Co. ads. Richmond.	78
Tyson v. Blake .....	466	Union Theol. Seminary ads. Howland	464
Uline v. N. Y. Cent. & Hud. R. R. Co.	17	Union Trust Co. of New York v.	
Ulster Co. Sav. Inst. v. Leake....	233, 290	Monticello, etc., R. Co.....	373
Underhill ads. Johnson .....	270	Union Trust Co. v. Whiton.....	29
Underhill ads. Vandervoort .....	468	United States Direct Cable Co. ads.	
Underwood ads. Barnes.....	272	Hart .....	433
Underwood v. Farmers' Joint-Stock		United States Express Co. ads. Reed.	75
Co .....	232	United States Fire Ins. Co. ads. United	
Underwood v. Green.....	22, 302, 337	States Trust Co. ....	93
Underwood v. Sutcliffe .....	419	United States Life Ins. Co. ads.	
Unger v. Forty-second St., etc., R.		Cushman .....	238
Co.....	80, 379	United States Life Ins. Co. ads. Evans	238
Unger ads. Nicolay.....	190	United States Life Ins. Co. ads. Mc-	
Union, etc. v. Buffalo .....	429	Ginley.....	440
Union Bank ads. Bank of Commerce.		United States Teleg. Co. ads. Baldwin.	433
	285, 324	United States Teleg. Co. ads. Brase..	432
Union Bank ads. Beckwith .....	48	United States Trust Co. v. United	
Union Bank v. Bush.....	14, 358	States Fire Ins. Co.....	93
Union Bank v. Coster's Ex'rs...215,	407	Universal Life, etc. ads. N. Y. Life..	241
Union Bank ads. Crane .....	388	Universal Life Ins. Co. ads. Marvin..	241
Union Bank ads. Mott .....	21, 42, 250	Universal Life Ins. Co. ads. Penfold.	240
Union Bank of New York ads. Com-		Upham v. New York Loan and Trust	
mercial Bank of Pennsylvania.....	191	Co .....	63
		Upton, Matter of.....	96, 333

	Page.		Page.
Upton ads. Carroll.....	326	Van Antwerp, Matter of.....	71, 97
Upton ads. Monroe.....	65	Van Aulen ads. Delaney.....	473
Upton ads. Paine.....	285, 385	Van Benthuyssen ads. Metcalf.....	174
Urbahn ads. Bergen.....	295	Van Benthuyssen v. Sawyer.....	432
Urquhart v. City of Ogdensburg.....	305	Van Bergen v. Bradley.....	28
Utica, City of, ads. Baker.....	339	Van Beuren v. Dash.....	466, 471
Utica, City of, v. Churchill.....	60	Van Biel v. Prescott.....	437
Utica, City of, ads. Evans.....	314	Van Blarcom v. Broadway Bk.....	146
Utica, City of, ads. Hunt.....	301	Van Bokkelen v. Taylor.....	180, 385, 394
Utica, City of, ads. Storrs.....	303	Van Brunt v. Applegate.....	349
Utica, etc., R. Co. ads. Salter....	123, 244	Van Brunt ads. Marine Bk. of Chi-	
	313, 377	cago.....	194
Utica & S. R. Co. ads. Holbrook....	79, 174	Van Brunt v. Day.....	189, 262
Utley ads. Goldbery.....	22	Van Brunt ads. Hitchings.....	37, 53
Utter ads. Babcock.....	155, 157, 265, 287	Van Brunt ads. Van Cott.....	120
		Van Buren, Matter of.....	329, 430
Vail ads. Farmers' Bk. of Bridgeport.	319	Van Buren ads. Davis.....	421, 423
Vail v. Foster.....	420, 454, 456	Van Buren ads. Mitchell.....	14
Vail v. Hamilton.....	270	Van Buren ads. Verplanck.....	93, 206
Vail ads. Hollister Bank.....	21	Van Buskirk v. Roberts.....	82, 146
Vail v. Rice.....	184, 188	Van Buskirk ads. Sheldon.....	188, 339, 431
Valarino v. Thompson.....	102, 252	Van Buskirk v. Warren.....	45, 91
Valentine, Matter of.....	223	Van Campen ads. Freeland.....	319, 355
Valentine v. Conner.....	38, 450	Van Cott v. Van Brunt.....	120
Valentine ads. Peck....	175	Van De Bogert ads. Yates....	7, 155, 374
Valentine ads. Skinner.....	214	Van De Mark ads. Donovan.....	443, 473
Valentine ads. Teed.....	211	Van Denburgh v. Prest., etc., of	
Valentine's Ex'rs ads. McCracken....	296	Greenbush.....	281
Valiente ads. Dyckman.....	401	Vanderbilt ads. Chase.....	347
Valton v. Loan Fund Assurance Soc..	185	Vanderbilt ads. Commissioners of Pi-	
Valton v. National Fund Life Assur-		lots.....	357
ance Co.....	238, 239, 241, 370	Vanderbilt ads. Harbeck.....	248
Vann v. Rouse.....	33, 261	Vanderbilt ads. Hilton.....	9, 202, 353
Vanneman v. Powers.....	274	Vanderbilt ads. People.....	327, 328, 338, 405
Van Alen v. Feltz.....	411, 414	Vanderbilt ads. Quimby.....	75
Van Alen v. Illinois Cent. R. Co.....	119	Vanderbilt v. Richmond Turnpike Co	
Van Allen v. American Nat. Bank....	12		11, 121
Van Allen v. Farmers' Joint-Stock		Vanderbilt v. Schreyer.....	24, 215, 295, 343
Ins. Co.....	232	Vanderbilt ads. Sturges.....	122
Van Allen ads. People.....	100, 129	Vanderbilt ads. Ward.....	76, 146, 149
Van Allen ads. Romaine.....	150	Vanderbilt ads. Williams.....	81
Van Allen ads. Wait.....	30	Vanderheyden ads. Bentley.....	289
Van Alstyne ads. Adams.....	203	Vanderheyden v. Mallory.....	63, 275
Van Alstyne v. Cook.....	351	Vanderhorst ads. Bank of New York.	
Van Alstyne v. Erwine.....	49		9, 320
Van Alstyne v. Friday.....	218, 364	Van Derlip v. Keyser.....	443
Van Alstyne v. Nat. Com. Bk. of Al-		Vanderpoel ads. Elverson.....	183
bany.....	324, 325	Vanderpool v. Smith.....	262
Van Alstyne ads. People.....	86, 122, 217, 218	Vanderpool v. Van Valkenburgh.....	344, 425
Van Alstyne v. Van Alstyne.....	465	Vanderslice v. Newton.....	107, 148, 434
Van Amburgh v. Baker.....	270	Van der Volgen v. Yates.....	154, 443

	Page.		Page.
Vandervoort v. Gould...	7, 149, 273, 359	Van Marter v. Hotchkiss.....	37, 100
Vandervoort ads. Hasbrouck .....	475	Van Nostrand v. Moore.....	466
Vandervoort ads. Underhill .....	468	Van Nostrand ads. Smith.....	469
Vanderweille v. Taylor.....	459	Van Nostrand ads. Wolfe.....	125, 469
Van Derwerker ads. National Bank of Schuylerville.....	245	Van Olinda ads. Smith.....	13
Vanderzee v. Vanderzee.....	469	Van Orden ads. Ham .....	45, 213, 473
Van Deusen ads. Baldwin.....	38, 220	Van Reed ads. Foster.....	292
Van Deusen v. Rowley.....	213	Van Rensselaer v. Aiken .....	113
Van Deusen v. Sweet .....	170, 188, 223	Van Rensselaer v. Albany & West Stockbridge R. Co .....	162
Van Deusen v. Trustees of Pres. Cong. .....	347, 386	Van Rensselaer v. Ball...45, 93, 255,	262
Van Deusen v. Worrell. ....	287	Van Rensselaer v. Barringer ....	256
Van Deusen v. Young .151, 344, 438,	458	Van Rensselaer v. Bouton.....	18
Vandewalker ads. Bosworth.....	246	Van Rensselaer v. Chadwick.....	259
Van Dewater v. Kelsey .....	20	Van Rensselaer v. Dennison.....	157
Van Dusen ads. Phelps .....	256	Van Rensselaer ads. Gillet.....	243
Van Dusen v. Worrell .....	157, 178	Van Rensselaer ads. Hamilton.....	214
Van Duzer v. Howe.....	19, 319, 450	Van Rensselaer v. Hays.....	93, 255
Van Dyck ads. Metropolitan Bank. 58,	94	Van Rensselaer v. Jewett'.164, 243,	262
Van Dyck v. McQuade.....	60, 62	.....	439
Van Dyke v. Emmons.....	469	Van Rensselaer v. Kidd.....	340
Van Dyke v. Maguire. ....	363	Van Rensselaer ads. People.....	354
Van Epps ads. Jordan .....	348	Van Rensselaer v. Read.....	256, 469
Van Eps, In Matter of Petition of....	278	Van Rensselaer v. Slingerland ...	256
Van Etten ads. Currier .....	144, 273, 296	Van Rensselaer v. Snyder.....	99
Van Every ads. Brooks.....	384	Van Rensselaer ads. Witbeck .....	164
Van Evrea ads. Settle.....	100	Van Rensselaer v. Witbeck.....	431
Van Gelder ads. Abeel.....	343	Van Pelt v. McGraw.....	458
Van Gelder ads. Van Gelder .....	29	Van Pelt ads. Quinn.....	145
Van Gelder v. Van Gelder...29, 193,	384	Van Santep v. Standard Oil Co.....	67
Van Giesen v. Van Giesen .....	365	Van Santvoord ads. Merrick.....	118
Van Giessen v. Bridgford.....	418, 424	Van Santvoord ads. Van Schaick ...	312
Van Guysling v. Van Kuren ...	462	Van Schaick ads. Hone .....	465, 466
Van Heusen v. Radcliff.....	255, 287	Van Schaick v. Third Ave. R. Co ..	256
Van Hoesen ads. Hoes .....	470	Van Schaick v. Van Santvoord .....	312
Van Horn ads. N. Y. & Oswego Mid- land R. Co .....	373	Van Schoick v. Niagara Fire Ins. Co. .....	229, 232
Van Ingen v. Whitman .....	352	Van Schoonhoven ads. Bacon.....	383
Van Keller ads. Peck.....	181	Van Schoonhoven v. Carley.....	457
Van Keller v. Schulting.....	104	Van Schuyver v. Mulford.....	473
Van Keuren v. Corkins.....	291, 383	Van Sise ads. Furman .....	394
Van Keuren v. Parmelee.....	353, 415	Van Slyke v. Hyatt.....	21
Van Kirk v. Sedgwick.....	52	Van Slyke ads. Jackson.....	235
Van Kleek v. Le Roy.....	208, 212	Van Steenburgh ads. Jewell.....	394
Van Kuren ads. Van Guysling .....	462	Van Syckel ads. Bennett. ....	39
Van Leuven v. First Nat. Bank of Kingston.....	62	Van Tassel ads. Tabor.....	440
Van Leuven v. Lyke.....	14	Van Tassel v. Wood.....	39
Van Loan v. Farmers', etc., Ins. Ass'n	226	Van Tassel ads. Tabor.....	180
Van Loon v. Lyons.....	129	Van Tuyl v. Westchester F. Ins.Co.27,	232
		Van Valkenburgh v. American Popu- lar Life Ins. Co.....	233

	Page.		Page.
Van Valkenburgh v. Lenox Fire Ins. Co.....	230	Vermilya ads. Bogert.....	359
Van Valkenburgh ads. Vanderpool..	425	Vermilya ads. Purdy.....	367
Van Valkenburgh ads. Vanderpool..	344	Vermilya ads. Selden.....	20, 443, 444
Van Vechten ads. Ferris.....	446	Vermilyea v. Palmer.....	27
Van Vechten v. Griffiths....188, 207,	440	Vermont Copper Mining Co. ads. Hughes.....	119
Van Vechten v. Keator.....	466	Vermont Copper Mining Co. ads. Mitchell.....	121, 434
Van Vechten v. Pruyn..	319	Vermont Copper Mining Co. ads. Ormsby.....	120, 255
Van Vechten ads. Thompson.249, 299,	453	Vermont, etc., R. Co. ads. Ogdensburgh, etc., R. Co.....	39, 125
Van Voorhies ads. Mills.....	277	Vernam ads. Chubbuck.....	285
Van Voorhis ads. Bostwick...61, 361,	422	Vernam v. Smith.....	246, 259
Van Voorhis v. Brintnall.....	92, 278	Vernol v. Vernol.....	209
Van Vranken ads. Potter.....	1, 21	Vernon ads. Litchfield.....	95
Van Wagenen ads. Flake.....	26	Vernon v. Vernon .....	469
Van Wagenen ads. Peckham....	119	Verona Cent. Cheese Co. v. Murtaugh.....	356, 405
Van Winkle v. Constantine.....	271	Verplanck, Matter of.....	424, 470, 473
Van Woert v. Albany & Susquehanna R. Co.....	409	Verplanck v. Member .....	38
Van Wyck v. Allen.....	147, 392	Verplanck v. Van Buren.....	93, 206
Van Wyck v. Aspinwall.....	264	Verree ads. Long Island R. Co.....	113
Van Wyck v. Brasher.....	153, 161	Vestvali ads. Fells.....	360
Van Wyck ads. Foster.....	43	Vick v. N. Y. Cent., etc., R. Co.....	79
Van Wyck v. Hardy.....	14, 347, 417	Victory v. Baker.....	309
Van Wyck v. McIntosh.....	176, 187	Victory v. Blood.....	20
Van Wyck ads. Seymour.....	462	Viele v. Judson.....	123, 170, 291, 383
Van Wyck ads. Sloan.....	441	Viele v. Troy & Boston R. Co .....	112, 169
Van Wyck ads. Sloane.....	391		401, 442
Van Wyck v. Watters.....	39, 451	Vilas v. Jones.....	251, 423
Van Zandt ads. Burhans.....	7, 246, 483	Vilas v. New York Cent. Ins. Co....	226
Van Zandt v. Mut. Ben. Life Ins. Co.....	175, 240	Vilas ads. People.....	421, 448
Varian ads. Hammond.....	176, 183	Vilmar ads. Hauselt.....	46, 124
Varnum ads. Commercial Bank of Kentucky. ....	310, 326, 337	Vilmar v. Schall.....	125, 191, 383
Vary ads. Fawcett... ..	22	Vincent v. Newhouse.....	463
Vassar v. Camp .....	103	Viner v. New York, etc., Steamship Co .....	78
Vassear v. Livingston .....	262	Vines ads. Argotsinger.....	151, 365, 438
Vaughan ads. Eastern Plankroad Co.	357	Vischer ads. L'Amoureux .....	169
Vaughn ads. Bunn.....	287, 371, 444	Vischer ads. Phelps.. .	30, 317
Vedder ads. Campbell..284, 292, 356,	383	Voak v. Northern Cent. Ry. Co.....	278
Vedder v. Fellows.....	80	Vogel v. Mayor of N. Y....	304, 338, 460
Veeder v. Baker.....	31, 357	Volans v. Owen .....	87
Veeder v. Judson.....	118, 123	Volkening, Petition of.....	94
Veeder v. Mudgett.....	270	Volkening ads. Brown.....	337, 393
Veghte ads. Johnstown Cheese Mfg. Co.....	157, 460	Volkening v. De Graaf.....	3, 31
Velie ads. Smith.....	278, 414	Volkening ads. Sage.....	34
Veltman v. Thompson.....	399	Volkening ads. Jordan .....	223
Vendryes ads. Everett.....	91, 326	Voltz v. Blackmar .....	12, 184
Venice, Town of, v. Woodruff.....	436	Vonderwulbeke ads. Mehl.....	21
Verdin v. Slocum.....	344, 473		

## TABLE OF CASES.

629

	Page.		Page.
Von Sachs v. Kretz.....	64, 181, 412	Waffle v. Dillenback.....	123, 440
Von Schoening ads. Hubbell.....	402	Waffle v. N. Y. C. R. Co.....	459
Voorhees ads. Bates.....	16	Waffle ads. Sibley.....	426
Voorhees v. Burchard.....	157	Wager v. Troy Union R. Co.....	166
Voorhees v. Howard.....	130	Wager v. Wager.....	201, 465
Voorhees v. McCartney.....	52, 123	Wager ads. White.....	274
Voorhees v. McGinnis.....	204	Wagner ads. Freeborn.....	469, 470
Voorhees v. Voorhees.....	153, 463	Wagner v. Jones.....	441
Voorhies ads. Dederer.....	44, 89	Wagner v. People.....	132, 138
Voorhis, Matter of.....	334	Wagner ads. Root.....	194
Voorhis v. Childs' Ex'r.....	346	Wagoner ads. Billington.....	453
Voorhis v. Mayor, etc.....	108	Waine ads. Witbeck.....	457
Voorhis ads. Nichols.....	29	Wait ads. Blair.....	171
Voorhis v. Olmstead.....	368	Wait ads. Graves.....	208, 360, 418
Voorhis ads. Onderdonk.....	399	Wait v. Green.....	390, 391
Vose v. Cockcroft.....	457	Wait ads. Phelps.....	11, 343
Vose v. Cowdrey.....	121	Wait v. Ray.....	393
Vose v. Florida R. Co.....	422	Wait ads. Terry.....	212, 248
Vose ads. Mercer.....	38, 176	Wait v. Van Allen.....	30
Vose v. Reed.....	341	Wait v. Wait.....	277
Vose v. Yulee.....	387	Waite ads. Willits.....	121
Vosburgh v. Lake Shore, etc., R. Co.	280	Wakefield v. Fargo.....	118
Vosburgh ads. Rogers.....	224	Wakely v. Davidson.....	460
Vosburgh v. Tator.....	69	Wakeman v. Dalley.....	208
Vredenburg ads. Browne.....	450	Wakeman v. Price.....	20
Vroman ads. Stephens.....	179	Wakeman v. Sherman.....	224, 415
Vrooman v. Griffiths.....	273	Walbridge ads. Despard.....	168, 178, 256
Vrooman v. King.....	180	Walbridge ads. Oliver Lee & Co.'s	
Vrooman v. Turner.....	291	Bank.....	451
Wabash Ry. Co. ads. Thornton.....	117	Waldele v. New York Cent., etc., R.	
Wachtel v. Noah Widows and Or-		Co.....	181
phans' Society.....	49	Waldo ads. Hidden.....	202
Wachter v. Quenzer.....	263	Waldron ads. Briggs.....	31, 213, 440
Waddell v. Darling.....	363	Waldron ads. Powell.....	371, 381, 438
Waddell's Adm'r v. Elmendorf's		Waldron v. Romaine.....	391
Adm'r.....	245, 404	Waldron v. Willard.....	45
Wade ads. Coleman.....	41, 423	Walker v. American Nat. Bk.....	53
Wade v. De Leyer.....	26, 36	Walker v. Bank of State of N. Y....	8
Wade v. Kalbfleisch.....	1	Walker ads. Central City Savings	
Wademan v. Albany & Susquehanna		Bank.....	269, 349
R. Co.....	376	Walker v. Caywood.....	217, 357
Wadhams v. American Home Miss.		Walker v. Dunspagh.....	189
Soc.....	273	Walker ads. Gibson.....	464
Wadsworth v. Allcott.....	55	Walker v. Henry.....	196, 284, 299
Wadsworth ads. Farmers and Mechan-		Walker ads. Jagger Iron Co.....	269
ics' Bank of Genesee.....	360	Walker ads. Jones.....	274
Wadsworth v. Heermans.....	193	Walker v. Millard.....	104, 395
Wadsworth v. Lyon.....	288	Walker ads. Murray.....	291
Wadsworth v. Sharpsteen.....	114, 161, 319	Walker ads. People.....	132, 404
Wadsworth ads. Wadsworth.....	13	Walker v. Spencer.....	3, 25, 349
		Walker v. Walker.....	103

	Page.		Page.
Wall v. Buffalo Water-Works Co. . . . .	363	Ward ads. Bradley . . . . .	431
Wall v. East River Mut. Ins. Co. . . . .	229	Ward v. Buckman . . . . .	400
Wall v. Home Ins. Co. . . . .	230	Ward ads. Carpenter . . . . .	172
Wall v. Kellogg's Ex'rs . . . . .	199	Ward ads. Carrington . . . . .	368
Wall v. Lee . . . . .	386	Ward ads. Craig. 11, 31, 54, 212, 247, 295	296
Wall ads. Newbury . . . . .	407, 408	Ward v. Dewey . . . . .	89
Wallace v. Castle . . . . .	19, 39, 50	Ward v. Howard . . . . .	321
Wallace ads. Knapp . . . . .	10	Ward v. Kelsey . . . . .	257
Wallace v. Swinton . . . . .	196	Ward v. Kilpatrick . . . . .	204, 283
Wallack v. Society for Reformation of Juvenile Delinquents . . . . .	222	Ward ads. Lyme . . . . .	33, 123
Waller v. Supervisors of Sullivan Co. . . . .	268	Ward ads. McKechnie . . . . .	423
Waller ads. Forbes. . . . .	47, 130, 185, 363	Ward ads. Morris . . . . .	160
Waller Stein v. Columbian Ins. Co. . . . .	237	Ward ads. Murdock . . . . .	464, 466
Wallis v. Randall . . . . .	189	Ward v. N. Y. Cent. R. Co. . . . .	147
Wallman v. Society of Concord . . . . .	112	Ward v. Roy . . . . .	124
Walls v. Bailey . . . . .	184	Ward ads. Ryan . . . . .	3, 380
Walrath v. Redfield . . . . .	168	Ward v. Stahl . . . . .	420
Walrod v. Shuler . . . . .	254	Ward v. Syme . . . . .	422
Walsh ads. Donnell . . . . .	346	Ward v. Vanderbilt . . . . .	76, 146, 149
Walsh v. Hartford Fire Ins. Co. . . . .	232	Ward v. Warren . . . . .	162, 433
Walsh v. Kelly . . . . .	30	Ward v. Whitney . . . . .	50, 191, 344, 399
Walsh ads. Merritt . . . . .	346, 400	Wardell ads. Clayton . . . . .	271
Walsh v. N. Y. Floating Dry Dock . . . . .	329	Wardell ads. Spear . . . . .	224
Walsh v. People . . . . .	71, 135, 136, 439, 440	Warden ads. Bigsby . . . . .	126
Walsh v. Powers . . . . .	221	Warden ads. Cayuga Co. Bk . . . . .	14, 317
Walsh ads. Southard . . . . .	45		318, 367
Walsh v. Washington Marine Ins. Co. . . . .	236	Wardens of St. Paul's Ch. ads. Cook . . . . .	386
Walter, Matter of . . . . .	333	Warden of State Prison ads. People. . . . .	138
Walter v. Bennett . . . . .	454	Warfield v. Crane . . . . .	347
Walter ads. Cozine . . . . .	397	Warhus v. Bowery Sav. Bank . . . . .	61
Walter v. Fowler . . . . .	364	Waring v. Ayres . . . . .	110
Walter ads. May . . . . .	211	Waring v. Indemnity Fire Ins. Co. . . . .	232
Walter ads. McDonald . . . . .	442	Waring v. Loder . . . . .	249
Walter v. Middleton . . . . .	397	Waring ads. Page . . . . .	64, 383
Walter ads. People. 86, 100, 134, 137, 173	436	Waring ads. Porter . . . . .	172, 328
		Waring v. Soder . . . . .	292
Waltermire v. Westover . . . . .	254	Waring v. Somborn . . . . .	170
Walton ads. DeWitt . . . . .	322	Warner v. Blakeman . . . . .	131, 211, 297
Walton v. Walton . . . . .	198, 201	Warner v. Durant . . . . .	469
Walworth ads. Farmers' Loan and Trust Co. . . . .	9, 278, 292, 340	Warner v. Erie Ry. Co. . . . .	280
Walworth v. Thompson . . . . .	215	Warner ads. Knapp . . . . .	177
Wambaugh v. Gates . . . . .	251	Warner ads. Langley. 14, 36, 245, 421, 442	442
Wandell ads. Hartnett . . . . .	467	Warner v. Lee . . . . .	317
Wandle ads. Hart . . . . .	296	Warner v. N. Y. Cent. R. Co. . . . .	377, 442
Wands ads. Terwilliger . . . . .	264	Warner v. Warren . . . . .	273
Wangler v. Swift . . . . .	40, 105	Warner ads. Wheeler . . . . .	412
Wanzer v. Carr . . . . .	289	Warren Chemical and Manuf. Co. ads. Curran . . . . .	279
Ward, Matter of . . . . .	405	Warren ads. Commercial Bank . . . . .	349
Ward v. Atlantic & Pac. Teleg. Co. . . . .	432	Warren ads. Cook . . . . .	361, 366

	Page.		Page.
Warren ads. Frost.....	299	Watson v. Brennan.....	397
Warren v. Haight.....	325	Watson v. Forty-second Street, etc., R. Co.....	311, 413
Warren ads. Long.....	209	Watson v. Gardiner.....	126
Warren ads. McIntyre.....	3, 29	Watson v. Gray.....	7, 10
Warren ads. Newell.....	299	Watson ads. Home Ins. Co.....	68
Warren ads. Slade.....	123	Watson ads. Juliand.....	61, 351
Warren ads. Van Buskirk....	45, 91	Watson ads. McFarlan.....	260
Warren ads. Ward.....	162, 433	Watson, Matter of, v. Nelson.....	27, 102, 425
Warren ads. Warner.....	273	Watson v. N. Y. Cent. R. Co....	248, 405
Warring ads. Richards.....	317, 322	Watson ads. Park Bank.....	322
Warring ads. Snedeker.....	204	Watson v. People.....	140
Warwick ads. Greene.....	291	Watson ads. Stevens.....	293, 374
Washburn v. Burnham.....	89	Watters ads. Van Wyck.....	39, 451
Washburn ads. Boots.....	110, 218, 340, 359	Watts v. Ronald.....	473
Washburn ads. Mygatt.....	43, 340, 430	Wattson v. Campbell.....	30, 92, 299
Washington ads. Gilhooley.....	259	Waugh v. Waugh.....	155
Washington Park, Matter of Commis- sioners of.....	102, 165, 166	Waule ads. Ryan.....	29
Washington Cemetery v. Prospect Park, etc., R. Co. ....	167, 406	Wavel v. Wiles.....	36
Washington Marine Ins. Co. ads. Walsh.....	236	Waverly Water-Works Co., Matter of.....	160
Washoe Tool Mfg. Co. v. Hibernia Fire Ins. Co.....	231, 439	Waydell ads. Riggs.....	24
Wasmer v. Delaware, etc., R. Co.....	338, 378	Wayland v. Tysen.....	364
Wason ads. Dickerson.....	8	Wayne Co. Savings Bank v. Low.....	92, 449
Wasson ads. Aikin.....	405	Weaver v. Barden.....	316, 366
Wasson ads. People.....	73	Weaver ads. Conger.....	148
Waterbury ads. Kelly.....	365	Weaver ads. Coyne.....	47
Waterbury v. Westervelt.....	211, 345, 392	Weaver ads. Dubois.....	438
Waterford Turnpike Co. ads. People.....	447	Weaver ads. Dunford.....	167, 199, 397 398, 417, 426
Waterhouse ads. Reade.....	125	Weaver v. Ely.....	125
Waterman ads. Bentley.....	24	Weaver ads. Williams.....	43, 60
Waterman ads. Dunham.....	46, 249	Webb v. Bailey.....	51
Waterman ads. Graves.....	447	Webb ads. Bank of California.....	356
Waterman v. Whitney.....	462, 463	Webb v. Buckelew.....	247
Waters ads. Belknap.....	16	Webb ads. Morey.....	12
Waters ads. Gifford.....	145	Webb v. Odell.....	322, 439, 454
Waters v. Green.....	20	Webb v. Rome, etc., R. Co.....	379
Watertown, City of, v. Fairbanks.....	96, 307	Webb ads. Winsted Bank.....	452
Watertown Bank and Loan Co. v. Mix.....	17	Weber ads. Brown.....	113, 410
Watertown Fire Ins. Co. ads. Landers.....	233	Weber ads. Feeter.....	90
Watervliet Turnpike Co. ads. Hig- gins.....	80, 279	Weber v. New York Cent., etc., R. Co.....	377
Watkins v. Abrahams.....	271	Weber ads. Todd.....	342, 343
Watkins ads. Dunham.....	18	Webster v. Hudson R. R. Co....	308, 310
Watkins ads. Slauson.....	124, 421	Webster ads. Olmstead.....	249, 353
Watkins v. Wilcox.....	386	Webster v. People.....	20, 141
Watrous ads. Boyce.....	171	Weed ads. Armstrong.....	19
Watrous v. Kearney.....	26, 52, 223	Weed v. Barney.....	77
		Weed v. Burt.....	206, 278
		Weed v. Mutual Benefit Life Ins. Co.	240
		Weed v. New York & Harlem R. Co.	19

	Page.		Page.
Weed v. Panama R. Co.....	76, 278	Wells v. Connecticut Mut. Life Ins. Co. ....	238
Weed ads. Pendleton.....	181, 247	Wells ads. Craig.....	156
Weed v. People... ..	138, 139	Wells ads. Cronkite.....	77
Weed v. Tucker.....	340, 403	Wells ads. Eaton.....	367
Weed v. Village of Ballston Spa....	304	Wells v. Kelsey.....	184
Weed v. Weed.....	196, 285, 465	Wells ads. Leitch...61, 273, 337, 443,	473
Weedsport Bank v. Park Bank....	57, 356	Wells v. Mann... ..	420
Weeks ads. Bridger.....	30	Wells v. Miller.....	422
Weeks ads. Byrne.....	78	Wells ads. National Bank.....	323, 355
Weeks ads. Esselstyn.....	415	Wells v. New York Cent. R. Co..	79, 309
Weeks v. Little.....	109	Wells v. Pierce.....	290, 296
Weeks v. Love.....	343	Wells ads. Roth.....	195
Weeks v. New York Cent., etc., R. Co. ....	81	Wells ads. Smith.....	418
Weeks v. N. Y., etc., R. Co.....	439	Wells v. Steam Nav. Co..	55, 73, 110, 400
Weeks ads. Wright.....	409		434
Wegman v. Childs.....	99	Wells v. Wells.....	463
Wehle v. Butler... ..	151, 346, 437	Wellsborough, Town of, v. N. Y. & Can. R. Co. ....	436
Wehle v. Conner.....	49, 196, 396, 398	Welch ads. Bonati.....	92
Wehle v. Connor.....	151	Wellwood ads. Jones.....	40
Wehle v. Haviland.....	50, 151	Welsh v. Cochran.....	437
Wehle v. Spellman.....	448	Welsh v. Darragh.....	384
Wehrkamp v. Willet.....	189, 192, 474	Welsh v. German-American Bank... ..	57
Wehrum v. Kuhn. ....	90	Welsh v. Gossler.....	109, 389
Weiant ads. Wood.....	183	Wemple ads. Bergin.....	369
Weiderwax ads. Bingham.....	154, 155	Wemple ads. Crounse.....	461
Weigand v. Sichel.....	183, 208, 365	Wendell v. Crandall.....	168
Weil, Matter of.....	334	Wendell v. Mayor, etc.....	304
Weil ads. Robinson.....	108	Wendell ads. People.....	267
Weir ads. Rogers.....	56	Wendell v. N. Y. Cent., etc., R. Co. ....	221, 312
Weismer v. Village of Douglas..	101, 302, 429	Wendt ads. DeLavallette...145, 178,	412
Weissenbach ads. People.....	40, 329	Wendt ads. Peyser.....	31, 345, 384
Weisser v. Denison.....	37, 58	Wentz ads. People.....	137
Welch, Matter of.....	221	Wenzler v. People.....	98, 330
Welch v. German-American Bank... ..	58	Wenzlich v. McCotter.....	338
Welch v. New York Cent. R. Co....	174	Werder ads. Keck.....	25
Welch v. Sage.....	265, 325	Werely v. Persons.....	181
Welch ads. Tinson.....	442	Weseman v. Wingrove .....	348
Weld ads. Burwell.....	186	Wessels ads. Frank.....	316
Weld ads. Hazeltine.....	458	West v. Cary .....	300
Weller v. Tuthill.....	113	West ads. Chapman.....	343
Welles v. March... ..	350	West ads. Kelly.....	426
Welles v. Yates.....	385	West ads. Mitchell.....	409
Welling v. Ryerson.....	288, 296	West ads. Tarbell.....	383
Wellington v. Kelly.....	110	West ads. Thurst .....	182, 248
Wellington ads. Richard.....	187	West Bradley, etc., Manfg. Co. ads. Driscoll.....	269
Wellington ads. Wood.....	228	Westbrook v. Gleason.....	382, 383
Wells ads. Babcock.....	443	Westbrook ads. People .....	25
Wells ads. Buckley... ..	273		
Wells v. City of Buffalo.....	89		



	Page.		Page.
Westbrook v. Willey.....	432	Westervelt ads Ackley....	206, 273, 274
Westchester Fire Ins. Co. ads. Bush.	228	Westervelt v. Gregg.....	96, 273
Westchester Fire Ins. Co. ads. Hast- ing.....	233	Westervelt ads. Moore.....	183, 396, 397
Westchester Fire Ins. Co. ads. Heil- mann.....	226	Westervelt ads. Waterbury.	211, 345, 392
Westchester Fire Ins. Co. ads. Mead.	385	Westfall v. Hudson R. Fire Ins. Co..	230
Westchester Fire Ins. Co. ads. Pelton.	231	Westfall ads. Kingsbury.....	215, 258
Westchester Fire Ins. Co. ads. Van Tuyl.....	27, 232	Westfall v. Preston.....	430, 432
Westcott ads. Acer.....	156	Westlake ads Higbie.....	34, 200, 425
Westcott v. Fargo.....	75, 117, 245, 363	Weston, Matter of.....	126, 199, 425
Westcott v. Johnson.....	34	Weston v. N. Y. Elevated R. Co.....	379
Westcott ads. Lazier.....	186	Weston v. Syracuse. City of.....	404
Westcott v. Thompson ..	391	Westover ads. Waltermire.....	254
Westerlo v. DeWitt.....	214	West Point Iron Co. v. Reymert..	157, 222
Western v. Genesee Mutual Ins. Co..	235		357, 370
Western ads. Kelsey.....	29, 471	West River Bank v. Taylor.....	326
Western N. Y. Life Ins. Co. v. Clin- ton.....	420	West Side Bank ads. Crawford.....	27
Western R. Co. ads. Aikin.....	203	West Side Bank v. Pugsley.....	419
Western R. Corp ads. Ayres..	34, 37, 126, 364, 387	Wetherald ads. Irving Bank ...	59
Western R. Co. v. Bayne.....	12, 362	Wetmore v. Brooklyn Gas-light Co..	461
Western R. Corporation ads. Hege- man .....	79	Wetmore v. Hegeman .....	345
Western R. Corporation ads. Keegan.	280	Wetmore v. Parker.....	126, 463, 470
Western R. Co. ads. McDonald.....	75	Wetmore v. Porter.....	198, 345, 365
Western R. Co. v. Nolan....	222, 430, 444	Wetmore v. Truslow....	30, 446
Western R. Co. ads. Nolton.....	79	Wetsell ads. Hunter ...	146, 192, 390, 408
Western Trans. Co. v. Barber..	56, 78, 202, 406	Wettstein ads. Honegger..	18, 192, 363, 381
Western Trans. Co. ads. Chamberlain.	405	Wetzell v. Dinsmore.....	78
Western Trans. Co. ads. Hall .....	257	Weyer v. Beach.....	16, 233
Western Transp. Co. ads Home Ins. Co.....	30, 76	Weyl v. Boylan.....	454
Western Transp. Co. v. Hoyt.....	76	Whalen ads. Beckwith.....	69, 218
Western Trans. Co. v. Kilderhouse..	449	Whalen ads. McCarty .....	180
Western Transp. Co. v. Lansing....	259	Whalin v. White.....	256, 259
Western Trans. Co. v. Marshall ..	66, 391	Wheaton v. Gates.....	336
Western Trans. Co. v. Schen..	183, 268, 403	Wheeler ads. Aetna Ins. Co.....	76
Western Trans. Co. ads. Stone....	280, 367	Wheeler v. Allen .....	5
Western Union Tel. Co. ads. Blanch- ard .....	338, 432, 459	Wheeler ads. Allis.....	125
Western Union Tel. Co. ads. Elwood.	433	Wheeler ads. Bassett.....	25
Western Union Tel. Co. ads. Lowery.	150, 433	Wheeler ads. Beards .....	24
Western Union Tel. Co. ads. Shaver.	316	Wheeler v. Billings... ..	178
Western Union Tel. Co. ads. Wil- liams .....	16, 119, 120, 433	Wheeler ads. Boylston.....	371
Western Union Tel. Co. ads. Young..	433	Wheeler ads. Bradley .....	408
		Wheeler v. Clark.....	157, 460
		Wheeler v. Clutterbuck .....	160
		Wheeler v. Conn. Mut. Life.....	112, 239
		Wheeler ads. Cope.....	4, 450
		Wheeler ads. Eveland.....	455
		Wheaton v. Fay.....	66, 67, 224
		Wheeler ads. First Nat. Bank of Oxford.....	435
		Wheeler v. Garcia.....	112
		Wheeler ads. Hennessy.....	437
		Wheeler ads. Houston.....	161, 406

	Page.		Page
Wheeler ads. Jenkins. ....	39, 400, 401	White v. Carroll.....	264
Wheeler ads. Latimer.....	87, 371	White ads. Cary... ..	192, 382
Wheeler ads. Macy.....	37, 401	White ads. Chautauqua Co. Bk. 33, 131,	164
Wheeler v. Miller.....	118	White ads. Chapman.....	316
Wheeler ads. Morris.....	17, 344	White ads. Clift... ..	284, 296
Wheeler v. Newbould.. ..	184, 368	White v. Coatsworth.....	246
Wheeler ads. Newell.....	43, 107	White v. Continental Nat. Bank....	322
Wheeler ads. Paris. . . . .	298	White v. Corlies.....	104
Wheeler ads. Parish.....	120, 149	White v. Coulter.....	27
Wheeler ads. People.....	339, 344	White ads. Currie.....	393
Wheeler ads. Phillips.....	196, 301	White ads. Dolph.....	256
Wheeler ads. Quick.....	104	White ads. Frick.....	395
Wheeler v. Reynolds.....	402, 410	White ads. Graves.....	114
Wheeler ads. Robinson....	172, 262, 458	White ads. Greene.....	37
Wheeler ads. Rogers.....	32, 73, 77, 78	White v. Hackett.....	351
Wheeler v. Ruckman.....	205	White v. Haight.....	235
Wheeler v. Ruthvan.....	472	White ads. Hamilton.....	461
Wheeler ads. Salt Springs Nat. Bk..	115	White ads. Harris....	66
Wheeler v. Scofield.....	29, 282	White v. Havens.....	234
Wheeler v. Scully.....	418	White v. Hicks.....	369
Wheeler v. Spinola.....	459	White v. Howard.....	471
Wheeler ads. Terry.....	27, 390	White v. Hoyt.....	106, 107
Wheeler ads. Trustees of Union Col- lege.....	291, 337	White v. Joy.....	365
Wheeler v. Warner.....	412	White v. Lester.....	60, 265
Wheelock ads. Amer. Nat. Bank. .	58, 60	White ads. Litchfield .....	46
Wheelock ads. Coburn.....	422	White ads. Mabbett.....	32, 349
Wheelock v. Lee . . . . .	64, 251	White v. Madison.....	177, 225, 262, 397
Wheelock ads. Pacific Pneumatic Gas Co.....	173	White v. McLean.....	190
Wheelock v. Tanner.....	112	White v. McNett.....	273
Whelan v. Lynch.....	146, 184	White v. Merritt .....	168, 209, 247
Whintringham v. Dibble.....	187	White v. Miller....	147, 179, 183, 247, 392, 396
Whipple v. Christian.....	283	White v. Nellis.....	394
Whipple ads. Cook .....	63, 249	White ads. N. Y. Life Ins. Co.....	265
Whipple ads. Fake.....	421	White v. People.....	133
Whitaker ads. Burrows.....	392	White ads. Quincey.....	416
Whitaker v. Eighth Ave. R. Co.....	380, 405	White ads. Rider.....	14, 438
Whitaker v. Imperial Skirt Manuf. Co .....	23	White ads. Roberts.....	149, 222
Whitaker v. Whitaker .....	275	White v. Ross.....	117, 171, 234
Whitcher ads. Morris.....	153, 284	White ads. Sanford .....	347
White v. Ambler.....	181, 324	White v. Spencer .....	366
White v. Anthony. ....	126	White v. Smith....	19, 150, 359, 416, 442
White v. Ashton .....	78	White v. Stillman.....	451
White ads. Barker...26, 39, 124, 351,	394, 444	White ads. Tallman. ....	90, 428, 432
White v. Baxter.....	110, 162	White v. Wager.....	274
White v. Bogart.....	247	White ads. Whalin.....	256, 259
White v. Bullock .....	200	White v. Williams.....	456
White v. Calder.....	438	White's Bank of Buffalo v. Myles.	214, 215
		White's Bank of Buffalo ads. Nash.	59, 451
		White's Bank of Buffalo v. Nichols.	157, 162, 163

## TABLE OF CASES:

635

	Page.		Page.
Whited v. Germania Fire Ins. Co....	232	Whittlesey v. Frantz.....	269
Whited ads. Rouse.....	190	Whitwell ads. Menagh..	350
Whitehall, Village of, ads. President Del. & H. C. Co.....	375	Whitworth v. Erie Ry. Co.....	76
Whitehall Trans. Co. v. New Jersey Steamboat Co.....	150, 400	Whyland ads. Filkins.....	104
Whitehead ads. Dunham.....	46	Wiberly v. Matthews....	41
Whitehead v. Kennedy.....	37, 53	Wibert v. N. Y. & Erie R. Co.....	76
Whitehead ads. Seaman....	17, 199, 425	Wickham ads. Demarest.....	306
Whitehead v. Smith..	475	Wicks v. Hatch.....	415
Whitehouse v. Bank of Cooperstown.	181	Wickwire ads. Benton. ....	283
Whitelegge ads. Scofield.....	361	Wider ads. Stephens.....	39
Whitford v. Laidler.....	10, 120, 160	Widger ads. Rexford.....	450
Whitford v. Panama R. Co.....	311	Wier ads. Morton .....	258
Whitin ads. Greenpoint Sugar Co....	269	Wigand v. Sichel.....	363
Whiting v. Barney.....	54	Wiggins v. Howard.....	445
Whiting v. City Bank of Rochester.	310, 324	Wiggins v. McCleary.....	163
Whiting v. Edmunds.....	7, 39, 87, 260	Wiggins ads. Terry .....	469
Whiting v. Mayor, etc.....	365	Wight ads. Cutler.....	173
Whiting ads. Stoddard.....	287, 455	Wilber ads. Marvin.....	8
Whitlock v. Hay.....	453	Wilber v. Sisson.....	105
Whitmore ads. Foose.....	445, 471	Wilbor v. Danolds.....	22
Whitmore v. Mayor, etc.....	330	Wilbur ads. Dodge.....	10
Whitney v. Allaire.....	151, 208, 255	Wilbur ads. Stall .....	433
Whitney ads. Bennett..	304, 306, 341, 359	Wilckens v. Willet.....	167
Whitney v. Black River Ins. Co.....	227	Wilcox ads. Barkley.....	459
Whitney ads. Burnside.....	41	Wilcox ads. Burr.....	243, 269
Whitney ads. Crocker.....	57, 62, 239	Wilcox ads. Estes.....	446
Whitney ads. Forman.....	470	Wilcox v. Hawley.....	30, 195
Whitney ads. Fulton..	296, 426, 444, 445	Wilcox v. Howell.....	171
Whitney ads. Marble.....	218	Wilcox v. Knight.....	394
Whitney v. Martine.....	9, 12, 39	Wilcox ads. Mygatt.....	199, 243, 411
Whitney v. Nat. Bk. of Potsdam....	145	Wilcox v. Rome, etc., R. Co.....	313
Whitney ads. Nolan.....	111	Wilcox ads. Smith.....	418
Whitney v. Thomas .....	430	Wilcox ads. Watkins.....	336
Whitney ads. Townsend....	76, 250, 426	Wilcox v. Wilcox.....	216, 252
Whitney ads. Ward....	50, 191, 344, 399	Wilcox Silver Plating Co v. Green...	10, 390, 409
Whitney ads. Waterman..	462, 463	Wilder ads. Pitts.....	7, 180
Whitney Arms Co. v. Barlow....	268, 270	Wilder v. Ranney.....	198, 467
Whitlock ads. Johnson.....	30	Wilder ads. Woods.....	109
Whitlock ads. McAndrew.....	77	Wilds v. Hudson River R. Co.....	313
Whitlock ads. People.....	97, 307	Wile v. Wilson.....	93, 110
Whitman ads. Van Ingen.....	352	Wiles ads. Danckel.....	186, 248
Whiton v. Snyder.....	174, 176, 274	Wiles v. Peck.....	41
Whiton v. Spring..	399	Wiles v. Suydam.....	359
Whiton ads. Union Trust Co.....	29	Wiles ads. Wavel.....	36
Whitson v. Whitson.....	464	Wiley v. Brigham.....	29
Whittaker ads. Kay.....	345, 364, 450	Wiley ads. Leslie.....	9
Whittemore v. Farrington.....	451	Wiley ads. Robinson.....	208
Whittlesey v. Delancy.....	117, 253, 361	Wilke v. People .....	26, 134, 137
		Wilkes v. Harper.....	417, 471
		Wilkes ads. Henry.....	293

	Page.		Page.
Wilkes v. People's Fire Ins. Co.	237, 399	Williams ads. Porter	46, 419
Wilkin ads. Cornes	202, 372, 416	Williams ads. Prior	285, 286, 385
Wilkin ads. Harrison	88, 168, 194, 448	Williams ads. Robinson	289
Wilkin v. Raplee	19	Williams v. Sargeant	21, 179
Wilkins v. Earle	19, 173, 223, 476	Williams v. Shelly	420
Wilkins ads. Pearce	326, 350	Williams v. Thorn	131, 445, 447
Wilkinson v. Gill	265	Williams v. Tilt	453
Wilkinson ads. Lingke	342	Williams v. Townsend	294
Wilkinson v. First Nat. Fire Ins. Co.	232	Williams v. Vanderbilt	81
Willard v. Brown	175	Williams v. Wayne, Supervisors of	429
Willard v. Bunting	259	Williams v. Weaver	43, 60
Willard ads. Ellis	74	Williams v. West. Union Teleg. Co.	
Willard ads. Leonardsville Bank	56	Williams ads. White	456
Willard ads. Waldron	35	Williams v. Williams	386, 444, 449
Willett, Matter of	332		16, 119, 120, 433
Willett ads. Bond	195	Williamsburgh City Fire Ins. Co. ads.	
Willett ads. Carpenter	94, 167, 194, 396	David	153
Willett ads. Paige	364	Williamsburgh City Fire Ins. Co. ads.	
Willett ads. People	137	Hand	225
Willett ads. Sherman	144	Williamsburgh Ins. Co. ads. Boehen	231
Willett ads. Wehrkamp	189, 192, 474	Williamsburgh Savings Bank ads.	
Willett ads. Wilckens	167	Allen	61, 310
Willetts ads. Howland	32, 438, 441, 475	Williamsburgh, etc., Bridge Co. ads.	
Willetts v. Sun Mut. Ins. Co.	110	People	447
Willey ads. Westbrook	432	Williamson v. Brown	337
Williams v. Brown	394, 395	Williamson ads. Lasher	420
Williams ads. Croft	199	Williamson ads. Prospect Park, etc.,	
Williams ads. Dalrymple	442	R. Co.	166, 217, 375
Williams v. Duanesburgh, Town of	436	Willis v. Long Island R. Co.	312
Williams ads. Dunham	155	Willis ads. Mallory	55
Williams v. Fireman's Fund Ins. Co.	227	Willis v. Mott	462
Williams v. Fitch	4, 189, 193, 327	Willis v. People	132
Williams v. Fitzhugh	453	Willis ads. Ryerson	455
Williams ads. Ford	53, 54, 169, 185, 191	Willis v. Smyth	62, 342, 443
	299, 301	Willits ads. McGoldrick	7, 392
Williams v. Freeman	465	Willits v. Waite	121
Williams v. Gillies	294, 349	Willner ads. Dutton	12
Williams v. Glenny	3, 169	Willover v. Hill	264, 363
Williams v. Hayes	25, 364	Wills v. Hudson River R. Co.	377
Williams v. Hernon	29, 38	Willsea ads. People	94
Williams v. Hutchinson	342	Willson ads. Avery	389
Williams v. Ingersoll	51, 54, 91	Willson ads. Breunan	43
Williams v. Lawrence	401	Willson ads. Doty	214
Williams ads. Mayor, etc.	302	Willy v. Mulledy	259, 309
Williams v. Mechanics and Traders'		Wilmerding ads. Cartwright	202
Fire Ins. Co.	439	Willmot v. Richardson	339, 393
Williams v. New York Cent. R. Co.		Willmot ads. Union Dime Sav. Inst.	
	102, 166, 217		171, 454
Williams ads. Otis	88, 437	Wilson ads. Bridgeport Ins. Co.	420
Williams v. People	142, 218, 405, 475	Wilson v. Deen	258
Williams v. People's Fire Ins. Co.	226	Wilson v. Elwood	474

# TABLE OF CASES.

637

	Page.		Page.
Wilson ads. Emery .....	353	Winter v. Drury.....	325
Wilson v. Genesee Mut. Ins. Co.....	228	Winter v. Eckert.....	26, 251
Wilson ads. Gerould.....	67, 197, 421	Winter v. Kinney.....	340
Wilson v. Goit.....	263	Winter ads. Shuttleworth ...	28, 199, 214
Wilson v. Herkimer Co. Mutual Ins. Co .....	230	Wintermute v Cooke.....	267
Wilson ads. Kavanagh.....	120, 441	Wise v. Chase .....	107
Wilson v. Lawrence. ....	399	Wise ads. Clark .....	210, 416
Wilson v. Little.....	150, 368	Wisner ads. Dill.....	198
Wilson v. Maltby .....	288	Wiseman v. Lucksinger.....	161, 163
Wilson v. New York Cent. R. Co.....	109, 146	Wisner v. Occumpaugh.....	258
	190	Witbeck v. Holland.....	77
Wilson ads. Nickelson .....	110	Witbeck v. Wayne.....	457
Wilson v. Palmer.....	34	Witbeck ads. Van Rensselaer ...	164, 431
Wilson ads. Payne.....	283, 287	Witherhead v. Allen.....	245
Wilson ads. People.....	142, 164	Witkowski v. Paramore.....	25
Wilson v. Randall.....	108, 183	Witty v. Campbell.....	205
Wilson v. Robertson .....	47	Witty v. Matthews.....	261
Wilson ads. Ryan .....	261	Wohler v. Buffalo & State Line R. Co.	152
Wilson ads. Seymour .....	93, 185	Wohlfahrt v. Beckert... ..	161, 191, 310
Wilson v. Simpson.....	25	Wolcott v. Holcomb.....	45, 124
Wilson ads. Tuthill.....	11, 288	Wolcott ads. Leavitt .....	206
Wilson ads. Youngs.....	289	Wolcott ads. Tillotson.....	419
Wilson ads. Wile .....	93, 110	Wolf v. Security Fire Fire Ins. Co... ..	33
Wilson v. Wilson .....	10, 12, 327	Wolfe ads. Althorff.....	149, 279
Wiltzie v. Eaddie.. ..	32, 384	Wolfe v. Burke.....	437
Wiman ads. Bronson .....	185, 390	Wolfe ads. DuBeirat.....	162
Wiman ads. Fitzhugh.....	78, 88	Wolfe v. Howard Ins. Co .....	148
Wiman ads. Gilbert .....	111	Wolfe v. Howes.....	273
Winan ads. Fitzhugh.....	250	Wolfe v. Scroggs .....	273
Winans v. Peebles.....	275	Wolfe v. Security Fire Ins. Co.....	226
Winant ads. Dissoway.....	86, 345, 385	Wolfe v. Van Nostrand .....	125, 469
Winch v. Mut. Ben. Life Co .....	243	Wolf ads. Staphenhorst.....	33
Winchell v. Hicks.....	33, 369, 414	Wolfkiel v. Sixth Ave. R. Co.....	310
Winchell ads. Miller.....	106, 293	Wolley ads. Ogdensburgh, etc., R. Co .....	373
Winchester v. Osborne .....	157	Wolstenholme v. Wolstenholme File Mfg. Co.....	40
Winchester ads. Thomas.....	309	Wolstenholme File Mfg. Co. ads. Wol- stenholme.....	40
Windsor Hotel Co. ads. Martin.....	23	Wood v. Ambler.....	187
Winegar v. Fowler.. ..	170	Wood v. Auburn & Rochester R. Co.	374
Winfield v. Potter.....	52	Wood ads. Binsse.....	420
Wing v. Schramm.....	275	Wood v. Brown.....	200, 345
Wing ads. Syracuse Chilled Plow Co.	275	Wood ads. Butts.....	340
Wing ads. Taylor.....	31, 244, 289	Wood ads. Byxhie.....	360
Wingrove ads. Weseman.....	348	Wood ads. Camp.....	309
Winne v. McDonald.....	114	Wood v. Chapin.....	50, 153
Winne v. Niagara, etc., Ins. Co.....	233	Wood ads. Crosby.....	248
Winne ads. Russell.....	170, 299	Wood ads. Elliott.....	297
Winnie ads. Brownell.....	15, 324	Wood v. Erie Ry. Co.....	76
Winslow v. Clark.. ..	63, 295	Wood ads. Farnsworth.....	270
Winsted Bank v. Webb. ....	452		
Winter v. Coit.....	202		

	Page.		Page.
Wood ads. First Nat. Bk. of Buffalo..	318	Woodruff ads. Kendall.....	288
Wood v. Fisk.....	421, 423, 448	Woodruff v. McGrath.....	27
Wood v. Henry..	194	Woodruff ads. Norton.....	55, 179, 388
Wood ads. Hewlett..	16, 17, 176, 348, 443	Woodruff ads. Platt.....	248, 252
Wood ads. Horner.....	371, 403	Woodruff ads. People.....	330
Wood v. Hubbell.....	257	Woodruff ads. Woodruff.....	107, 436
Wood ads. Ingallsbee.....	223	Woods ads. Bank of Cooperstown.	189, 319
Wood ads. Irvine.....	258, 309, 338	Woods ads. Hewlett.....	439
Wood v. Lafayette.....	69, 188, 438	Woods v. Pangburn.....	264
Wood v. Mayor.....	303	Woods v. People.....	143
Wood ads. Melvin ...	14, 67, 367, 384	Woodward v. Fuller.....	113
Wood v. Mitcham.....	465	Woodworth v. Bennett.....	113
Wood v. Morehouse.....	173, 195	Woodworth ads. Blauvelt.....	281, 283
Wood v. New York Cent., etc., R. Co.	378	Woodworth ads. Campbeil.....	48, 184
Wood v. North-western Ins. Co.	172, 227	Woodworth ads. Eno.....	455
Wood ads. Olcott.....	41	Woodworth ads. Lewes.....	179
Wood v. Orser.....	370, 396, 437, 442	Woodworth v. Paine ..	386
Wood ads. Park Bank.....	429	Woodworth v. Payne.....	156
Wood ads. People.....	133, 143, 307	Woodworth v. Sweet.....	274
Wood v. Phillips.....	433	Wooley ads. Cornwell ...	471
Wood v. Poughkeepsie Ins. Co.....	231	Wooley v. Grand Street, etc., R. Co.	378
Wood v. Robinson.....	210, 445	Wooley v. Wooley.....	464
Wood ads. Ross.....	209, 247, 356	Wooley ads. Cornell.....	473
Wood ads. Scattergood.....	175	Wooley ads. Hopkins.....	296
Wood v. Seely.....	277	Wooley v. Newcombe.....	262
Wood v. Shehan.....	108	Woodner v. Hill.....	113, 434
Wood v. Squires.....	416	Woolsey, Matter of Application of.	95, 217
Wood v. Swift.....	222, 384	Woolsey v. Brown.....	274
Wood ads. Trevor.....	104	Woolsey v. Trustees of Rondout.	14, 302, 341, 367
Wood v. Tunnichliff.....	40, 198, 215	Woolverton ads. Herrick.....	318
Wood ads. Van Tassel.....	39	Woolworth ads. Hine, Matter of. .	231
Wood v. Weiant.....	183	Woolworth ads. Pringle.....	93, 172, 246
Wood v. Wellington.....	228	Wooster v. Forty-second Street R. Co.	413
Wood v. Wilder.....	109	Wooster ads. Phillips.....	210
Wood v. Wood.....	164, 276	Wooster v. Sage.....	105
Wood ads. Wright.....	105	Wooster v. Sherwood.....	297
Woodford v. People.....	139	World Mut. Life Ins. Co. ads. Boos.	35, 238
Woodgate v. Fleet.....	179, 265, 347, 446	World Mut. Life Ins. Co. ads. Neuen-	
Woodhull v. Rosenthal 157, 164, 259,	260	dorff.....	12
Woodin ads. McCaffrey.....	261	Wormser ads. Porter.....	33, 407, 416
Woodin ads. Sage.....	196, 198	Worster v. Forty-second Street, etc.,	
Woodmansee v. Rogers.....	51	R. Co.....	377, 379
Woodruff ads. Cheney.....	297	Wortendyke ads. American Linen	
Woodruff ads. Clark.....	68	Thread Co.....	352
Woodruff v. Cook.....	469	Worth v. Case.....	315
Woodruff ads. Cornell.....	297	Worth ads. Ritter.....	90, 154, 205
Woodruff ads. Edwards.....	248	Worthington ads. Barney.....	152
Woodruff v. Erie R. Co.	120, 169, 257, 402	Worrall ads. Harger ...	320
Woodruff v. Imperial Fire Ins. Co.	230, 232, 331, 398		
Woodruff ads. Howland.....	202		

	Page.		Page.
Worrall v. Munn.....	8, 10, 147, 154, 157, 401, 456	Wyckoff ads. Lott.....	470
Worrall v. Parmelee.....	180, 189, 440	Wylde v. Northern R. Co. of New Jersey.....	311
Worrell ads. Van Deusen....	157, 178, 287	Wylie v. Lockwood .....	469
Wottrick v. Freeman.....	186, 474	Wylie v. Marine Nat. Bank.....	10
Woven Tape Skirt Co., In Matter of.	381	Wyman v. Wyman.....	225
Wright v. Ames.....	115, 351	Wynehamer v. People.....	97
Wright v. Baldwin.....	74	Wynkoop v. Niagara Fire Ins. Co.	176, 232
Wright v. Brown.....	17		
Wright v. Cabot.....	12, 182, 191	Yale v. Dederer ....	274, 275
Wright ads. Cutler.....	366, 453	Yates v. Burch....	201, 448
Wright v. Delafield.....	262	Yates ads. Lowman .....	423
Wright v. Douglass....	19, 49, 182, 196, 447	Yates v. Lyon....	46, 220, 370
Wright v. Fleming.....	426	Yates v. N. Y. Cent., etc., R. Co....	188
Wright v. Garlinghouse.....	321	Yates v. North.....	51
Wright ads. Hamilton.....	6, 54	Yates v. Olmstead.....	54, 299
Wright v. Holbrook.....	287	Yates v. People.....	141
Wright v. Hooker.....	262, 349	Yates v. Van De Bogert.....	7, 155, 374
Wright v. Hunter.....	28	Yates ads. Vander Volgen.....	154, 448
Wright ads. Jewell.....	92, 449	Yates ads. Welles.....	285
Wright ads. Marine Bk. of Chicago..	66	Yeager ads. Morehouse.....	209
Wright v. Miller.....	212, 443	Yenni v. McNamee.....	458
Wright v. New York Cent. R. Co....	280	Yerkes v. Nat. Bank of Port Jervis..	62
Wright ads. Northern Ins. Co.....	215	Yonkers Savings Bank ads. Frost....	289
Wright v. Nostrand....	185, 213, 381, 419	Yonkers, Village of, ads. Sanders....	89
Wright v. Paige.....	192, 263	York v. Allen.....	154, 265
Wright v. Root.....	54, 292	York ads. Mead... ..	293
Wright v. Rowland.....	16, 51	York ads. Peck .....	124
Wright v. Saddler.....	13	Youmans ads. Delhi, Village of ....	460
Wright v. Sanders.....	34, 310	Youmans v. Edgerton .....	286
Wright ads. Sheldon.....	247, 426	Youmans ads. Kiff.....	151
Wright ads. Sherman.....	216, 222, 402	Young, Matter of.....	277, 424
Wright ads. Smith.....	348, 360	Young ads. Babbett....	10, 114, 162, 405
Wright v. Storrs.....	355, 423	Young v. Brush .....	200
Wright v. Tallmadge.....	273, 369	Young v. Campbell.....	20
Wright v. Weeks.....	409	Young ads. Crabb.....	199, 207
Wright v. Wood.....	105	Young v. Davis .....	21
Wright v. Wright..	54, 127, 265, 275, 358, 407	Young v. Duke .....	409
Wrigley ads. Stimson.....	409	Young v. Guy .....	456
Wunsch ads. Duffy.....	410	Young v. Heermans .....	131
Wurtz v. Dupuy .....	161	Young v. Hill.....	243
Wyckoff v. Anthony....	57, 323, 368, 434	Young v. Hunter .....	105, 354
Wyckoff ads. Bergen.....	35	Young ads. Mattoon .....	180, 476
Wyckoff ads. Bridges.....	217	Young ads. O'Brien.....	244, 250
Wyckoff ads. Dain.....	394	Young ads. Payne.. ..	49
Wyckoff ads. Fraser.....	70	Young ads. Quincey.....	22
Wyckoff v. Meyers.....	111	Young v. Thurber.....	127, 203
Wyckoff v. Queens Co. Ferry Co....	203	Young ads. Van Deusen....	151, 344, 438, 458
Wyckoff ads. Seymour.....	202	Young v. West. Un. Tel. Co.....	433
Wyeth v. Braniff.....	451	Young v. Young.....	213

	Page.		Page.
Younger v. Duffie.....	462	Zalinski ads. Smith ....	417
Younghanse v. Fingar.....	21, 126	Zborowski, Matter of Petition of ...	332
Youngs ads. Johnson.....	17	Zehner ads. Hammond,.....	6, 163, 173
Youngs v. Kent.....	14, 363, 367	Zett ads. Sexton.....	309
Youngs v. Lee.....	319	Zeyst ads. People ..	112
Youngs v. Stahelin. ....	152	Zimmerman v. Erhard..	205, 349, 389
Youngs v. Wilson..	289	Zingsen ads. Meriden Britannia Co.	107, 410
Youngs v. Youngs .....	469	Zink ads. Johnson.....	296
Yturria ads. Clements.....	110, 389	Zink v. People.....	142
Yulee ads. Vose. ....	387	Zinn v. New Jersey Steamboat Co ...	76
Zabriskie v. Salter .....	292	Zinsser ads. Tice.....	113
Zabriskie v. Smith.....	30	Zittlosen ads. Gillespie .....	357
Zahrt, Matter of.....	149, 209, 467	Zogbaum v. Parker. ...	395













